necessary for carrying into effect such scheme, and for applying the same accordingly; and also for adjudicating upon the expenses incurred in the Court below: And it is also further ordered, that the cause be, and is hereby, remitted back to the Court of Session in Scotland, to do and proceed further therein as shall be just and consistent with this declaration, and these directions and this judgment."

Lord Ordinary, Handyside.—*Act.* Patton, Thoms; John Rogers, S.S C. *Agent.*—*Alt.* Penney, Macfarlane; Webster and Renny, W.S. *Agents.*

MAY 21, 1858.

JAMES HILL KIPPEN and RICHARD KIPPEN, *Appellants*, *v.* GEORGE MARSHALL DARLEY and Others, Kippen's Trustees and others, *Respondents.*

Marriage Contract — Presumption — Legitim — Provisions to Children — Double Portions — Construction—*By an ante-nuptial contract, the children were provided by their parents in a sum of money to be divided equally among them, and it was declared to be in full of legitim and every other claim which, by law, might be competent to the children by the death of the father. Of the five daughters of the marriage, two of them were married, and in their marriage contracts the father bound himself to pay to each of them £5000, which was declared to be in full of legitim, &c. The father afterwards executed a trust settlement, in which he provided £4000 to each of the three unmarried daughters, and this provision was, in like manner, declared to be in full of legitim, &c. Thereafter, M. one of the three unmarried daughters being about to be married, the father, in her marriage contract, made her a provision of £5000, but there was not adjected to it any such declaration as was inserted in the other deeds, that the provision was to be in full of legitim and other claims competent to her by law in case of his death.*

HELD (affirming judgment), *That while the sum in the marriage contract of M. was intended to be given in satisfaction of the provision in the marriage contract of her parents, it was not intended to come in place and satisfaction of the provision in the trust settlement.*

There is no presumption in the law of Scotland against double portions, unless the first provision is ex obligatione: *Per* L. Chelmsford L. C. & L. Wensleydale (L. Cranworth *dissenting*).

Appeal—Costs—Lords Disagreeing—*There is no rule of practice, that when the Lords differ in opinion, and affirm a judgment, it will be affirmed without costs.*[1]

Messrs. Kippen (residuary legatees) appealed against the judgment of the Court of Session, maintaining in their case—"(1) That the provision contained in the marriage contract of the respondents must be held as in satisfaction, not only of the provision in the truster's marriage contract, but also of the bequest contained in the previously executed deed of settlement; and that the respondents cannot claim from the estate of the deceased more than the sum stipulated to be paid under their marriage contract. (2) The specialties in the case, when rightly viewed, do not exclude the operation of the general doctrine."

The respondents, in their case, supported the judgment on the following grounds:—"Because having regard to the terms of the trust settlement and marriage contract, and to the other deeds and writings executed by Mr. Kippen, the provision contained in the marriage contract was not intended to satisfy or extinguish the claim for the provision of £4000, and both sums remained exigible out of the estate of the deceased."

Rolt Q.C., and *Anderson* Q.C., for the appellant.—The question here is one of construction, viz., What is the intention of the testator Mr. Kippen as derived from the words of the deeds?—*Primâ facie*, a provision by way of tocher or portion to a daughter on her marriage, is a satisfaction of all other prior provisions made to that child; and that is a rule to commence with in endeavouring to discover the intention. Such is clearly the rule in England—*Hartop* v. *Whitmore*, 1 P. Wms. 680, and cases collected; *Chancey's case*, 2 Tudor's L. C. 303, *et seq.* It is immaterial that there is a slight difference between the limitations or destinations of the money as settled by the two deeds—*Wharton* v. *Lord Durham*, 3 Cl. & F. 146; Sugden's Law of Property, 126. So a legacy may be held to satisfy a portion—*Thynne* v. *Lord Glengall*, 2 H. L.

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[1] See previous reports 18 D. 1137; 28 Sc. Jur. 565. S. C. 3 Macq. Ap. 203: 30 Sc. Jur. 563.

Cas. 131. There is no distinction between the effect of a marriage portion on a prior legacy, and on a prior provision secured by some deed or contract, for in both cases it is a presumed satisfaction.

A similar presumption exists in the law of Scotland. Stair (1, 8, 2) says nothing about a different effect according as the prior provision is voluntary or *in obligatione*. Bankton (1, 6, 5) and Erskine (3, 3, 93) lay down the proposition broadly—See also Bell's Dict. "Tocher." Nearly all the old cases turned on bonds of provision; but bonds of provision (which was the old mode of providing for children) were in substance wills, being kept undelivered by the father till his death. A bond of provision was a voluntary instrument, as its form shews—Dallas' Styles, 702 (1st ed.) Jurid. Styles, 449 (2d ed.). The modern form of a trust deed has superseded the old form of a bond of provision. There is a whole chapter of cases in Morison's Dict. shewing how far tocher is a revocation of bonds of provision—*Belshes* v. *Murray*, M. 11,361; *Cockburn* v. *Laird of Cambusnethen*, M. 11,474; *Dows* v. *Dow*, M. 11,477; and others. Two modern cases clearly bear out the presumption—*Grant* v. *Anderson*, 3 D. 89; 13 Sc. Jur. 32; *Smith or Nimmo* v. *Anchinblane*, 3 D. 1109. The presumption does not, of course, extend to the legitim, which is not impliedly extinguished by a tocher—*Duchess of Buckingham* v. *Breadalbane's Trustees*, 2 Sh. & M'L. 377; 13 Sc. Jur. 158.

Therefore, the general presumption being in favour of tocher being held to be in satisfaction of prior legacies, the *onus* is on the respondents to shew, that there is something in the deed to rebut that presumption. For this purpose it is not competent to look to Mr. Alston's and Mr. Shaw's marriage contracts at all; but even if they are looked to, they do not establish anything material. It is said, there is no express clause of discharge and satisfaction inserted in Mrs. Edmiston's marriage contract, as there is in those of Mrs. Alston and Mrs. Shaw; but such a clause was unnecessary, and mere surplusage, and its omission is sufficiently accounted for by the fact that different conveyancers prepared the deeds, and followed different styles. It is said that there is a difference in the destination of the two sums; but such difference is slight, and, as already stated, is immaterial. It is also said that the codicil of January 1852 confirmed the trust disposition and the legacy to Mrs. Edmiston, inasmuch as it made no alteration in the original trust disposition; but that may have arisen from the fact, that the testator knew that that legacy had been revoked or adeemed by the marriage portion. It is well settled, that a simple republication of a will does not set up an adeemed legacy—*Powys* v. *Mansfield*, 6 Sim. 637; 3 Myl. & Cr. 359; *Drinkwater* v. *Falconer*, 2 Ves. Sr. 622; *Monk* v. *Monk*, 1 Ball & B. 298; *Booker* v. *Allen*, 2 Russ. & M. 270; *Hopwood* v. *Hopwood*, 22 Beav. 488; *Ex p. Pye*, 2 Tudor's L. C. 253: Wms. on Exec. 1170. The whole scheme of the provisions by will and by marriage contract is obviously founded on the notion of treating all the daughters equally, and, by holding the legacy to Mrs. Edmiston recalled, substantial equality will be the result. If the legacy is not recalled, then she will obtain a provision double that of the other daughters.

The law of England being therefore shewn to be clear, and there being nothing in the law of Scotland to shew the existence of a different principle, the English rule or canon of construction should be applied. There cannot be two modes of reasoning in such circumstances. The House has generally proceeded on the principle that, if there is a clear rule settled in England, and nothing in the law of Scotland conflicts with it, then, in the absence of any positive authority to the contrary, the English rule will be extended to Scotland—See *Duncan* v. *Findlater*, 1 M'L. & Rob. 911; *Miller* v. *Small*, *ante*, p. 222; 1 Macq. 345; *Adamson* v. *Barbour*, 1 Macq. 376; *ante*, p. 250; *Provost of Dundee* v. *Morris*, *ante*, p. 747; 3 Macq. Ap. 134, and many other cases.

