HUTCHISON ET AL., ... APPELLANTS.
SKELTON ET AL., ... RESPONDENTS.

1856. *July* 18*th*.

Contribution—Satisfaction of Legacy.—A testator directed his trustees to secure 1,500*l.* to his daughter Mary for life, and to her children in fee; but with a proviso that payment in his lifetime should go in satisfaction of the gift. Mary had received 1,000*l.* from the testator, and predeceased him. The Court of Session held that the children of Mary were, nevertheless, entitled to the full 1,500*l.* without deducting the 1,000*l.* The House reversed this decision.

The question was one of construction. The Testator, John Hutchison, by a testamentary deed of trust disposition, directed his trustees as follows:—

That they shall set apart and secure to each of my daughters, Mary, Elizabeth, Katharine, Ann, and Jean Hutchison in life-rent, and their children respectively in fee, the sum of 1,500*l.* sterling, to bear interest from the first Whitsunday or Martinmas six months after my decease, but always with and under this special condition, viz., that as these provisions are intended for the particular or personal benefit of my daughters and their children, so the same are to be nowise subject to the *jus mariti* of their husbands, or to the debts or deeds of any or either of them, or the diligence of their creditors; and the receipts of my daughters themselves, and of their children, according to their several rights of life-rent and fee, shall be sufficient exoneration to my trustees, without the necessity of any consent or acquittance by their several husbands; it being understood, and hereby specially provided and declared, that whatever sum or sums have already been paid, or may in lifetime hereafter be paid to any or either of my said children, whether sons or daughters, and vouched by receipt or other written document, or entered to their debit in my ledger or other account-book, shall be held and accounted (without reckoning interest thereon) as so much of the provision falling to such child or children under this deed of settlement, and declaring further that the said provisions, both to wife and children, shall be in full satisfaction to them respectively of every provision, legal or conventional, that they could ask or demand by and through my decease in any manner of way.

The Respondents were the children of Mary Hutchison, who had predeceased the Testator. They claimed the legacy of 1,500*l.*, without deduction of an advance of 1,000*l.* made by the Testator to Mary in his lifetime.

The *Lord Ordinary* (*a*) held, that "The fee of the 1,500*l.* must be taken to infer a distinct and several estate in the children of Mary, as of their own right altogether, apart from and independent of their mother; and therefore that the residuary legatees were not entitled to have the 1,000*l.* either set off against the same or deducted therefrom."

To this decision the First Division adhered, the following observations having fallen from the Court in explanation of their judgment; a judgment which the learned *Solicitor-General* designated as "a singular one."

Lord President: Some confusion has arisen here from the way in which the Testator has thought proper to frame this bequest in favour of his daughter, who was dead, in the same terms as if she had been alive. This is the more extraordinary, seeing that the bequest that he gives her is a life-rent. We must discover his meaning from the terms of the deed. It appears that what the Testator did give to his daughter was a life-rent, and a life-rent only. I think that the word "allenarly" (*b*) is not requisite in a deed such as this, which is a trust for the grandchildren as well as the daughter, to restrict the mother's right to a life-rent. The principle that we apply to trust deeds, as contradistinguished from deeds of investiture, is applicable here. If it be made plain that the provision is one in which the grandchildren are to have the fee and the daughters the life-rent, the word allenarly is not requisite. I think that it was only a life-rent that was given to the daughters. Whatever sums should be advanced by the Testator to his children were to be held as so much of the provision falling to them. The advance of 1,000*l.* to his daughter Mary is entered in his book as a sum which was to be deducted from her patrimony. But the question is, from what is it to be deducted? The whole question is one as to what is the meaning and intention of the truster. He

(*a*) Lord Ivory.
(*b*) "Allenarly" is the scientific word for "only."

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might have directed the deduction to be made either from both the fee and the life-rent, or only from one of them. The terms of the settlement are not very clear. There is, however, no direction to make any deduction from the provisions of the grandchildren, but only from those of the children; and I think that the grandchildren are not to suffer deduction under this direction. Upon the whole, I am for adhering.

Lord *Fullerton:* I am of the same opinion, and I think that we cannot do otherwise without infringing principles which are fixed in law. The question is, What is it that this deed expresses? If it could be shown that the Testator had constituted only one right, so that both the life-rent and the fee would go to the daughters, that would present a different case from what we have here. But I cannot hold this to be the case. The word "allenarly," it is true, is not here, but there are words which are equivalent. We have, I think, gone too far in admitting constructions of deeds inconsistent with the intentions of the Testator. In this case there are two provisions, not one,—a life-rent to the mother and a right of fee to her children. The question arises, from what provision is the deduction to be made? It it quite clear that it must be from that of the party who has received the payment proposed to be deducted,—that is, from the life-renter, and not from the fiar. The interlocutor of the Lord Ordinary should be adhered to.

Lord *Ivory:* I remain of the opinion expressed by me as Lord Ordinary in the interlocutor under review.

Lord *Cuninghame* was absent.

The *Solicitor-General* and Mr. *Rolt* for the Appellants.

Sir *Fitzroy Kelly* and Mr. *Munro* for the Respondents.

The argument on both sides is exhausted in the following opinion of—

Lord Chancellor's opinion.

The LORD CHANCELLOR (*a*):

I have no hesitation in moving your Lordships to come to a decision different from that at which the Court in Scotland arrived.

