[1st *July* 1833.]

JOHN DIXON and WILLIAM DIXON, Appellants.— *Dr. Lushington—Murray.* No. 29.

JOHN FISHER and others, Respondents.—*Lord Advocate —Solicitor General.*

Testament—Condition—Provisions to Wives and Children—Parent and Child—Legitim.—A father bequeathed a provision to his daughter in life-rent, and her children in fee, declaring that the provision should be in full of all that his daughter could claim from his estate—Held, (affirming the judgment of the Court of Session,) that the right of the children to the fee was not affected by the daughter repudiating the provision, and betaking herself to her legal claims.

2D DIVISION. Lord Fullerton.

BY a disposition and settlement, dated 11th April 1817, and a codicil thereto, dated 15th March 1820, William Dixon disposed of all his heritable and moveable estate, in the following terms:—

" I William Dixon, lately residing at Govanhill near " Glasgow, now of Calder Iron Works, being resolved " to make a settlement of my affairs to take place in " the event of my death, in order that all disputes and " differences with regard to my property may be " avoided; and considering that I have already in part " provided for my wife by a separate life-rent deed

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" executed by me in her favour, which provision so " made is hereby ratified and approved of, and which " with the additional provision after mentioned is " hereby declared to be in full to her of all that she can " ask or claim in and through my decease, and it is " therefore now necessary that I shall provide for my " children, which I have resolved to do in manner un- " derwritten. Therefore I hereby give, grant, assign, " convey, and dispone to and in favour of John Dixon " and William Dixon, my two sons, and their lawful " issue, and failing either of my said sons to the survi- " vor of them and his lawful issue, all lands, heritages, " leases, minerals, adjudications, teinds, and heritages of " every description or denomination, as also all debts " and sums of money, whether heritable or moveable, " interest thereof, rents of lands or minerals, stock in " trade, or in any company or society, public or private, " and dividends or profits thereof, stock of farms, stock " of minerals, and every other species of property, real " or personal, connected with any work, farm, or un- " dertaking with which I may be connected, concerned, " or employed in at the period of my death; as also " all cash, goods, gear, and effects of every denomina- " tion, including heirship moveables, presently belonging " or which shall be appertaining, resting, or owing to " me at the time of my decease; excepting my household " furniture and plate, which is to belong to my wife if " she survive me; with all and sundry writs, title deeds, " leases, bonds, heritable and moveable, promissory " notes, bills, accounts, account books, transfers of stock, " and other writs, and grounds and instructions of the " said subjects and funds before conveyed, with all " action, diligence, and execution competent or that

" may be competent, and all that has followed or may
" be competent to follow on the premises, dispensing
" with the generality hereof, and declaring these presents
" to be as good and effectual to all intents and pur-
" poses as if every particular sum and subject above
" conveyed were herein specially enumerated; and
" declaring that any list or inventory of the said debts
" and funds, to be signed by me as relative hereto, shall
" be considered as part hereof, so as to exclude the
" necessity of confirmation. Declaring always, that
" where any leases are held by me and not assignable,
" that such leases shall devolve to my heir-at-law, who
" shall be bound to impute the value thereof, as the
" same shall be ascertained by arbiters, to be mutually
" appointed by him and his brother, in part and to
" account of his share of my said succession. And in
" the event of both or either of my said sons wishing to
" have my said property divided, or to possess any part
" thereof for his own separate behoof, the same shall be
" valued by arbiters, to be by them mutually named,
" with power to appoint an oversman in case of dif-
" ference; and who shall also, in case of any one subject
" or article being elected by both my said sons, be
" entitled to fix who shall be entitled thereto; and said
" arbiters or oversman shall also be entitled to fix the
" periods of payment thereof, and the same shall impute
" in part and to account of their shares accordingly,
" subject always to a rateable part of the burdens and
" provisions after mentioned. And further declaring,
" that these presents are granted and shall be accepted
" of by my said sons and their foresaids under the fol-
" lowing burdens and conditions, viz.:—in the first
" place, for payment of my death-bed and funeral