Lord Advocate (Inglis), and *Sir R. Bethell*, Q.C., for the respondents.—There is no such presumption in the law of Scotland against double portions, as is contended to exist in England. The sole rule in Scotland is, What is the intention, or rather, what do the words which are used mean. In England the rule is artificial, being an exception to the general rule, *i.e.*, it is confined to the case of parties in the mutual relation of parent and child. It is a rule most unjust in its effects, and has been condemned by many English Judges. It is a rule peculiar to England; it is rejected by all other countries. There seems no sound reason why, if a parent give by will a legacy of £1000 to a child, and next day he give that child a marriage portion of £1000, the latter should be held to be a satisfaction of the prior legacy. The rule of common sense would be, that both provisions should be payable, if there were assets enough to satisfy both. The English rule is a rule founded on a mere fiction, and an irrational fiction. The only case in which it would be plausible is, where the fortune of the parent remained the same. But it is a mere rule of procedure—a mere mode of settling the *onus probandi*. It has been often condemned—*Ex p. Pye*, 18 Ves. 140; *Pym* v. *Leckyer*, 5 Myl. & Cr. 45; *Powys* v. *Mansfield*, 6 Sim. 637; 2 Tudor L. C. 303, *et seq.*; and Roper on Leg. 375; Story's Eq. Jur. § 1100 (2d ed.). Therefore the English rule is a bad rule, and ought not to be extended; and, since the law of Scotland proceeds on a more sensible rule, the latter should be confirmed, and not made to give way to the English rule. The law of England on this question, being also a foreign law, should be entirely disregarded. The maxim, *debitor non presumitur donare*, has been carried out by the law of Scotland to all cases, including the relation of parent and child—See 1 Mackenzie, Works, 318; Mack.

Inst. 3, 3.—Erskine clearly refers to prior obligations, and not donations, as being revoked by the tocher, for all the cases he refers to are of that description—See the cases Mor. 11,474, *et seq.*; see *Belshes* v. *Murray*, Kames Sel. D. 34. The tocher does not defeat legitim; neither does it defeat a voluntary provision, for both only emerge at death, and up to that time are *in spe tantum*. The sole question in each case is, What is the meaning of the deed? and such is the rule derived from *Smith* v. *Nimmo*, 3 D. 1109.

On examining the circumstances, therefore, of this case, the first important discrepancy between Mrs. Edmiston's and the other marriage contracts is, that there is no express clause discharging her legal rights, as in Mrs. Alston's deed. Without that clause the legitim could not be discharged—*Howden* v. *Crighton*, 1 S. 18; *Duchess of Buckingham* v. *Breadalbane*, 2 Sh. & M'L. 377; and it is clear that nothing was intended to be left in these deeds to implication. It is said a different conveyancer drew the last deed, but that is an unsafe guide to the intention, and should be disregarded. Then there are important differences between the destination of the sum given in the marriage contract, and of the sum given in the will. The two daughters, first married, had married comparatively poor men, as is seen by the provisions made for them by their husbands; but Mrs. Edmiston married a man of higher position, who made a liberal settlement on his part, which called for corresponding liberality on her father's part. Besides, the testator did not put his unmarried daughters on the same footing as his married daughters, so that any theory of equality with regard to the family is quite unfounded. It is also a strong confirmation of the respondents' view, that the codicils of January 1852 and 1853, expressly confirm the will in all respects except as to some alterations of the legacies to his son George and the unmarried daughters. That shews the testator knew how to alter his will so as to adapt it to altered circumstances; and he must have had his attention called to the circumstance of Mrs. Edmiston's marriage, and would have stated, if he intended, that the legacy should no longer be claimed by her in consequence of that marriage, and the portion then given to her.

Besides, it is not enough for the Court to look only to the intention of the father, for Mr. Edmiston, the husband, was a party to the deed as much as Mr. Kippen, and it is not credible that Mr. Edmiston would have accepted the £5000 as a provision in lieu of all Mrs. Edmiston's claims. At least, a Court has no right to imply such an intention on his part. The interlocutor of the Court below was therefore right, and ought to be affirmed.

Anderson replied.—It is plain that Stair (1, 8, 2), Bankton (1, 6, 5, and 7), and Erskine (3, 9, 3), all favour, if not expressly lay down, the doctrine, that the tocher impliedly satisfies a prior provision to a child, and that the same presumption exists in the law of Scotland which exists in the law of England. It is a mistake to say that all the cases those writers refer to were cases where the prior provision was *in obligatione*, as witness *Young* v. *Pape*, M. 11,476; *Dows* v. *Dow*, M. 11,477. In fact, none of the many cases in Morison turn on onerosity, or on the point whether the provision was voluntary or *ex contractu*. If the tocher impliedly revokes a provision *in obligatione*, it will *à fortiori* revoke one *in voluntate*. It is also a mistake to say that the English rule or presumption has been condemned. It was at first carried too far, because it was once held, that a portion, however small, would adeem a legacy, however large; but, as the rule is now settled, it is reasonable and just, viz., that the portion is held to be satisfaction *pro tanto*, and therefore only adeems a legacy which is equal or larger in amount. See *per* Lord Cottenham in *Pym* v. *Lockyer*. In looking into the deed and the will and codicils here, there is nothing to rebut the presumption, that the tocher was a satisfaction of the legacy.

Cur. adv. vult.

LORD CHANCELLOR CHELMSFORD.—My Lords, in this case the proceedings originated in a summons of multiplepoinding brought at the instance of the respondents, the acting trustees of William Kippen, to have it found and declared, that under a certain trust disposition, and certain marriage settlements, they were only bound to pay to Mrs. Margaret Edmiston, the daughter of William Kippen, the sum expressed and contained in her marriage contract, which was to be taken by her in satisfaction of all rights and claims which she could demand or become entitled to through the decease of her father, either by settlement or in any other manner. The Lord Ordinary, before whom the case was first brought, found, "That according to the true construction of the marriage contract between the claimants, Mr. and Mrs. Edmiston, to which the late Mr. William Kippen was a party, the provisions there made by Mr. Kippen for his daughter Mrs. Edmiston, and the issue of the marriage, were in implement and satisfaction of the provisions previously made for her and her issue in the marriage contract between her father and mother, and in her said father's trust deed and settlement." Against this interlocutor, a reclaiming note was presented to the First Division of the Court of Session by the respondents, Mr. and Mrs. Edmiston and their son. The Judges of the First Division being equally divided, the case was sent for hearing to the whole Court, on the question, whether the interlocutor reclaimed against should be adhered to. The case having been heard by the whole Court, a majority, consisting of six of the Judges, were of opinion that the provisions in the settlement were payable to Mrs. Edmiston and her children, in addition to those contained in her marriage

contract; while a minority of three Judges were of a contrary opinion, and in favour of affirming the Lord Ordinary's interlocutor.

The case having again been brought before the Inner House, two Judges adopted the views of the majority of the consulted Judges, and two those of the minority, so that in the result your Lordships will find that eight of the learned Judges were of opinion that Mrs. Edmiston was entitled to the benefit both of her own marriage contract and of her father's trust disposition or settlement, and five of the same learned body were of an opposite opinion, and the following interlocutor was pronounced; "The Lords having heard the counsel for the parties, and considered the opinions of the consulted Judges in conformity therewith, recall the interlocutor of the Lord Ordinary complained of: Find that the provisions made by the late Mr. Kippen for his daughter, Mrs. Edmiston, in her contract of marriage, and the issue of her marriage with Mr. Edmiston, were in implement and satisfaction of the provision made for children in the marriage contract between her father and mother, in so far as she was interested therein, but were not in implement and satisfaction of the provision made in favour of her and her children by the trust disposition and settlement of Mr. Kippen: Find that said last mentioned provision is still subsisting, and must be implemented; and, therefore, sustain the claim of Mr. and Mrs. Edmiston and her son to that extent, and repel the same *quoad ultra*."

Against this interlocutor appeal is now made to your Lordships. In order to determine the question involved in this appeal, which, from the great difference of opinion existing upon it, your Lordships will consider to be one of some difficulty, it will be necessary to examine very carefully the different settlements upon which the solution of it depends.

By the marriage contract of William Kippen and Marianne Alston, to which the father of Marianne was a party, which is dated 2d August 1815, certain provisions were made for the children of the marriage, to which alone it is important to draw attention.

