PARENT AND CHILD.

1678. *December* 20.

STRACHAN *against* PATRICK STEWART, Town-clerk of Banff.

No 1.

A FATHER is pursued for a sum furnished to his son. *Alleged* he was forisfamiliate, and entering an advocate, and this lending is *contra S. C. Macedonium*. THE LORDS found he was liable to have alimented his son according to his quality and estate, so far as the son could not entertain himself by his own industry, and that he was not totally forisfamiliate; and therefore ordained the pursuer to prove the sum was furnished for aliment and the worth of the father's estate, that they might modify accordingly.

Fol. Dic. v. 2. p. 25. Fountainhall, MS.

1685. *November* 27.

JEAN ROBERTSON *against* Her Father's HEIRS, or M'INTOSH *against* ROBERTSON.

No 2.
Though, by the Roman law, the father was bound to tocher his daughter, yet the Lords found it otherwise by the law of Scotland.

JEAN ROBERTSON having pursued her father's heirs, for payment of 500 merks in legacy to her by John Robertson, which was uplifted by her father as administrator in law to her. The defender *alleged* absolvitor, because the pursuer's father in her contract of marriage with her husband, contracted 5000 merks with her, which ought to be ascribed *pro tanto* in satisfaction of the said legacy. It was *answered*, That her father was obliged to pay her tocher albeit he had not been her debtor the manner libelled, and that he had only tochered her suitably to his own estate, he being a gentleman of 2000 merks of rent. It was *replied*, That albeit by the Roman law, the father was obliged to tocher his daughter, yet there was no obligation by our law upon the father to tocher his daughter; and that therefore, what he had given, was to be imputed and ascribed in payment of his debt in the first place, seeing *debitor non præsumitur donare*. It was *duplied*, Whatever might be said if the father had granted a bond of provision to his daughter, that the tocher might be ascribed in satisfaction thereof; yet in this case, where the legacy was adventitious, proceeding

No 2. from a stranger, and where the pursuer's contract of marriage did not bear in satisfaction, the defence could not be sustained. THE LORDS sustained the defence, and found, That where a tocher was provided in a contract of marriage, with a daughter, it was presumed to be in satisfaction of the foresaid legacy which she could crave of her father, party contracter of the tocher. See PRESUMPTION.

Fol. Dic. v. 2. *p.* 25. *P. Falconer, No* 107. *p.* 74.

*** Fountainhall reports this case:

THE case of M'Intosh of Daviot against Mr William Robertson of Inches, was reported by Lord Register. A friend leaves Marjory Robertson, Inches' daughter, a legacy of 500 merks; her father uplifts it, and afterwards marries her to the Laird of M'Intosh's brother, and in the contract of marriage gives her 5000 merks of tocher, but says nothing of the legacy, or that it is in satisfaction of all. Daviot now pursues Inches for the legacy. *Alleged*, it is presumed to be paid, because long posterior thereto he gave her a large tocher of 5000 merks, *et debitor non præsumitur donare*. *Answered*, The brocard is founded on no principle or text of law, but only the doctors invention. 2*do*, *Unumquodque eodem modo dissolvitur quo colligatur*, and therefore the legacy being in writ, there must be a formal and specific discharge of it. 3*tio*, The contract matrimonial does not so much as bear that the tocher shall be in satisfaction of her bairns part and portion natural, so that Marjory after her father's death was creditor to the family for her legitim and share of his moveables; *ergo*, if the tocher be not in satisfaction of that, *a fortiori* she may still claim the legacy left her by a stranger; and his not inserting that clause shews, he minded not to frustrate her of the legacy; and the paying it by the tocher is but *præsumptio hominis*, which is elided *aliis signis et præsumptionibus*. 4*to*, The brocard only holds between debtor and creditor stangers, but not *inter parentes et liberos*; for law presumes the father's affection to be such, that he will not diminish what his children had formerly right to by the gift of strangers. 5*to*, The maxim takes only place *in profectitiis a patre*, but not *in bonis adventitiis* from strangers, as this legacy is. 6*to*, A tocher in law is no donation, *quia pater filiam dotare tenetur*, *tot. tit. C. De dot. promiss.* and that on the 15th December 1682, John Grant and Elizabeth Gilchrist, pursuing Robert Pringle for her tocher, who *alleged*, that he had given her houshold-plenishing to the value, the Lords found the said furnishing did not compense *hoc loco*, and that his affording horses and carts to carry it away inferred it was gifted; and so the brocard did not hold here. *See* PRESUMPTION.