The question turns entirely upon the construction of a particular instrument. It has been likened at great length in the printed arguments to cases with

(*a*) Lord Cranworth.

which, I think, it has little or nothing in common. In the first place, we were pressed with the case decided in this House of *Dixon* v. *Fisher* (*a*), in which it was held, and held upon very intelligible principles, that where a person claiming against a will is put to an election; if that which is given by the will is a life-rent only, and after the death, the fee is given to the children; then if the election is made—say by a daughter, to take against that instrument, to take, for instance, the *legitim*, such election will not affect the interest of those who take after her. It has been so settled, and it is unnecessary to discuss the grounds upon which that determination was come to.

During the argument at the Bar, the case was likened, and so it is in the printed papers before me, to cases of ademption of legacies; but I cannot say that I think they have any close analogy. They somewhat resemble, but they do not at all afford an authority, on which a Court of justice could act. Those cases of ademption proceed upon this ground; that if a testator makes a will and gives that which is in the nature of a portion to his daughter, say 5,000*l.* *simpliciter*, and afterwards in his lifetime the daughter marries, and he gives to that daughter 1,000*l.*, even though he does not give it, as he had given it by the will, *simpliciter*, but settles it upon herself for her life, and afterwards to go to her children; still that must be intended to be taken in satisfaction of what has been given by the will, because the Courts, in this country at least, have not considered that the circumstance of a limited interest, such as an interest for life, being given to the daughter, and after the death

(*a*) 10 Sh. & Dun. 55, affirmed 1st July 1833; 6 Will. & S. 431.

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of the daughter an absolute interest being given to the children of that daughter, makes any substantial difference. It is still deemed a satisfaction.

The present case, however, turns entirely upon the construction of this will. Now the will, after directing the payment of debts, and making certain other provisions, proceeds thus: "Tertio, the trustees are to set apart and secure to each of my daughters" (there having been five of them) "in life-rent, and their children respectively, in fee, the sum of 1,500*l.* sterling, to bear interest," and so on. Then it excludes the *jus mariti*. "And lastly, that they shall pay and divide the free remainder and residue of my estate, real and personal, hereby disponed, amongst my sons equally between them, share and share alike." With this proviso: "It being understood, and hereby specially provided and declared, that whatever sum or sums have already been paid, or may in lifetime hereafter be paid to any or either of my said children, whether sons or daughters, and vouched by receipt or other written document, or entered to their debit in my ledger or other account book, shall be held and accounted (without reckoning interest thereon) as so much of the provision falling to such child or children under this deed of settlement."

Now Mary Hutchison, afterwards Mary Arbuthnot, died in the Testator's lifetime, two or three years before the date of the will, and he had advanced upon her marriage 1,000*l.* Is that to be taken in reduction of the 1,500*l.*, or is it not? The Court below decided that it was not; because, they said, that that was to be deducted from her life interest, and not from the ultimate interest of the children. She was herself dead, so that in her case there would be no deduction. But the same principle would apply to the other

daughters; they are not dead, at least we have not heard of their death, and I presume they are still living.

What is contended for by the Respondents is, that the sum which the Testator directs to be deducted from the provision falling to the children under the will shall be deducted from the life interest, because that which would otherwise be deducted, if not from the life interest, would have to be deducted, not from the provision for the child, but from the provision for the child of the child. Now, in the first place, it is obvious that the intention of this will was to give equal legacies to all the daughters, and equal shares of the residue to all the sons. But the intention of giving equal legacies to the daughters would be defeated by the construction which has been adopted by the Court below; because if there had been any daughter who had had 1,500*l.* advanced in her lifetime, the consequence would be that, eventually, that daughter's family would take 3,000*l.*; whereas, the daughter who had had nothing advanced to her would take only 1,500*l.*, a result which it is very improbable that the Testator should have contemplated.

But further, how is the gross sum which has been advanced in the lifetime to be apportioned and set apart against the life interest in the legacy given by the will? Supposing a sum of 1,500*l.* to be advanced in the lifetime; the Testator dies; the interest that had accrued due down to the death of the Testator is expressed not to be taken into account. Then take interest, at any rate you please,—five per cent.,—is that to go on, and the daughter to remain unprovided for for twenty years, till the interest for that number of years shall amount to 1,500*l.*, and then to be let into the enjoyment of the whole? The whole arrangement

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would be so extremely inconvenient, that if there be any other possible construction that will not militate against the language used by the Testator, I think it is the duty of the Court to arrive at such a construction. Now, is there any such possible construction? I think that which is suggested by the learned Counsel for the Appellants is a perfectly rational construction. The Testator calls it "the provision falling to such child or children." If a man by his will gives 1,500*l.* for his child to have the benefit of it during her life, and afterwards to go to her children, she being a married woman with a family, is not that legitimately described as a "provision falling to children?" It appears to me clear that it is so. The same expression, portions for children, have been so construed in England, and I can see no difficulty whatsoever in adopting the same construction upon the language used in this instrument.

Upon the whole, although we are generally anxious to hear the matter fully argued, in deference to the opinions of the learned Judges of the Court below, I cannot say that I feel any reasonable doubt upon the subject. Therefore I think that, they having come to what I consider to be a wrong conclusion, I must move your Lordships that the Interlocutors be reversed.

Ordered accordingly.

WEBSTERS—JOHNSTONE, FARQUHAR, AND LEECH.