By that marriage contract William Kippen binds and obliges himself to "provide and pay to the children of the marriage, the following sums at the first term of Whitsunday or Martinmas after his decease, with the lawful interest thereof from the time it becomes due until it is paid, viz., if one child, £2000, if two £4000, if three £6000, if four £8000; but which said sums, if there be more children than one, the said William Kippen shall be entitled to divide among them and their issue, in such shares and proportions, and in liferent or fee as he shall think proper, by any deed under his hand, which failing, the same shall be divided equally among them; the issue of such of them as may be dead succeeding to their father or mother's share." And then the marriage contract contains this clause:—"And the foresaid provisions stipulated in favour of the said children shall be in full to them of all legitim, bairns' part of gear, or any other claim which by law they might be entitled to at the decease of the said William Kippen, or at the dissolution of the marriage, all of which is hereby discharged, save and except what further provisions the said William Kippen may of his own free will make in their favour, and save and except, in the event of his dying intestate, their claims to a share of his estate and effects; and the said Marianne Alston and William Kippen hereby accept of the foresaid stipulations by the said John Alston, in favour of the said William Kippen, in full of any share or provision which the said Marianne Alston is entitled to by the contract of marriage betwixt the said John Alston and Mary Dennistoun."

There were ten children of this marriage—five sons and five daughters; the daughters being Marianne, Christiana, Margaret, Jane Dennistoun, and Elizabeth.

Marianne married John James Alston, and Christiana married the Rev. William Shaw, and upon the occasion of their respective marriages, marriage contracts were prepared by one of their brothers, George Kippen; the contract on the marriage of Mr. and Mrs. Alston being dated 17th June 1848, and that upon the marriage of Mr. and Mrs. Shaw on the 5th and 12th of May 1849. I mention these marriage contracts together, because they will be found to be nearly exact counterparts of each other; and when I direct attention to any of the provisions contained in the one, your Lordships will understand that corresponding provisions are to be found in the other. To both these marriage contracts of his daughters, William Kippen is a party. Mr. Alston by his contract obliges himself, in the event of his being survived by his wife, to pay her an annuity of £100. The annuity which Mr. Shaw provides for his wife is £30; and in implement of his obligation, he undertakes to secure her an annuity of £30 from the Widows' Fund of the Church and Universities of Scotland.

The provision for the children of the marriage is in these terms:—"The said John James Alston binds and obliges himself to provide and pay to the children of the marriage the following sums of money at the first term of Whitsunday or Martinmas after his decease, with the legal interest thereon from the time it falls due until actually paid, viz.—If one child, the sum of £1000, if two, the sum of £1500, if three, the sum of £2000, if four or more, the sum of £2500, but which said sums, if there be more children than one, the said John James Alston shall be entitled to divide among them and their issue in such sums and proportions, and in liferent or fee, as he shall think proper, by any deed under his hand, which failing, the same shall be divided equally among them; the issue of such of them as may be dead succeeding to their

father or mother's share." And on the other part, the said William Kippen (it is recited) "is desirous of securing upon his said daughter in liferent, for her liferent use allenarly, and upon her children of the present marriage in fee, whom failing, upon her own heirs or next of kin in fee, the sum of £5000 sterling; and as his object can be best secured by the creation of a trust," he appoints trustees, and he "binds and obliges himself, and his heirs, executors, and successors, to make payment to the said trustees or their foresaids of the said sum of £5000 sterling—£1000 sterling thereof at Martinmas next, and £4000 sterling thereof at the end of twelve months from the date of the said William Kippen's death, with interest thereon from the time of payment till actual payment."

And then the deed contains a clause that they are to make payment of the annual interest thereof to the said Marianne Kippen, as an alimentary provision, free from her own debts or deeds, and the diligence or execution of his creditors, or the deeds of the said John James Alston, and the diligence or execution of his creditors; and upon the death of the said Marianne Kippen they shall divide the said sum of £5000 sterling equally among all her children of the present marriage, with power nevertheless to the said Marianne Kippen and John James Alston, and to the survivor of them, at any time during their or the survivor's lifetime, and even on death bed, by any writing under their or the survivor's hands, to divide and proportion the said sum of £5000 among said children, as they or the survivor shall think proper. Then it is declared, that in the event of there being no children of this marriage, the foresaid sum shall go and belong to the nearest of kin of the said Marianne Kippen, "which foresaid provisions in favour of the said Marianne Kippen, stipulated by the said John James Alston, she, with consent foresaid, hereby accepts of in full of all terce, *jus relictæ*, half or third of moveables, and every other claim which she or her next of kin might or could claim at the dissolution of the marriage, —all which she hereby renounces and discharges. And the foresaid provisions stipulated in favour of the said children shall be in full to them of all legitim, bairns' part of gear, or any other claim which they by law may be entitled to at the decease of the said John James Alston, or at the dissolution of the marriage, all which are hereby discharged, save and except what farther provisions the said John James Alston may of his own free will make in their favour, and save and except, in the event of his dying intestate, their claim to a share of his estate and effects. And the said Marianne Kippen and John James Alston hereby accept of the foresaid stipulations and provisions by the said William Kippen, in favour of his said daughter and her children, secured by the foresaid trust, in full of any share or provision which the said Marianne Kippen is entitled to by the contract of marriage betwixt the said William Kippen and Marianne Alston, mother of the said Marianne Kippen, and every other provision, whether legal or conventional, competent to be made against the said William Kippen, or his means and estate, or his heirs or successors, after his death."

After the marriages of the two daughters, Marianne and Christiana, and on the 17th of July 1849, William Kippen executed a trust disposition and deed of settlement of his property. After appointing trustees, he directed them, in the first place, to pay to his son, William Kippen, the sum of £2000 sterling, at the expiry of twelve months after his death, "but under deduction always of such sum or sums as I may have advanced to him or for his behoof, according to a statement thereof in my ledger;" and then, in the next place, he directed and appointed his trustees "to set apart, from the first and readiest of my means and estate, real and personal, not otherwise specially destined, the sum of £4000 sterling, for each and every of my daughters, Margaret Kippen, Jane Dennistoun Kippen, and Elizabeth Kippen, and for the lawful issue of such of them as may have died, leaving such issue, as coming in place and as in right of their deceased parent, and to invest and secure the said sum for behoof of each of my said daughters in liferent, for her liferent use allenarly, during all the days and years of her natural life, exclusive of the *jus mariti* or right of administration of any husband whom she may have married, or may marry, and of her lawful issue, share and share alike, in fee and property, and that in any such way and manner as to my said trustees may seem best calculated for carrying out this my intention; and the said provision shall bear interest from the date of investment, or if not invested within twelve months after my death, then from the lapse of said time until the same is so invested; declaring, that in case any of my daughters surviving me shall happen to die without leaving lawful issue, it shall be in her power, by any deed or other writing under her hand, to legate and bequeath the said sum of £4000 sterling hereby provided to her in liferent, to any person or persons she may judge proper; and failing thereof, the same shall revert to and form part of the residue of my estate;" and then he takes notice, that he had already provided for his two daughters, Marianne Kippen, the wife of John James Alston, and for Christiana Dennistoun Kippen, wife of the Rev. William Shaw of Bonhill, by the marriage contracts between them and their said husbands; and he declared that the provisions therein made in favour of his said two daughters, were in full of all they could claim, or were entitled to receive from his estate. He then, in the fifth place, directs and appoints his trustees to make payment of the sum of £6000 "to my son George Kippen, at the end of twelve months after my death, with interest thereof from said period and until the same is paid; but said provision shall be

subject to deduction of all sums which shall be owing to me by my said son at my death, as the same shall appear by my books or other writings, shewing the amount of said debts;" and then there is this clause, "And which provisions above written, conceived in favour of my said children, shall be accepted of by them, and the same are hereby declared to be in full of all legitim, portion natural, bairns' part of gear, executry, or others whatsoever, which they or any of them can ask or demand by and through my decease, or in any other manner of way."

William Kippen afterwards, by an instrument, called his first codicil, dated the 10th January 1850, revoked and recalled the bequest to his two daughters, Jane Dennistoun and Elizabeth, and instead thereof, he appoints them an annuity of £120, exclusive of the *jus mariti* of their respective husbands, in the event of their marriage, and of their debts and deeds, and the diligence of their creditors; and he says, "and with these alterations and additions, I hereby approve and confirm my said deed of settlement in all other respects."