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" expences, and of all just and lawful debts that shall " be due by me at the period of my decease, and of all " gifts, legacies, and provisions which I shall think " proper to leave and bequeath by any deed or writing " under my hand: in the second place, under payment " to each of my daughters who shall be in life at my " death, or the lawful issue of such of them as may " predecease me, as coming in right of their mother " deceased, of the sum of 2,000*l.* sterling; the said " provisions to bear interest from the first term of " Whitsunday or Martinmas after my decease, but the " principal sum not to be payable till two years there- " after. Declaring, however, that the provision conceived " in favour of my daughter Janet by her contract of " marriage shall be payable in terms thereof; and " when the same is paid it shall be held to be in full " of her provision, and of all that she, her husband, or " children can ask or claim by and through my decease. " And further declaring, that the provisions to my said " other daughters shall not be subject to the jus mariti " or right of administration of their husbands, or liable " to be attached for their debts or deeds, but shall " belong exclusively to my said daughters in life-rent for " their life-rent use allenarly, and to their children in " fee, and shall be so secured at the sight of my said " sons or the survivor of them: and in the third " place, for payment of the sum of 1,000*l.* sterling to " my wife, in case she survive me six months after my " death, over and above the other provisions conceived " by me in her favour by separate deed as before men- " tioned; the said sum to bear interest from the foresaid " term of payment until actually paid. And I hereby " declare, that the provisions above mentioned shall be

" in full to each of my daughters, their husbands, " children, or assignees, of all that they could ask or " claim in and through my decease, legally or conven- " tionally, or any other manner of way. Moreover, I " hereby nominate and appoint my said two sons, John " Dixon and William Dixon, and the survivor of them, " and their foresaids, to be my executors, universal " legators, and intromittors with my whole means and " estate, excluding hereby and debarring all others " from these offices, with power to my said executors to " give up an inventory and confirm all or any part of " my said moveable estate. And I hereby recall all " former settlements, reserving always to myself the full " power and enjoyment of my said means and effects " during my lifetime, with power to me at any time of " my life or even on death-bed not only to sell and " dispose of the whole premises, or any part thereof, or " to burden and affect the same with debts, gifts, " legacies, and provisions at pleasure, but also to re- " voke, alter, or innovate these presents in whole or in " part, and declaring that in so far as the same shall " not be so revoked, altered, or innovated, by a writing " under my hand, in so far shall the same remain good " and effectual to all intents and purposes, although " found lying by me, or in the custody of any other " person, undelivered at the time of my death, with the " delivery whereof I have dispensed, and hereby dis- " pense for ever."

Codicil.—" I, the before-designed William Dixon, " considering that by the blessing of Providence my " worldly affairs have continued to prosper, whereby I " am enabled and feel it to be my duty to enlarge the " provisions to my daughters; therefore, and for the

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" love and favour which I bear to them, I hereby direct " my said sons or survivor, as my general disponees " and executors, to content and pay to each of my said " daughters in life, and the lawful issue of such of them " as have or may predecease me leaving issue as in " right of their parent, the further and additional sum " of 2,000*l.* sterling, which shall bear interest and be " payable in like manner as specified in the foregoing " settlement in regard to the former provisions con- " ceived in their favour; and declaring that the said " present, like the former provision, shall not be subject " to the jus mariti, debts, deeds, curatory, or administra- " tions of any husbands whom my said daughters have " or may marry; but shall, along with the said provisions, " be lent out and secured on good security, at the sight " and in name of my said sons or survivor, along with " Mr. Nathaniel Stevenson, writer in Glasgow, as " trustees for the use and behoof of my said daughters " in life-rent allenarly, and their children in fee; the " fee being to be divisible among the children by any " joint deed of the parents or the survivor; and failing " such writing being executed, to be divided among the " children equally and proportionally, share and share " alike. Declaring that such of my said daughters as " shall not be married or have children shall notwith- " standing have right to dispose of by will or settlement " the one half of their total provision; but on failure " so to test, the same, along with the other half, shall " devolve to their surviving brothers and sisters, includ- " ing the issue of such of them as have deceased for " their parents share, equally and proportionally. And " further declaring, that in the event of the decease of " my said son William Dixon without leaving lawful