Replied, To the first, that the brocard is founded in positive law, *viz. Omnis donatio sapiens naturam jactationis et dilapidationis in dubio nunquam præsumitur*, *l.* 25. *D. De probat.* To the 2*d*, The legacy is also taken away *scripto*, *viz.* by the contract of marriage. To the 3*d*, The clause in satisfaction is not *ex neces-*

situate juris, but *ad majorem cautelam*, to prevent actions from covetous and ungrateful children; and the tocher can only be ascribed in satisfaction of debts *ab ante*, as this legacy was; but not of the legitim, which is posterior, and comes by succession. To the *4th*, By the Civil Law parents were bound to tocher their children, *l.* 19. *D. De ritu nupt.* but with us tochers are donations *nullo jure cogente*; for a moral or natural obligation hinders not but it is still gratuitous, unless there was a civil tie supperadded; and if nothing were a donation but where there was no tie at all, then there shall not be an absolute donation in nature. To the *5th*, The legacy is not taken from her, but more than remunerate by the posterior tocher. To the *6th*, Though a tocher be onerous *quoad maritum, ad sustinenda onera*, yet it is free as to the farther payer. And, in Pringle's case, the plenishing given was but *xenia et dona nuptialia*, which never use to pass for payment of any part of the tocher; and they were not *res fungibiles*, but *species inæstimatæ*, and so could not be given *in solidum* to compense the tocher, a liquid sum. No 2.

THE LORDS adhered to their former interlocutor in March last; and in regard of the practiques, and contract of marriage produced, bearing a tocher of 5000 merks to have been paid by the father, they assolized the defender *simpliciter* from the legacy now pursued for.

Fountainhall, v. 1. *p.* 378.

*** Harcarse reports this case.

1685. *November.*—A father who was debtor to his daughter, for a legacy left to her by her mother's brother, having contracted a portion with his daughter at her marriage, without the clause, in satisfaction of all that she could ask or claim, &c. her husband pursued for the legacy.

THE LORDS sustained the defence of debtor *non præsumitur donare*.

Harcarse, (BONDS.) *No* 202. *p.* 45.

*** Sir P. Home also reports this case.

1685. *November.*—JAMES ROBERTSON merchant in Inverness, having left a legacy of 500 merks to Marjory Robertson, daughter to John Robertson of Inches, and he having uplifted the legacy, the said Marjory Robertson and Lauchlan M'Intosh of Daviot her son, pursued Mr William Robertson as representing the said John Robertson his father, upon the passive titles for payment of the legacy: *Alleged* for the defender, albeit his father did uplift the legacy, yet he did thereafter give the pursuer his daughter 5000 merks of tocher, which must be understood in the first place to be in satisfaction of the legacy *quia debitur non præsumitur donare*, as is clear by several decisions, particularly 1629, Carmichael against Gibson, *voce* PRESUMPTION, where the father being debtor to a son in a legacy left by the mother, and after the father's-decease, the father's executors

No 2. being convened to pay the legacy, it was found that the payment made by the father, for binding the son as apprentice to a craft, ought to be ascribed in satisfaction of the legacy *pro tanto* and ought not to be given *ex pietate paterna*, for it was presumed that he would liberate himself of his debt before he would give any thing, and the day of 1634, against *

where a father having given a bond of provision to his children, did thereafter give them a posterior bond for the equivalent, or other sums, the posterior bond was understood to be in satisfaction of the prior *quia debitor non præsumitur donare*; and the 19th November 1661, Fleeming, No 24. p. 8260., where the Lords found, that a mother who was tutrix to her children, having given out a sum of money in her children's name, to be in satisfaction of the bairns portions, in so far as she was debtor to them in the same, and a donation *pro reliquo*; and Young against Paip, *voce* PRESUMPTION, where the Lords found that a posterior bond of provision in favour of a child, ought to be imputed in satisfaction of a prior provision, unless it could be made appear, that the first bond was granted for an onerous cause; and it is the opinion of the most eminent lawyer that have written on the subject, and particularly Scotanus in his *examen juridicum* upon that title of the digest. *De ritu nuptiarum*, that tochers indefinitely given by parents, are imputed *primo loco*, to be in satisfaction of what the parent is due to the children; and Dowes against Dow, *voce* PRESUMPTION, where the Lords found a tocher granted by a father to his daughter, in her contract of marriage, ought to be imputed in satisfaction of all former provisions, albeit not exprest. *Answered*, that the brocard *quod debitur non præsumitur donare* being but founded upon presumptions, may be elided by contrary and stronger presumptions, according to that principle in law, L. 25. D. De regul juris, nihil tam naturale est quam eo genere quodque dissolvere quo colligatum est; and Mantica de Conject. ultim. voluntat. lib. 12. tit. 17. No 6—7—8. and 21. lays it down as a rule, that *quod judicatur ex conjecturis, ex conjecturis etiam tollatur, et ut major ratio excludit minorem ita etiam præsumptio potentior contrarium excludit, et inter plures conjectures benigne et favorabiliter accipienda est, veluti si pro liberis indicatur*; which is likeways clear from our own decisions, and particularly Cruickshank against Cruickshank, *voce* PRESUMPTION, where the Lords found that the presumption *quod debitur non præsumitur donare* was elided by stronger contrary presumptions; and the presumption that the father has granted the tocher out of his own means, and not in satisfaction of the legacy left to his daughter, is stronger than that presumption, that the father designed that it should be imputed in satisfaction of the legacy *pro tanto* in the first place; and it is upon that ground, that this brocard by the common law takes no place in donations made by parents to children, as is clear from L. 7. *C. De dotis promissione*, and the lawyers thereupon, and particularly Perez. upon that title No 7. Verum pater administrator bonorum filiæ suæ si dotam pro ea promisserit censetur eam non ex bonis filiæ sed ex suis promississe, præsumptionis ratio est in officio paterno; and No 8. Cum igitur omnio

* *See* APPENDIX.