After the execution of this first codicil, Margaret married Mr. Edmiston, and by her marriage contract, not prepared as those of her sisters by their brother, but to which William Kippen, the father, was a party, dated 14th December 1850, Edmiston obliged himself to pay her a jointure of £150, and provides and secures to the children of the marriage his whole estate, heritable and moveable, and these provisions are to be in full satisfaction to her of all terce of lands, half or third of moveables, or anything else which she might claim by reason of her marriage; and then "William Kippen, on his part, for the causes aforesaid, binds and obliges himself, his heirs, executors, successors, and representatives whomsoever, to pay, amongst other things, to his daughter the sum of £5000, as a tocher for the said Margaret Kippen, his daughter, payable as follows, viz., the sum of £1000 at the term of Whitsunday 1851, with interest thereafter till paid, and the remaining sum of £4000 at the first term of Whitsunday or Martinmas accruing after the lapse of twelve months from the death of the said William Kippen, with the legal interest thereof thereafter till payment; and it is hereby specially covenanted and agreed upon between the parties contractors, that the said trustees or their foresaids shall hold the interest of the whole foresaid sum of £5000, as the same becomes payable, in trust for the said Margaret Kippen in liferent, for her liferent alimentary use allenarly, exclusive of the *jus mariti* or right of administration of the said Hugh Fleming Edmiston, or any further husband of the said Margaret Kippen, and unaffectable by his debts or deeds, or by the diligence of his creditors, for payment or performance of any of his debts or obligations; and the said trustees or their foresaids shall hold the said principal sum of £5000 in trust for the children of this marriage, equally among them, (if more than one,) share and share alike."

And then it declared, that in the event of the dissolution of this marriage, by the death of the said Margaret Kippen without issue, or in the event of there being issue of the marriage at her death, all of whom shall die before attaining the age of twenty one years, without lawful issue, then, and in either of these events, the said tocher of £5000 shall revert to the said William Kippen, and his heirs and assignees whomsoever; and in the event of his death before the said Margaret Kippen, then the said trustees or their foresaids shall pay over the said sum of £5000 to the sons of the said William Kippen who may be alive at the time, and to the issue of the predecessors, equally amongst them, the issue drawing the share which would have fallen to their father, had he survived the said Margaret Kippen.

Your Lordships will observe that there is no such clause in this marriage contract as that which is contained in the marriage contracts of Marianne and Christiana; that Margaret and her husband do not accept of the provisions by William Kippen, secured by the trust in full of every provision, whether legal or conventional, competent to be made against the said William Kippen, or his means or estate, or his heirs or successors after his death.

After this marriage contract, William Kippen made two other codicils, one dated on the 6th January 1852, and the other on the 7th of January 1853. By the former he restored to his daughters Jane and Elizabeth the £4000 which he had given them under his trust disposition; he revoked the legacy of £2000, and reduced, by £2000, the legacy of £6000 that was given to George; and then the codicil states, "and, with the above alterations, I do hereby confirm my said trust disposition and deed of settlement in all other respects." And, by the latter codicil, he again took away the £4000 to his two daughters, and left them with their annuities of £120, and added these words, "and with these alterations, I hereby approve of and confirm my deed of settlement in all other respects."

My Lords, upon all these different instruments and writings, the question arises, Whether the provision made for Mrs. Margaret Edmiston on her marriage contract was intended to be an addition to the benefit which was given to her by her father's trust disposition, and also to that which she was entitled to under his marriage contract, or whether it was to be taken in satisfaction of all her antecedent rights and claims?

This latter proposition is strongly contended for by the appellants, who assert that, by the law of Scotland, the word "tocher," *ex vi termini*, or any provision made by a father upon his daughter's marriage, without the use of that word, is presumed to be in extinguishment of all subsisting claims which the daughter has on her father's estate. And that no words of discharge

or satisfaction are necessary to give this effect to the deed. And they maintain, that the law of Scotland, like the law of England, presumes against double portions to children; and that this presumption requires to be rebutted by proof to the contrary. The respondents, on the other hand, insist that there is no such presumption in the law of Scotland;—that every case of this description is one entirely of intention, depending upon its own circumstances, and governed by no general rule.

My Lords, in this country the leaning or presumption against double portions is settled by a long course of decisions; and, though the rule may have been characterized as an artificial one, and there may be found occasional expressions of disapprobation of it by some Judges, and of regret that it should ever have been established, yet it is too firmly fixed as a canon or rule of construction in our law to be lightly departed from. Whether there is a similar rule of presumption in Scotland is a question, upon which, unfortunately, the greatest diversity of opinion prevails.

To shew your Lordships how little assistance upon the essential preliminary to the correct adjudication of the present case can be derived from the judgments of the learned Judges, it will be sufficient to select some of the strongest and most decisive expressions of each class of opinions as to the existence or non-existence of this rule of presumption. The Lord Justice Clerk says, "It is of great importance to keep in view that there is no rule, or legal presumption, (as the counsel for the residuary legatees distinctly admitted,) in the law of Scotland, that a provision to a daughter in her marriage contract supersedes, or evacuates, or recalls, a bequest in her favour in a prior testamentary writing. It is necessary to keep this in view from the outset, for the residuary legatees have, notwithstanding the above admission, borrowed much of their arguments from the law of England, which seems to be widely different." Lord Curriehill, after adverting to the rule as it prevails in England, says, "This artificial rule appears to be followed out in England to its legitimate consequences, insomuch, that the legacy is held not indeed to be satisfied or implemented, but to be altogether *rescinded* by the subsequent provision, even although the latter should be less in amount than the former." And then he says: "But the canon of construction on which in England, this class of cases is founded, forms no part of the law of Scotland, and, indeed, even its technical denomination, the ademption of legacies, is unknown in the judicial language of this country; and considering its artificial nature and its tendencies, I do not think that it ought now to be introduced. I am strongly confirmed in this opinion, when I see in what light it is viewed in the country where it operates, and which is thus stated by 'Roper on Legacies' (i. 324). The artificial doctrine of the Court before stated in regard to presumptive ademption has met with severe reproof from modern Judges, as tending to defeat the intention of parents." On the other hand, Lord Ardmillan (who agreed in the result with the Lord Justice Clerk, that there was no ademption in this case,) says, "I am, however, not quite satisfied that between the principles of construction applicable to such a case by the law of Scotland and those recognised by the more recent judgments in the law of England, the difference is so great as seems to be assumed in the opinion of the Lord Justice Clerk. I am disposed to think, that although the mode of expressing the rules of construction differs, yet the principles of construction, as now understood, are substantially the same. In both countries the question really resolves into one of intention. There is no inflexible rule, and no absolute presumption; while there is, in both countries, a presumption against a double portion to one child not absolute or unbending, but simply an element of greater or less weight according to circumstances to be considered in the search for the true meaning of the testator." Lord Deas, who was the Lord Ordinary who had originally pronounced the interlocutor against the double portion, says, "I have only to add, that when I pronounced my judgment in the Outer House, I was not aware of the cases and authorities in the law of England, to which I latterly referred the parties, and which, although not previously noticed at the bar, were consequently commented on at the hearing of the whole Court, and are alluded to in the opinions of the consulted Judges. But it certainly does not diminish my confidence in the soundness of the leading principles on which I proceeded, and which I then regarded, and still regard, as deeply founded in the law of Scotland, that I find the same principle recognised and acted on in an enlightened system of jurisprudence like that of England, connected as it is with a subject not involved in any such technicalities as to prevent our understanding what English lawyers say about it, and founded as I think it is, upon views which, so far as they apply to a case like the present, recommended themselves by their natural justice, and I would almost say by their common sense."

In this unfortunate conflict of opinions amongst the learned Judges, your Lordships are left without the aid of your natural guides in the law which it is their duty to administer, and are compelled from such materials as the writings of the Scotch Jurists, and the reported decisions of the Scotch Courts supply, to form your own judgment on this leading question. My Lords, after a very careful consideration of all these authorities, I have been led to the conclusion that there is no satisfactory proof, that the general presumption, contended for by the appellants, exists as a canon or rule of construction which is to be arbitrarily applied, in the first instance, to the construction of deeds of provision for children, and which must prevail, unless it is rebutted by proof of a contrary intention.

I do find a rule of presumption of a more limited description, by which cases respecting children's portions have been sometimes governed, and by which they are to be explained, and which is expressed in the well known formula, "*debitor non præsumitur donare.*" This is so far from corresponding with the rule of the English Courts, that it will be found, that although in them the presumption is in favour of the ademption of a legacy by a portion, and of the satisfaction of a portion by a legacy, their leaning or presumption is rather in a contrary direction.

