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bonds of provision, yet it does always hold in contracts of marriage, wherein parents are still presumed fully to express all their children's provisions, that they may have a suitable meeting, for though the clause in satisfaction be omitted, yet it is implied. It was *duplied*, That that presumption is elided by the narrative of the bond of 12,000 merks, bearing, "That it was granted for tenements, whereunto the heir of the second marriage would have succeeded, if they had not been disponed to the heir of the first marriage;" which must import, that these tenements came by the second wife, and that they were so provided by her contract of marriage, after which, the husband contractor could do no fraudulent deed without an onerous, at least a reasonable cause, especially in favour of children of a second marriage. It was *triplied*, That the narrative of the first bond does not alter the case, for it does neither instruct nor presume that these tenements belonged to the second wife, it being ordinary for husbands having several wives to take infeftments in tenements to them and their wife in conjunct fee, and to the heirs of the marriage, which left no obligation upon them not to alter, but they may dispone at their pleasure, unless there had been an anterior contract obliging them to take the tenement so, and though that were proved, yet the tenements in the contract must be in satisfaction, especially where the disponer had no such fortune as to give both these provisions, having other children, as is instructed; *2do*, The tenements attained to by the contract are less than the bond, and so can never be understood to be in satisfaction thereof.

THE LORDS found, That the destination mentioned in the narrative of the bond of 12,000 merks did not presume that there was a prior contract of marriage, appointing that destination, in which case, the father could not alter the destination *ad arbitrium*, but for a reasonable cause, and though a prior contract was proved, they found, that Hog could not both have the 12,000 merks, and the acres and tenements, in the contract of marriage; but if the acres and tenements were proved to be more than the 12,000 merks, they should be in full satisfaction thereof, and if of lesser value, that the husband should have the acres and tenements by the contract, and the excresce of the 12,000 merks over and above these acres and tenements.

Fol. Dic. v. 2. p. 146. Stair, v. 2. p. 778.

1681. *June* 24. DOWS *against* DOW.

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Found again that a tocher granted by a father to his daughter is to be interpreted as in satis-

THE deceased John Dow of Ironhall gave a bond of provision in favour of his children, bearing, That he had disponed his whole estate, heritable and moveable, in favour of his eldest son, and his other heirs male, whereby his other children would have no provisions; therefore he obliges him and the heir-male of his body, to pay them such sums in full satisfaction of all portion-natural, and bairn's part, to which they could succeed by his death, and in

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faction *pro tanto* of all former special provisions, tho' not so expressed; but not of any undetermined general claim, such as legitim, or a clause of conquest, which is only in hope.
See Gibson against Marjoribanks, No 162. *infra.*

case of the failing of the heir-male of his body, he obliges himself and his other heir-male, to pay the same portions, and to add so much more; he did also subjoin holograph postscripts, making further additions, whereupon his four daughters pursue his heir-male, who was not of his body, but of a far distant relation, to pay these provisions both in the bond and postscript. The defender *alleged*, That the postscripts, though they were proved holograph, cannot instruct their date to have been before the defunct took the sickness of which he died. It was *answered*, That the question is not here *contra tertium*, but against the heir, who is reputed as *eadem persona cum defuncto*, and the defunct died suddenly; and these provisions are no voluntary deed, but a natural obligation upon fathers to provide for their children. It was *answered*, That the heir is *tertius quoad* deeds on death-bed, and as to these may quarrel his predecessor's deeds, and is not obliged to perform them; and that privilege of the heir hath been ever sustained against provisions to children, it being the great security and interest of all dying persons to be free from importunity of wives, children, and relations, seeing they can do nothing in that case, but dispose upon a share of their moveables, which the law allows; and the same importunity that might induce them to do deeds prejudicial to their heirs, might induce them to antedate the same deeds, which being holograph, could have no mean to redargue the date. The Lords found the holograph postscripts did not prove their date to be before the defunct's sickness, unless the date were adminiculated by other writs with witnesses, or by witnesses who saw the writs before the defunct contracted the sickness of which he died. The defender further *alleged*, Absolvitor for such of the daughters, who, after these bonds, were married, and received a tocher from their father. It was *answered*, That *non relevat*, unless the tocher bore in satisfaction of all former provisions, for *debitur non præsumitur donare*, takes no place in provisions by parents, the presumption being stronger from their natural affection, that posterior provisions are additions. It was *replied*, That this holds not in tochers and contracts of marriage, which are ever presumed to be in satisfaction of all former provisions; for parents would never omit to accumulate their children's provisions in their contracts, that the reciprocal conditions might be the better.

The Lords found the pursuers' tochers provided by their father in their contracts of marriage, were in satisfaction of all former provisions, though not so expressed; but if they were contracted before their brother died, that they were not thereby excluded from the additional provision incident thereafter by the succession of the other heir-male. See Proof.

Fol. Dic. v. 2. *p.* 146. *Stair, v.* 2. *p.* 883.