" issue, and without disposing of his share of my said
" means and effects, whereby a great succession would
" devolve upon my said son John, I hereby direct and
" appoint that the said John Dixon shall in that event
" be bound to account for and pay to his sisters, in-
" cluding the children of such of them as have deceased,
" in right of their parents, the just and equal one half
" of the succession which may devolve to him by the
" predecease of his said brother in the event aforesaid,
" and that at the terms, and with interest, and to be
" settled and secured for them and their children, ex-
" clusive of their husbands' jus mariti or right of
" administration, all as before mentioned, and equally
" and proportionally, share and share alike, including
" the children of such of my daughters as have or may
" decease leaving lawful issue, for their mother's share
" as before specified. And I of new dispense with the
" delivery hereof, and consent to the registration of this
" codicil in the books and to the effect mentioned in
" the foregoing settlement."

The appellants, on the death of their father, accepted the trust, and entered into possession of the estates, in terms of the deed of settlement and of the codicil. Margaret Dixon (Mrs. Fisher), the mother of the respondents, was a daughter of the testator; and having repudiated the liferent provision bequeathed to her, and betaken herself to her right of legitim, she and her husband instituted a process of multiplepoinding in the name of the appellants, in order that the estate of the testator might be divided among the parties according to their respective rights; and a relative process of count and reckoning was also instituted.

In the process of multiplepoinding she claimed 12,000*l.*

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as the amount of her legitim; and her children, the respondents, claimed that the two provisions of 2,000*l.* should be secured to them as fiars in terms of the deed of settlement. On the other hand, the appellants contended that Mrs. Fisher could not claim her legitim without discharging the claim of her children to the fee of the provisions, or if they insisted on their right to those provisions her claim to legitim could not be sustained.

After various proceedings had taken place the Lord Ordinary ordered the appellants to consign in the Bank of Scotland the sum of 4,000*l.* sterling, with interest, or, in their option and without prejudice to the pleas of the parties, to grant and lodge in process a security there-for over their heritable estate. The money, including interest, amounting to about 5,000*l.*, was accordingly lent out, and the bond and disposition in security bore that the same "quoad both principal and interest is granted in "trust, for behoof of the aforesaid Margaret Dixon "otherwise Fisher, and her children, and for the said "Daniel Fisher her husband, according to their respec-"tive rights and interests either at common law or "under the said deed of settlement and codicil of Wil-"liam Dixon the elder, or otherwise as may be deter-"mined in the action of multiplepoinding herein-before "recited, and subject at all times to the orders of the "said Lord Ordinary or of the Court, to be pronounced "in said process; the rights and interests, and pleas of "the whole parties being reserved to them entire, in "terms of the before-recited interlocutor."

The Lord Ordinary ordered cases to the Court, and issued the following note:—"The question whether, in "the case of a bequest by a father of a certain sum to a "child for his life-rent use allenarly, and to the chil-

" dren of that child in fee, the declaration that the
" bequest shall be in full of all the child's legal claims
" imports a condition on the compliance with which
" the right of fee as well as that of the life-rent is
" dependent, is one which appears to the Lord Ordi-
" nary to be attended with considerable difficulty. The
" case of Watt v. Ewan, 10th July 1828, founded on
" by the pursuers, is certainly very nearly in point, and
" on the strength of that decision the Lord Ordinary
" was at first inclined to give judgment in favour of
" the pursuers; but in the present case, independently
" of the expressions in the settlements, marking perhaps
" more clearly the testator's intention, there is this
" additional distinction, that the provision is in favour
" of the testator's daughters in life-rent for their life-
" rent use allenarly, and 'their children in fee,' while
" in the case of Watt v. Ewan, the provision was, 'in
" 'favour of my son John and his present wife, and
" 'longest liver of them, in life-rent, for their life-rent
" 'use of the interest thereof, and the fee thereof to the
" 'children procreated between them, share and share
" 'alike;'—which expressions might perhaps be held to
" denote a right in the wife and children of the specified
" marriage more absolute and unconnected with the
" rights of the father than that created by the general
" expressions employed in Mr. Dixon's settlement. As
" the point is of some importance, and as the report of
" the case Ewan v. Watt does not afford the means of
" ascertaining the precise grounds upon which it was
" decided, the Lord Ordinary has thought it most
" advisable to order cases. The multiplepoinding and
" count and reckoning depending between the present
" defenders and the mother of the pursuers include