The importance of ascertaining the rule which is to be applied in the case, will justify a closer examination of the subject. It appears from the text writers upon the law of Scotland, that until a comparatively recent period, provisions for children were not made by trust dispositions or deeds of settlement, but by what were called bonds of provision to take effect after the father's death. These were generally kept by the father in his own possession, but yet were effectual against his estate without delivery. If delivered by the father to the child, they were irrevocable, and a debt was created; but while the bonds were in the father's power, no debt was effectually contracted; and if other bonds of provision were subsequently granted, without reference to the former ones, they were understood to be not in satisfaction, but in addition to the child's patrimony, the rule of *debitor non præsumitur donare* not applying.

But it was asserted in argument, that with respect to a settlement by a father upon his daughter in her name, whether made by the name of tocher or otherwise, there was a rule, which invariably prevailed in the Scotch law, to presume it to be in lieu of all former provisions. Various authorities were adduced which, when examined, do not appear to bear out the proposition to the unqualified extent to which it was asserted. In Bankton's Institutes, book i. title 6, it is said—"Rights granted to children will be understood in implement of the provisions contracted in the marriage articles to them when *nascituri*, and both will not be due, for in these cases the design of the testator is evidently to exoner himself of the prior obligation." In this passage your Lordships will observe, that the learned author is dealing solely with provisions *in obligatione*. In Stair's Institutes, book i. title 8, § 2, it is said—"A tocher in a contract of marriage was found to be in satisfaction of all former provisions, though it did not so express." And *Young's case* is referred to, which will be afterwards more particularly mentioned, where the prior provision was also *in obligatione*.

But a passage from Erskine's Institutes, book 3, title 3, § 93, cited by the appellants' counsel, goes the whole length of the proposition for which they contend, for it is there stated, without any qualification, that "a settlement to a daughter in a marriage contract is presumed to be granted in satisfaction or solution of all former provisions, though it should not bear the words *in satisfaction*, because provisions granted by fathers in marriage contracts are generally intended to comprehend the whole estate that is to be expected by the husband from the wife or her father in name of tocher." But these general expressions used by Erskine on the subject of presumption must be understood with limitation, as was said by Lord Fullerton in the case of *Grant* v. *Anderson*, 3 D. 97—"In all the cases in which the principle laid down by Erskine was applied, the prior provision had been *in obligatione*, and the judgment was put expressly upon the maxim *debitor non præsumitur donare.*" And upon a careful consideration of all the cases which were cited from the Dictionary of Decisions, between the pages 11,361 and 11,474, your Lordships will find that they are almost all of them resolvable into the same principle.

In the case already mentioned of *Grant* v. *Anderson*, the language of Lord Mackenzie confirms this view of the previous authorities in the strongest manner. He says, "I cannot find one case in which a provision by will, not obligatory, was held to be satisfied by a provision in a contract of marriage." It is true, that the Lord Ordinary in that case speaks of the decisions as having established the presumption contended for in the most unqualified terms. After stating that the leaning of the Scotch law from an early period, in the construction of successive testamentary bequests of the same amount to the same legatee, has been to presume duplication, he proceeds (3 D. 94, note)—"But at the very time that this construction was first given to proper testamentary deeds, it seems to have been laid down in a series of cases, alike uniform and positive in their conclusions, that a tocher, provided and secured by a father in his child's marriage contract, must be presumed as given in satisfaction, either in whole or in part, as the case may be, of any anterior provision to that child, and not as a new and additional provision. There are few points in law settled by a more numerous class of decisions. In the Dictionary there is a whole section (*voce* Presumption, Dictionary, page 11,474) entitled 'Tocher granted in a Contract of Marriage, how far presumed in satisfaction of former provisions.' The decisions under that head are fully detailed in the defender's revised case, and they all shew that the tocher is presumed to be satisfaction of the prior provision, even without any express declaration to that effect. To these may be added various cases under other heads, not referred to by the defender; in particular, the case of *Stenhouse* in 1737 (M. 11,444), and *Matheson* in 1766 (M. 11,453)." *Stenhouse's case* is the same as *Young's case*, referred to by Lord Stair, and there the first provision was *in obligatione*, being contained in the father's marriage contract, providing for the heirs of bairns of the marriage; and *Matheson's case* is of a similar description, for there the

prior provision was contained in the marriage contract of the father, by which he became bound "to pay a certain sum to the eldest or only daughter to be procreated of the marriage."

It appears, therefore, that no authority can be adduced in favour of the general presumption founded upon by the appellants in the case of tocher or provision on the marriage of a child, and that *Grant* v. *Anderson* was the first case in which that question arose for determination, unconnected with the doctrine of *debitor non præsumitur donare.* If there had been any such established presumption, it is inconceivable that Lord Mackenzie and the other Judges should have found that case to be one of considerable difficulty; for it was clearly a case of provision made on the marriage of a daughter; and the Lord Ordinary had decided upon the force and effect of the tocher which was so provided. And how did the Court proceed in that case? Did it set out with this antecedent presumption as its guide? On the contrary, the Judges examined carefully the circumstances, arrived at their conclusion with hesitation and difficulty, and, as Lord Fullerton expresses it, "viewed it merely as a question of intention, and found the preponderance to be in favour of the defenders." *Nimmo's case*, the only other modern one amongst the Scotch cases cited by the appellants upon this point in 3 D. 1109, was, in fact, a case in which the rule of *debitor non præsumitur donare* was applicable, because there the daughter's marriage contract, which was made by the father, and which was *in obligatione*, preceded the provisions made by the father in a trust settlement.

The Judges, however, appear not to have decided this case upon any rule of presumption, but, as the Lord Justice Clerk expresses it, "upon the will and intention of the testator to be discovered from the whole of the deeds to which he was a party;" and Lord Moncreiff, page 1119, says, "After a full hearing and examining all the authorities, I can find no unbending rule which can make it indispensable to hold that there is a double provision of the same sum in this case, if it be contrary to evident intention, as I think it is. There may be presumptions both ways; but when all the cases are considered together, they convince me, that they were always considered as special, depending on the intention legally evinced in the particular deed. The rule in Erskine is much founded on as making a distinction between the case of double legacies and that of double provisions by a father to children. But what is there stated is confessedly but an exception from what is otherwise the general rule, that *debitor non præsumitur donare*, and that simply by a contrary presumption in favour of additional bonds of provision by a father to a child. But that contrary presumption must yield also to the presumption of intention arising upon the face of the deeds."

This long but necessary examination of the various authorities has led me at last to the conclusion, which I have already stated, that there is no settled presumption with respect to deeds of provision for children by the law of Scotland, as is contended for by the appellants. Nor is it unimportant to ascertain this point clearly in order to arrive at a satisfactory decision of the present case. Because it must be a vital distinction which will essentially affect the conclusion, whether the parties are to start with a canon or rule of construction which is to be arbitrarily applied, and which is to prevail until rebutted by proof of a contrary intention, or whether the intention is to be subjected to no original controlling force, but is to be gathered from the expression of it to be found in the deeds themselves.

My Lords, the question then, in this case, is, as the Lord Justice Clerk says in *Nimmo's case*, "truly *questio voluntatis.*" And how is this will and intention to be discovered, but as he also says, "from the whole of the deeds, and not from taking the terms in which any one of them is to be conceived, or even two of them?" There is no other mode of ascertaining the mind of a party but by the acts which he has done, or the words which he has used. If a father gives the same amount of money to a child by two different instruments, unless it appears either expressly or by necessary implication that he intended the one to be in satisfaction of the other, or unless there is an arbitrary rule which authoritatively pronounces that they must be so considered, why is the law to force such an intention upon his acts which may be in direct contravention of them? To search for the intention of a party, anywhere else than in his own declarations of it, is to substitute conjecture for construction. There is no antecedent improbability, that a father should be desirous of favouring one child more than another. And if this should be the obvious meaning of his acts, what is there in it which so violates the notions of propriety as to induce the law to force a totally different intention upon him?