No 2.

paterum officium esse, dicat imperator dotare filias, adventitia, bona filiæ non debent patrem ab hugismodi necessitate liberare, ne quæ in filiarum favorem interducta sunt in earum detrimentum retorquantur; and Christianus upon that book, No 4. 18. and Menoch lib. 3. de presumptione 15.; and if the father had designed that the tocher should have been in satisfaction of the legacy, he would have expressed it, which not being done, cannot be presumed to be in satisfaction of the legacy, and *in casu dubio interpretatio est facienda contra eum qui non apertius legem dixerit*; and this is clear likewise by several decisions, and particularly the 24th July 1723, Stewart against Fleming, *voce* PRESUMPTION, where a posterior provision granted by a father to his natural son, did not take away a prior provision, because it did not bear to be in satisfaction of the first; and the 20th February 1639, The Lord Cardross against The Earl of Marr, IBIDEM, where it was found, that a father granting a bond for infefting his son in certain lands, was not satisfied nor taken away, albeit the father did thereafter infeft him in other lands of far greater value; and the 5th December 1671, Dickson against Dickson, IBIDEM, where it was found, that the maxim, *debitur non præsumitur donare* did not make a posterior bond in favour of a brother's son to be in satisfaction of a former bond granted to that brother, seeing the posterior bond did bear for love and favour, and for no other cause, neither did it mention the prior bond; and the 14th February 1677, The Duke and Dutchess of Buccleugh against The Earl of Tweeddale, No 8. p. 2369., where it is found, that the Countess of Tweeddale, as executrix to her brother David, had right to his bairns' part of his father's executry, which was the eighth part of the inventory, there being no relict; and that David was not obliged to collate a right of land granted to him for love and favour by his father; and it was not presumed to be in satisfaction of his bairns' part, seeing the right did not express the same; and the 29th June 1680, Young against Paip, (above mentioned). And the decisions alleged by the defender do not meet this case; for as to that case of Carmichael against Gibson, (above mentioned), the practick bears, that it was betwixt poor parties whose substance was mean, and the sum small, the legacy being of L. 30, and the prentice L. 5 paid both, and the hail goods in the testament exceeded not L. 200; and this is mentioned to be the chief reason of the decision; and as to the other case of against both the first and second bond being granted for the children's provisions, it was reasonable to presume, that the one was granted in satisfaction of the other; and the decision of Fleming against Gibson, (above mentioned), differs from this case, because in that case, the money was lent out by the mother, and the bonds taken in the children's name; and so it was reasonable to presume it to be in satisfaction of the portions *pro tanto* for which she was liable to her children, as tutrix. And it appears by the same decision, that many of the LORDS thought it strange, considering that immediately before, in the same case, the tutrix having given in an article of L. 100 Sterling,

No 2. that she had paid to Langshaw, and for instructing thereof, had produced his retired bond, with his declaration, that she had paid him, upon which likewise he had given his oath; yet the LORDS found the article ought not to be allowed, albeit they were clear, that the debt was true, and really paid by the executrix; yet seeing she paid, not being an executrix nor tutrix, and cancelled the bond without taking an assignation thereto, they thought she could not distress her children for it, but that it was a donation in their favours, and was not to be imputed in part of their portion; and the decision of Paip and Young does not meet this case, because the tocher being due by contract of marriage, was granted for a most onerous cause, seeing the wife, in contentation thereof, was provided to a considerable liferent, and the children of the marriage to a sum in fee; as also it appears by that decision, that the LORDS inclined to sustain both the provisions; but in respect of the meanness of the father's estate, they thought it was presumable, that the father did not design that both these provisions should subsist, but only, that the first provision should be so far sustained, as the pursuer could instruct the onerous cause of the granting thereof; but the reason does not hold in this case, for not only there was a just and onerous cause for granting of the tocher, being by contract of marriage, but also the father was a man of a good estate. THE LORDS sustained the defence, and found, that the tocher ought to be imputed in satisfaction of the legacy; and found, that the legacy was satisfied by the tocher.

Sir P. Home, MS. v. 2. No 723.

1758. *July* 11. BARCLAY *against* DOUGLAS.

No 3.
A father liable to pay an account of furnishings to his son, tho' living separately from him, he minor, and not entered to any employment.

ROBERT BARCLAY, tailor in Edinburgh, sued Archibald Douglas of Dornock, for an account of tailor-furnishings made all at one time to his eldest son, amounting to L. 36.

The debt was contracted by Dornock's son, when eighteen years of age, without aliment or profession, and not living with his father, on account of some differences betwixt them; the debt was high, considering the circumstances of father and son; but for this the pursuer assigned, as the reason, that at the time of contracting it, the son's friends were soliciting a commission in the army for him.

"THE LORDS found the defender liable."

Act. *J. Craigie.* Alt. *Hew Dalrymple.*

J. D. *Fol. Dic. v. 4. p. 39. Fac. Col. No 119. p. 219.*