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" the whole funds of the testator; the very sum now " pursued for is lent out on security in virtue of an " order made in those processes; and the Lord Ordinary " understands that the determination of the pursuers' " mother to claim legitim or to accept the provisions of " the settlement will depend on the result of those " processes. But the question, how far the right of " fee in the children is in any way conditioned on that " determination, admits of being separately discussed; " and that course seems to have been sanctioned by " Lord Cringletie's interlocutor of the 26th May 1829, " 'repelling the preliminary defence that this action " 'ought to be dismissed, or remitted hoc statu to the " 'multiplepoinding,' and appointing the parties to " prepare a record."

The Second Division of the Court directed the parties to lay the revised cases before the other Judges, in order to obtain the written opinion of their Lordships, "whether the claim made on the part of the pursuers be " or be not well founded."

The Lords President, Balgray, Gillies, Craigie, Corehouse, and Moncreiff, concurred in the following opinion:

" —We have carefully considered the disposition and " settlement of the deceased Mr. William Dixon, dated " 11th April 1817, as also the codicil thereto annexed, " dated 15th March 1820.

" By these deeds it is declared, that the provisions to " his daughters shall not be subject to the jus mariti " or right of administration of their husbands, or liable " to be attached for their debts or deeds, 'but shall " 'belong exclusively to my daughters in life-rent, for " 'their life-rent use allenarly, and to their children in " 'fee, and shall be so secured at the sight of my said

" ' sons or the survivor of them.' Also in the codicil
" conferring an additional provision it is declared,
" ' That the said present, like the former provision,
" ' shall not be subject to the jus mariti, deeds, curatory,
" ' or administration of any husbands whom my said
" ' daughters have or may marry, but shall, along with
" ' the said former provision, be lent out and secured
" ' on good security, at the sight and in the name of my
" ' sons or survivor, along with Mr. Nathaniel Steven-
" ' son, writer in Glasgow, as trustees for the use and
" ' behoof of my said daughters in life-rent allenarly,
" ' and their children in fee, the fee being to be divisi-
" ' ble among the children by any joint deed of the
" ' parent or the survivor.' We consider these clauses
" of great importance, and we think that the grantor
" by these deeds created two separate and distinct
" estates, the one of life-rent and the other of the fee,
" and that these estates were in no ways dependent
" upon one another. We are the more inclined to be
" of this opinion, from the circumstance of trustees
" being appointed to hold the fee separately for behoof
" of the children, independent of the right of their
" parents. We therefore cannot see upon what grounds
" in justice the children can be deprived of the fee by
" any act or deed of the life-renters, who are entitled to
" manage their own property as they think fit, without
" control on the part of their children. The expressions
" made use of in Mr. Dixon's settlement, and to which
" the defenders refer, are to be considered with great
" caution, particularly when direct and positive rights
" are created. Where the intention of a grantor is
" clear and explicit, the inductive cause is of little im-
" portance in testamentary deeds. Whatever were

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" Mr. Dixon's intentions in a certain event, yet, as that " certainly has not taken place, without an express de- " claration it cannot be maintained that the daughters, " by claiming any thing due to them, either as a share " of the goods in communion at their mother's death " or in the name of legitim at their father's death, could " deprive their children of a right of fee with regard " to which their mother had no interest whatever but " that of life-rent. If Mr. Dixon had intended to make " the renunciation of those rights a condition of the " grant of the fee he ought to have expressed his inten- " tion in a more direct and explicit manner. Under " these circumstances we conceive it to be improper for a " court to extend a condition from presumed intention. " In the present case we think that neither of the par- " ties could make the condition of the other better or " worse. Upon the whole, we incline to think that the " case of Watt v. Ewan, decided 10th July 1828, is " very nearly in point, and ought to be followed as a " precedent. It may be observed that the plea of hard- " ship, which has been stated on the part of the " defenders, is not altogether just or correct. The " grantor's heirs will enjoy the life-rent of the grand- " children's provisions during the life of their mother, " and so annually diminish the claim."