To apply these observations to the present case, and treating it as one in which the intention is to be sought for in the deeds themselves, there appears to be no one circumstance in the different dealings of the father with his children, which clearly shews, that he meant to do exactly the same towards Mrs. Edmiston as towards his other daughters. The idea of intentional equality amongst them, must be confined to those who married; for with respect to the unmarried daughters, the father's intention is manifested at the last to place them on a different footing from the rest. And as to the assumed desire of establishing perfect equality amongst the married daughters, I do not know why the difference in their marriage contracts is not to have its due weight as indicating a different intention respecting them. In the marriage contracts of Marianne and Christiana, there is a clause to which I have already more than once

adverted, "that they and their husbands accept the provision which was made for them in full of all claim which they might have upon their father's estate," while there is no such clause to be met with in Margaret's marriage settlement. It has been argued that this may have arisen from the deeds having been prepared by different hands, George Kippen, the brother, having prepared the two first marriage contracts, and another writer having prepared that of Margaret. On the one hand, this is attributed to the wish of the father to conceal from his son the great difference which he was making in his bounty to his daughters by giving Margaret a double portion. On the other hand, the circumstance is more naturally accounted for from the fact of George Kippen being under sequestration at the time of Margaret's marriage. But whoever prepared the deeds, and from whatever cause, they are all alike the deeds of William Kippen; it is his meaning which they express, and this marked distinction between them cannot be disregarded in an inquiry into his intention.

The codicils, which were made after Mrs. Edmiston's marriage contract, are not so important for the provisions which they contain as for the fact, that on the occasions of making both of them, William Kippen must have had distinctly brought to his attention the clause in the trust disposition under which Mrs. Edmiston took the same sum of £4000 as her sisters Jane and Elizabeth. And when the father, by the second codicil, restores his two other daughters to the benefit of the settlement, and takes no notice of Margaret and her marriage contract, as by the settlement itself in the clause immediately following the one giving the £4000, he had noticed the marriage contract of his two daughters, Marianne and Christiana, and had declared that the provisions therein made in their favour were in full of all they could claim, or were entitled to receive from his estate, it seems to be strongly indicative of an intended distinction between them.

I do not lay much stress upon the revocation of the bequest to one of the sons, and the reduction of the bequest to the other, because they were in accordance with the trust disposition which provided by anticipation for the state of things which occasioned them, and they are only important as contributing to keep the settlement in the father's view.

A similar observation may be made upon the clause in both of the codicils, "and with the above alterations, I do hereby confirm my said trust disposition and deed of settlement in all other respects." To give a confirming effect to the double provision by these words, would be to blink the whole question. If the benefit to Margaret by the trust disposition were revoked by her marriage contract, this clause could not restore it; and if it were not, it was not wanted to give it continuance. But regarding this as a question of intention to be collected from deeds, it is impossible to overlook the inference which is to be drawn from the difference between the provisions in Margaret's marriage contract and in the trust disposition.

There is no correspondence of amount in the sums in the two deeds, and the limitations of them are essentially different. The £4000 in the trust deed is given to Margaret in liferent, and afterwards to all her children, with a power to her to dispose of the capital, if she died without issue. Under her marriage contract, the gift is confined to the children of that marriage, and none of her children by any future marriage are to participate in it, and even the children of the marriage are not entitled unless they attain majority. And instead of the capital being left to the control and disposal of Mrs. Edmiston, in case she died without children, it was to go, in that event, to Mr. Kippen, her father, or to his sons. Differences such as these are of material consideration, not merely as excluding the idea of any supposed intention in opposition to the language of the instruments themselves, but as confirming their import and effect. My Lords, my judgment proceeds entirely upon the ground of allowing a party to express his own intention in the instruments which he executes, without undertaking the task of conjecturing what he was likely to have done.

If the law forced upon me a presumption not upon the face of the deeds, it would be my duty to yield to it; but being left free from any such control, I have no other guide than that which the deeds themselves furnish, and which is safer than any conjecture which I could form. Confining myself, therefore, entirely to these, as recording the intention of William Kippen, the settler, and rejecting all extrinsic views of probability, which would impose a conjectural meaning upon him different from that which he has distinctly expressed, I agree with the majority of the Judges of the Court of Session, that the provisions made for Mrs. Edmiston in her contract of marriage were not in satisfaction of the provisions made in her favour by the trust disposition and settlement of Mr. Kippen; and therefore, I recommend to your Lordships to affirm the interlocutor appealed from.

LORD CRANWORTH.—My Lords, this question was twice argued in the Courts below, and the result of those arguments has been, that the great majority of the Judges below have come to the conclusion, that there is no such presumption in the law of Scotland as exists in England against what we call double portions, and that consequently Mrs. Edmiston is entitled not merely to that which she takes under her marriage contract, but also to the previous provisions which had been made for her by the will of her father.

My Lords, the case has also been very elaborately argued here, and I have ascertained by

communication with my noble and learned friend on the woolsack, and with my noble and learned friend opposite, (LORD WENSLEYDALE,) that they concur with the Court below; indeed, my noble and learned friend on the woolsack has already very elaborately and ably stated his grounds for concurring with the Court below; and therefore it is hardly necessary for me, in stating to your Lordships that I have arrived at a contrary conclusion, to state, that that, of course, is a conclusion at which I have arrived with a great distrust of my own opinion. But, at the same time, it being the opinion at which I have arrived, I think it my duty to state it, although it can have no practical bearing or effect on the judgment in this case.

My Lords, the ground upon which I have arrived at that conclusion, I shall state very shortly to your Lordships. I think, first, that there is such a presumption upon the authorities in the law of Scotland as exists in England; and I think, secondly, that if such a presumption exists, there is nothing in the facts of this case to remove it from the operation of that *primâ facie* presumption. When I say, that I think that presumption exists in the law of Scotland, I am guided to that conclusion by the text writers, and I think by the weight of the authorities. With respect to the text writers, we who are in the habit of assisting in the administration of Scotch law, all know that Lord Stair, Lord Bankton, and Mr. Erskine, are authorities as text writers to which we refer almost as we should refer to Coke or Littleton in England. Now, with regard to those three great authorities, it appears to me that they all lay down the proposition, that there is such a presumption; that is to say, Stair, the earliest authority, perhaps in some respect the greatest, states it, but with more hesitation, because it had not in his time been so much elaborated or investigated; and the other two authorities state it without any difficulty or hesitation, in terms which apply to the present case, as well as to cases where the claim is merely *ex obligatione*.

Now in order to bear out that view of the case, I have copied from those text writers the different propositions which they have laid down, which, I think, warrant me in the conclusion at which I have arrived. Lord Stair says (1, 8, 2)—"Bonds, assignations, and other rights in names of children, *unforisfamiliat*, and unprovided, are presumed to be donations." And then he gives the reason for that:—"And bonds of provision to children are not interpreted in satisfaction of prior bonds, but to be a further addition, and so are any other rights taken in the name of children, especially if *unforisfamiliat*. Yet a tocher in a contract of marriage was found to be in satisfaction of all former provisions, though it did not so express." And then he refers to a case, which undoubtedly was a case in which the first provision was a provision strictly *ex obligatione*. From the language of Lord Stair, I think I am entitled to infer that the question was somewhat new at that time. He does not lay down the doctrine very authoritatively, but says it has been so found. He expresses no objection to the doctrine, but lays down the doctrine as applicable to what I presume to have been other cases that had in his time existed.

We then come from Lord Stair to Lord Bankton, who, I think, was before Erskine. They were contemporaries, but Lord Bankton's book was published first. Bankton says, though not in the passage cited by my noble and learned friend on the woolsack, but in the passage next to it, in 1st book, title 6, § 5,—"Bonds of provision" (that is, for children) "will be effectual against the heir without delivery or a dispensing clause. But a disposition of the estate to the heir, posterior in date, but prior to the delivery of such bonds, will not subject him as successor *titulo lucrativo post contractum debitum;* because, while the bonds are in the father's power, the debt is not effectually contracted." That is, in fact, he merely elaborates the proposition, that bonds of provision, though undelivered, are valid if they remain in the custody of the maker of them up to his death. They are then valid against the heir, though, if the owner of the estate parted with it to the heir in his lifetime, they are not such debts as would then affect the estate. But Lord Bankton goes on to say,—"Mere bonds of provision being granted to a child in family, without relation of the one to the other, they will be all due. The case is different where a portion is contracted with a daughter in her marriage settlement, which will be presumed in satisfaction of former provisions or other claims against the father."

Now, my Lords, I confess that I am unable to give any other construction to that, but that he is speaking there of bonds of provision, such as he was alluding to in the former part of that paragraph, and that a provision made for the daughter upon her marriage will be presumed to have been made in satisfaction of former provisions; that is to say, if there is nothing to vary the case on the one side or the other, the provision made on the marriage is presumed to be that, which a second bond of provision would not have been presumed, namely, in satisfaction of the previous bond, or of all previous bonds which had gone before. Now, I confess it appears to me, that that lays down the law exactly as the law is in this country, which is, that, *primâ facie*, if a provision is made by a parent on the marriage of his child, that is presumed to be in satisfaction of what he had previously intended and indicated by, not a bond of provision, for in this country there is no such thing as a bond of provision, but by a voluntary provision which would be effectual if it remained uncancelled at the time of his death. That is the law as laid down by Lord Bankton.

Then Erskine (in book 3, title 3, § 93) says, "The rule *debitor non præsumitur donare* being

only a presumption, must yield to contrary presumptions. Hence bonds of provision by a father to a child, especially one who is not forisfamiliated, are from the presumption of paternal affection understood to be granted not in satisfaction but in addition to the child's patrimony." He refers to Lord Stair for that. "But even this presumption may be overruled by circumstances which point out an intention in the father to include the first bond in the last." My Lords, I infer from all this, following the reference to Lord Stair, that he considered this doctrine to have been more elaborately gone into since the time of Lord Stair. "Thus," he says, "a settlement to a daughter in a marriage contract is presumed to be granted in satisfaction or solution of all former provisions, though it should not bear the words 'in satisfaction,' because provisions granted by fathers in marriage contracts are generally intended to comprehend the whole estate that is to be expected by the husband from the wife or her father in name of tocher." That is the way in which the doctrine is laid down by Erskine, and which, as well as the passage from Bankton, would, I conceive, fully bear out the proposition, that the presumption in Scotland is the same as the presumption in England.

I must here observe, that when it is said by the learned Judges in Scotland, that this principle of the law of England has been often reprobated, I question whether that is a fair way of representing what has been said by the Judges in England. The extent to which the doctrine has been carried has been reprobated, but I am not aware of any case in which any Judge has, *ex cathedrâ*, said, that that is a principle that ought not to prevail; and if they had said so, I confess that I think that would have been saying something that experience would not warrant. Because, when a parent does, upon the marriage of his daughter, make a provision for her, *primâ facie* the presumption is, that he means that provision to be in satisfaction of what he otherwise intended to have given her. Take the common case of a parent having left by his will a legacy of £10,000 to her, it would, in ninety-nine cases out of a hundred, be held, that it would totally defeat his intention, if she were allowed to take the legacy as well as the provision. Therefore, I merely require to observe, that I do not agree to the proposition that seems to have been taken for granted by some of the Judges of the Court below, that the doctrine in England is one, which, as a simple doctrine, has been reprobated by any Judges here, or has been considered to be a doctrine that ought not to prevail. However, whether it is right or wrong, that it prevails in England is a matter beyond all doubt; and unless I reject the authority of Bankton, Erskine, and Lord Stair—Lord Stair speaking more diffidently because the question does not seem in his time to have been very much discussed—I have very great difficulty in saying, that the same doctrine must not be held to apply in Scotland, unless you say that those very learned writers have come to a wrong conclusion.

But now let us see what the early authorities are, which either bear out or militate against this proposition. It is perfectly true, as was observed by my noble and learned friend who referred to many of the opinions that we have before us, that a whole chapter or whole head in Morrison has reference entirely to this question. They are all more or less ancient cases, a century or two old. My Lords, it is perfectly true that, upon looking at these cases, it appears that the greater portion of them are cases in which the prior provision had been made *ex obligatione*. I do not know, that that appears to me very much to affect the case; but if it did, they are not all so. There are two particularly which are not so, one certainly, and the other in such terms that it may be doubtful, whether it is so applicable, because it was not a case of a portion at all. I allude to the case of *Belshies* v. *Murray*, M. 11,361, in which a gentleman of the name of Murray made a trust disposition and settlement of his estate upon the same relation (being a single man himself) charged with a legacy of £300 to his niece Amelia Belshies. That was in the year 1738. Two years afterwards he revoked that settlement and made a new one, and settled his property upon the defender Murray, but subject to the legacy which he had given in the former settlement. It appears that, soon after that, Amelia Belshies married a gentleman, whose name I do not remember, and she had two sons, namely, in the year 1744. Mr. Murray executed a bond to her to pay £1200 to her and her husband and her children, making a sort of family provision for them. It was held, after the death of Murray, that the £1200 being paid, (of course they had a right to claim that,) Amelia Belshies and her family could not claim the other £300, but that the £1200 was the substitution for the other.

If that had been the only case, I should not have felt, that that was a case that entirely bore out Erskine or Bankton, because it was not the case of a father by a tocher providing for his daughter. It might have been, though it was not stated, that it was done by a person standing *in loco parentis;* but that does not appear, so far as I collect from the report. But there is another case reported very soon afterwards, of *Dows* v. *Dow*, M. 11,477, which seems to me to go the full length of what these learned institutional writers lay down. There a bond of provision had been made by Mr. John Dow in favour of his children, four daughters; and if he should die without issue male, then the bond secured further provision for them. He had at that time a son, who afterwards died without issue, or, at least, without issue male—I believe without issue, never having been married; and the consequence was, that the estate, I suppose in virtue of some entail, passed to a distant collateral male heir. It was held, upon the question arising between

the daughters and the distant male heir, that, the tocher having been given by the father upon the marriage of such of his daughters as had married, the tocher mentioned in their marriage contract was in satisfaction of all former provisions, though not so expressed. But, then, the Court said, "if they were contracted," that is, if the daughters were married, (that is the meaning of it,) "before their brother died, then they were not thereby excluded from the additional provision incident thereafter by the succession of the other heir male." That was perfectly good sense, because what the father had provided was, in the one event, a particular portion, and, if a subsequent event had happened, a further portion; and the daughters married before the subsequent event had happened. Then, say the Judges, what you have as tocher must be in satisfaction of what was given to you, *rebus sic stantibus*, at the time of the marriage, but it does not preclude your claiming that which you may be entitled to upon the subsequent event happening, which, according to the provision, gave you a larger interest, and which could not have been intended to have been compensated for by the father, because *non constat* that that further provision ever could arise.

Now, it appears to me, that that case goes the whole length of recognizing this proposition, because, although it is true, that that is not a provision by a trust settlement and disposition, that is a mere matter of form. We learn from this case, that the system of giving bonds of provision as a mode of providing for children was, until a very recent period, the only mode, or almost the only mode, in which such provision could have been made.

And Lord Murray states, that, in his experience in his early practice at the bar, it was the common mode of providing for children. The principle really was, that if you make a voluntary provision for a child, though it be voluntary, yet, if you afterwards give a tocher to the child upon his marriage, that supersedes the previous intended voluntary provision.

Now, my Lords, the question is, How has that principle been borne out and acted upon in more modern times? Now I confess that I am unable, without saying that the two cases of *Grant* v. *Anderson* and *Smith* v. *Nimmo* were wrongly decided, to come to any other conclusion, but that the Courts have acted upon the principle laid down by Bankton and Erskine, and acted upon it as being the clear law of Scotland.

In the case of *Grant* v. *Anderson*, which was decided in 1840, a settlement had been made by Anderson, whereby he secured £2000 to his daughter. That settlement was made in 1829. In 1830 the daughter married Mr. Grant, and upon the occasion of the marriage the father bound himself, on his death, to pay £2000 for his daughter and her family in lieu of all claims except good will—that is, it would not exclude what he gave to her by way of bequest. She took that in lieu of all claim of legitim or any other claim that she might set up as a legal claim against him, but not of anything that he might leave her. The question was, whether, after that settlement, she was entitled to claim not only what she had under the settlement, but what had been given to her by will; and it was held that she was not. That case was very elaborately discussed; and Lord Mackenzie, a very able and very painstaking Judge, investigated the case fully, and stated that he had been unable to discover one case in which a provision by will, not obligatory, was held to be satisfied by a provision in a marriage contract. That may be very true, literally speaking. It did not apply to a provision by will, but it applied to voluntary provisions revocable up to the time of death. Therefore it seems to me, that the distinction between a bond of provision and a will is a distinction too weak to be supported. He says very truly—"I have not been able to discover one case in which a provision by a will not obligatory was held to be satisfied by a provision in a contract of marriage."