Lord Fullerton :—" I concur in the foregoing opinion. " If the present could be viewed as a mere question " of probability, very plausible reasons might perhaps " be given for the supposition that the testator in- " tended to make the right of fee, as well as that of " life-rent, dependent on the surrender of the legitim " by the daughters. But I do not think that the " deeds contain words capable of supporting such an

" intention. The effect of the deeds clearly is to
" create two distinct and independent rights, that of
" life-rent in favour of the daughters, and that of fee in
" favour of the children of those daughters. Then
" follows the declaration, 'that the provisions above
" 'mentioned shall be in full to each of my daughters,
" 'their husbands, children, or assignees, of all they
" 'could ask or claim in and through my decease
" 'legally or conventionally, or any other manner of
" 'way.' Now, I conceive it would be outstepping the
" limits of legitimate construction to connect with the
" surrender of legitim not only the provisions of life-
" rent, created in favour of the daughters who had a right
" of legitim, but the provision of fee in favour of the
" children who had no such right, so as to raise by
" implication a condition affecting the bequest to the
" children. The question seems to be substantially the
" same with that raised and decided in the late case of
" Ewan v. Watt; and though there may be some slight
" difference in the expression of these deeds, I do not
" think that the difference is such as to warrant the
" application of a different principle to the present
" case."

Lords Mackenzie, Medwyn, and Newton concurred in the following opinion:—" In this case the testator " declares, that the provisions are granted as 'provisions " 'to my daughters, and for the love and favour which " 'I bear to them.' The mode adopted of providing " the daughters is by giving them sums of 4,000*l.* each. " These sums, to be sure, are directed to be laid out on " securities for them in life-rent allenarly, and their " children natis aut nascituris in fee. But still the " whole grants of these sums were certainly viewed as

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" provisions on the daughters, insomuch that even in the " case of any daughter predeceased it is expressly men- " tioned, that the children of that daughter are to receive " it ' as coming in place of their mother,' and powers " over the fee, at least of one half, if not of the whole,— " powers of great importance,—are reserved to the " daughters or their husbands. The whole of each " provision is manifestly viewed as unum quid provided " in favour of each daughter; nor is there any thing " absurd, but the contrary, in making provisions for " daughters by a destination such as is here done, which " reserves the full benefit of it for themselves and their " children.

" 2. The deed then bears, ' that the provisions above " ' mentioned shall be in full to each of my said daugh- " ' ters, their husbands, children, or assignees, of all " ' they could ask or claim in and through my decease, " ' legally or conventionally.' The husbands, children, " or assignees are evidently mentioned only as persons " to whom the daughter's right might pass. The sub- " stance of the clause relates to daughters, that is, that " these provisions were to be in full of their claims, " legal and conventional. The idea of applicando ap- " plicandis is admissible. The husband, children, and " assignees could obviously have no right, legal or con- " ventional, of their own, not derived through the " daughter that was the wife, mother, or cedent. The " provision then may be read as if the words had been " simply, ' that these provisions shall be in full to my " ' said daughters, of all they could ask or claim in and " ' through my decease.'

" 3. The daughter Margaret Dixon (Mrs. Fisher) " refuses to give up and claims her legitim, and she

" repudiates the provision, which she has full power to
" do; yet her children claim the fee of the provision,
" as being settled on them independently of her or her
" deeds. We think the answer to this claim good, that
" the manifest intention of the testator was that the
" provision as unum quid should have effect as a pro-
" vision on his daughter, and as a satisfaction of his
" daughter's claim, legal or conventional, and not other-
" wise; and therefore, if it cannot have this effect, it
" cannot have effect at all. He never intended it, nor
" has he expressed it, as a separate independent legacy
" on his grandchildren. This construction, we think,
" is certainly agreeable to the true intention of the
" testator, and we are not aware of any principle by
" which that intention can be defeated and a result
" produced which the testator never intended. The
" case of Ewan does not appear to us to be one in which
" the circumstances were precisely similar to the present.
" In that case there do not appear to have been the
" same grounds for certainty that the provision was
" viewed as one provision on the child whose legitim
" was to be discharged, and on the want of this evi-
" dence of intention we believe the decision of the case
" must have rested. In this case we see no room for
" doubt on that subject."

The Court, on resuming consideration of the case, with the opinions of the consulted Judges*, pronounced, on the 24th Nov. 1831, the following interlocutor:—

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* Three of their Lordships, viz., the Lord Justice Clerk, Lord Glenlee, and Lord Cringletie, expressed opinions to the same effect as those of Lord Mackenzie, Lord Medwyn, and Lord Newton; but Lord Meadowbank agreeing with the other seven Judges who had signified their opinion that the defences should be repelled, there was thus a division among the Judges of eight to six.

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"The Lords on the report of Lord Fullerton, having "considered the revised cases for the parties and other "proceedings, with the opinions of the consulted Judges, "in respect of the said opinions find that the right of "the pursuers, the grandchildren of the deceased Wil- "liam Dixon, to the fee of the provisions in their favour "in the settlements of their said grandfather will not "be affectable by the repudiation by their mother, "Margaret Dixon or Fisher, of her right to the life- "rent of the said provisions; and with this finding "remit to the Lord Ordinary to proceed further in the "cause as to his Lordship shall seem just."*

Against this interlocutor John and William Dixon appealed.

Appellants.—By the settlements of Mr. Dixon the provision made in favour of each of his daughters formed one estate or unum quid, notwithstanding the directions given by him regarding the disposal, in certain events, of the life-rent and fee. There is a clear distinction between the appointment and creation of a legacy or estate, and the laying down rules for the disposal of such estate or legacy after it has been established or created; a distinction pretty much the same as that which has been employed in both parts of the kingdom, to settle questions with regard to the vesting of legacies, and by which it has been held that where a condition is so closely entwined in the dispositive or bequeathing clause, as to form an articulate part of it, the legacy shall not vest till the condition is fulfilled; though, where the legacy is first given by one

* 10 S. & D., p. 55.

clause, and the condition is afterwards adjected by another, it will not necessarily have the same effect as in the case first supposed. The principle of law now referred to, has been repeatedly adopted in Scotland*, and also in England, where it is described by Swinburn as having been even in his time, vexata questio.† Taking this, therefore, for granted, the proper question is, what were the estates created by Mr. Dixon in his disposition and codicil, and whether the subsequent directions with regard to the disposal of these estates were such as could have any effect whatever upon their constitution or creation? And on this head there are a variety of considerations, which lead, by necessary inference, to the conclusion that the provision of life-rent and fee was intended by him to constitute only one estate.

The declaration in the settlement has no reference to the children of the daughters separate from that which it bears to the daughters themselves; and there is no reason for applying to the clause the maxim applicando singula singulis.

It was plainly the testator's intention to create only one estate for each stirps or familia, and therefore the whole must be taken as standing or falling by the option which Mrs. Fisher may choose to make as to insisting on her legal provisions, or being satisfied with the life-rent of the 4,000*l.*‡

Besides, the interlocutor is erroneous, in so far as it gives the respondents more than even they themselves

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* Fouke v. Duncans, March 1, 1778, Mor.8092; Burnett v. Forbes, Dec. 9, 1783, Mor. 8105.

† See Swinburn on Wills.

‡ Williamson v. Cochrane, 28th June 1829, 6 S. & D. 1035; Ewans v. Watt, 10th July 1828, 6 S. & D. 1125.

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can pretend they have any right to, even on the largest construction of the deed of settlement; for by succeeding ultimately, as it is to be presumed they will, to their mother's share of the legitim, they will take greatly more than their grandfather intended that they should draw from his estate, and burden his heir with larger claims than ever were in his contemplation.

Respondents.—By the deed of settlement and codicil there are created two separate and independent estates; one of life-rent in favour of Mr. Dixon's daughters, and another of fee in favour of the children of the daughters. The estate thus vested in the grandchildren is totally independent of their immediate parents, and the grandchildren are plainly direct objects of the testator's affection and regard, and there are no grounds upon which it can be held that the daughters by any voluntary act can defeat the provisions in favour of their children, and deprive the latter of the benefit conferred on them by the testator. Such generally being the nature of the provisions to the daughters and to the grandchildren, it cannot be contended that the provisions to the grandchildren, who had no claim for legitim, were made conditional upon the acceptance by the daughters of their peculiar provisions in discharge and satisfaction of the legitim to which they alone had right. It is plain from the whole course of the appellants' reasoning that their plea results in this: that it is unlikely the testator would have done what he has done in the circumstances if he had imagined that his daughters would claim their legal provisions; and therefore they maintain that this claim on the part of the daughters must vacate the provisions of the grandchildren. But in whatever way the

presumption may be thought to bear, the appellants by such a course of argument do not construe the deed, but they make a new will for the testator. They forget that it is not enough to show, even if they could show, that an event has occurred contrary to what the testator probably contemplated, and which, if he had foreseen, might have altered his dispositions. Intention clearly expressed never can be overruled upon any such ground as this. The appellants' argument is good for nothing, unless they can find words in the deed which plainly and distinctly express or necessarily imply that the circumstance of the daughters having recourse to their legitim should vacate the provisions in favour of the grandchildren; a conclusion which cannot be supported against the clear and indisputable fact, that the grandchildren's provisions are given to the exclusion of all right and interest in them on the part of their parents.*

LORD CHANCELLOR.—When the case of Dixons v. Fisher was argued at your Lordships bar I proposed to stop the counsel for the respondents, conceiving it was unnecessary to call upon them. There is no doubt whatever that in this case there was considerable difficulty in the Court below upon the

* Newlands v. Newlands, 9th July 1794, Mor. 4289. affirmed on appeal; Thomson v. Thomson, 9th July 1794, Bell 72; Allardice v. Allardice, 25th Feb. 1795, Bell 156; Watherstone v. Rentons, 25th Nov. 1801, Mor. 4297; Thomson v. Forrester, 6 S. & D. 875, 4 W. & S. 136, affirmed; Seton v. Seton, 6th March 1793, Mor. 4219; Scott v. Crombie, 14th Feb. 1826, 4 S. & D., 454, affirmed on appeal 14th May 1827, ante, Vol. II. 550; Mein v. Taylor's Children, 8th June 1827, Fac. Coll. No. 96.

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construction of the will made in 1817 and the codicil dated in March 1820. I cannot say that it is a clear case, but upon a very full and anxious consideration of it I am of opinion that the judgment of the Court below is right and ought to be affirmed. I stated at the time when the counsel were at your Lordships' bar, that unless I should on further consideration feel more strongly than I at that time did the objections which they urged, to show that the Court below had not come to a right conclusion upon the construction, it would not be necessary to hear the further argument. The decision was certainly by a narrow majority, the learned Judges being very much divided in opinion; still I have come to the same conclusion, and I do not feel it to be necessary, therefore, to call upon the counsel for the respondents. That which I felt principally to require attention during the interval was the applicability of the case cited at the bar, of Ewans v. Watt, which had been decided a short time before. My Lords, that there may not be some difference between the two cases I am not prepared to say, but I see some of the learned Judges have been of opinion that the difference is much wider than I am at all disposed to think. I am of opinion, with the majority of the learned Judges, that there is a similarity between the two cases; that they are sufficiently near to make the one an authority in dealing with the other; and being of opinion, on a further consideration of this case, that there is not sufficient to call upon the respondents for any answer, I shall therefore advise your Lordships, on these grounds, to affirm the interlocutor, but, under the circumstances, without costs.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutors therein complained of be and the same are hereby affirmed.

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SPOTTISWOODE & ROBERTSON—RICHARDSON & CONNELL, Solicitors.