"And one reason," he says, "much urged in the cases where an obligatory provision (gratuitous or not, but obligatory) was held to be satisfied by an after provision in a contract of marriage, was that *debitor non præsumitur donare*, which is inapplicable in the case of a first provision, even by will, on a child, for that is in a sort onerous, the father being bound in morality at least to provide something; but," he says, "another and stronger reason is fully applicable to all cases of this kind, viz., that in marriage contracts the father is presumed to bring forward all that he means to give his child, or that child's share of his property, in order to obtain better terms from the other contracting party." This is the reason chiefly insisted on in the decisions, and it is to be observed that it is the only reason, which distinguishes these cases of marriage contracts from cases of other provisions where also the first provision is generally obligatory, and the maxim *debitor non præsumitur donare* is fully applicable, and where it is yet found that both provisions are due, contrary to what is found in the cases of marriage contracts. Now this is the *ratio* looked to by Stair, Bankton, and Erskine. Now it is quite applicable to the case of a voluntary provision on a child followed by a marriage contract.

It is said that that case was decided on some special grounds, and, unfortunately, it has been very much the habit—I am afraid too much the habit—on both sides of the Tweed to say we decide a case upon special grounds, when, in truth, you wish to shrink from the responsibility of laying down a more general rule. But I confess that I seek in vain for any special grounds in the case of *Grant* v. *Anderson*. It seems to me that if there was no such *primâ facie* presumption as appears to me to exist by the law of Scotland, the case was wrongly decided. I do not

at all mean to say, that it was wrongly decided, because, but for the difference of opinion that exists in this case, I should have thought it quite rightly decided according to the general law of Scotland.

Then that case was followed very soon afterwards by the *case of Nimmo*, which is very important. That was a case which did not decide the very point, because the other two dispositions that had to be considered were, first, the settlement upon the marriage contract; secondly, the provision that was made afterwards. The first settlement had been made in 1807 by Thomas Nimmo, binding his trustees to pay to each of his five daughters £1000; that is, £500 at the end of one year, and £500 at the end of five years after his death. Elizabeth, one of the daughters, married in 1825, and Nimmo, the father, then bound himself by her marriage contract to pay £1000 in the same way; that is, £500 at the end of one year and £500 at the end of five years after his death, to be settled upon her and her family. In 1830, (whether he had forgotten the settlement of 1807 does not appear,) he executed a new settlement, which, of course, got rid of the voluntary trust settlement of 1807, and by that new settlement, he burthened his estate to pay £1000 to each of his daughters, which included Elizabeth, to be settled in the same way. The question was, Whether the daughter Elizabeth was entitled to take that subsequent provision, as well as the provision that had been made for her on her marriage? It was held that she was not,—not by the universal concurrence of the Judges, but by three out of four. Lord Meadowbank dissented. He says, "I have had no difficulty whatever in being of opinion that the tocher being secured to Mrs. Smith (that was Elizabeth) by this contract supersedes the provision made for her in the deed 1807;" that is, if the question had been between the marriage contract provision and the prior voluntary provision, I should have had no doubt, that the marriage contract provision supersedes the other. He goes on to say, "And that had her father died at this period, she could only have been entitled to one sum of £1000." He goes upon this, that the case was different when he made a subsequent provision. He thought that the doctrine did not then apply, but that the subsequent voluntary provision was to be taken as additional. Lord Moncreiff concurring with the majority of the Court, that the subsequent provision could not be claimed, says—"It is a settled point, that if the contract is last, there is a presumption against duplication." It appears to me, therefore, that not only the institutional writers lay down this principle, but we have one of the highest authorities in modern times—universally acknowledged to be so by Scotch lawyers—Lord Moncreiff, stating that it is a settled point, that in that case the presumption is against duplication.

Then it is said that that does not mean what we understand by presumption, but it is only that you are to look at the circumstances of the case, and that it is a *questio voluntatis*. My Lords, one reason which leads me to the conclusion, that that cannot be what any of those authorities meant is, that, if it was so, there was no reason for saying anything at all upon the subject; because, whether you are speaking of tocher or anything else, if *ex visceribus* of the instrument, as the Scotch lawyers say, you can discover that it was meant to supersede the former without any presumption or rule of law, that case would include tocher and every other possible claim.

Upon these grounds, I am bound to state that the conclusion at which I should have arrived is, that the minority of the Judges in the Court below in this case have come to a correct conclusion as to what was the general rule according to the Scotch law. But then, my Lords, it is also said, and has been argued very forcibly indeed by the Lord Advocate, that if there had been such a presumption according to the Scotch law, that, like every other presumption, may be repelled, and that here there are circumstances which ought to lead your Lordships to say that it was repelled. It was said first of all, compare this marriage contract of Mrs. Edmiston's with the previous marriage contract. Now, my Lords, just one observation occurs upon that. I consider that to be a course which your Lordships cannot adopt; it cannot be consistent with any rules of evidence either in Scotland or in England, that when you are merely construing the meaning of a particular contract, you are to look to see what the maker of that contract—the person entering into it—may have done upon some other occasion. That is not a legitimate mode; my noble and learned friend has referred to it for a different object. It may be, that it was quite lawful to refer to other contracts, to find out his intention if there be no such general presumption; but if there be such a presumption, as I should have thought there was by the law of Scotland, then the meaning of this contract must be ascertained with reference to what the law of Scotland was, and with reference to the existence of such a rule. And that being so, it is clear to my mind that you cannot look to any other document for the purpose of explaining that which must be explained by what is found within its own four corners. The truth is, if this presumption prevails, the statement that it shall be in satisfaction of previous provisions is unnecessary, and the fact, that that has been stated in other instruments, only shews, what is very commonly the case, that the testator had unnecessarily, though probably very wisely, (it would have avoided all discussion if he had done so here,) stated, what would have been the rule of law, if he had not so stated.

But, then, it is said that here there is no intention of making the daughters equal. That is quite clear. I think there was no intention that they should be equal. Great inequality appears

upon the face of the documents, but the rule does not depend upon the provisions being equal. In some of the cases (I cannot say that I have examined them sufficiently to say in all) there has been great inequality amongst the children that were to take. I believe that inequality existed in the case of *Pym* v. *Lockyer*. The question is not, Whether the children were intended equally to be provided for, but whether the settler or testator, the maker of the trust deed, has indicated in what proportions he chooses his different children to be provided for. In *Pym* v. *Lockyer*, which was a great case before Lord Cottenham, the legacies were not all of the same amount; but Lord Cottenham does not seem to have considered that as a matter of any importance. In expressing his opinion, that the advance of a sum smaller than the legacy should only operate as satisfaction *pro tanto*, he says—"A father who makes his will, dividing his property amongst his children, must be supposed to have decided what, under the then existing circumstances, ought to be the portion of each child, not with reference to the wants of each, but, attributing to each the share of the whole, which, with reference to the wants of all, each ought to possess." Then he goes on to shew, that if he advances a less sum of money to any one child, that does not shew any alteration in his intentions as to the proportion in which they are to take, but only as to the certain portion that he meant to give by anticipation. He seems to assume, that the circumstance of there being inequality in the objects of the testator does not at all interfere with the general application of the rule. Here, at the date of the marriage contract, the father had provided, by his will and codicil, for his three unmarried daughters, in the proportions in which he thought they ought to be benefited at his death. Then he gives to one of them a sum equal to what he had given by the trust deed. I respectfully ask, why is the presumption of ademption, (as we should call it in England, though it is a very inaccurate expression,) which, it is admitted, would have applied if the legacies had been equal, inapplicable because they were unequal? The subsequent variations are not material. By the marriage contract, the provision for Margaret was gone, and the subsequent codicils only indicate the fluctuating intention of the testator as to the two remaining daughters.

Thirdly, it was argued, that possibly the gift might be set up by the subsequent codicil, but I think that is really unargueable. It was not very strongly pressed, because, as was pointed out in the case of *Powys* v. *Mansfield*, the effect of a codicil is only to set up the prior instrument, as far as it was then operative, not to give it any effect which by law it had not at the time. Then, with regard to the circumstance that one settlement makes provisions only for the children of the marriage, and the other for all the children: that has been often discussed upon grounds applicable as well to Scotland as to England; and it has been held, in the case of *Wharton* v. *Lord Durham*, 3 Cl. & F. 146, that that is totally unimportant;—that what you are to consider is the amount which the father gives. What may be his reasons for giving it more or less strictly tied up in one case than in another is a matter, which it is impossible for us to enter into or explain. Therefore these differences are immaterial.

As to the suggestion that the testator evidently intended inequality by reason of the revocation of what he had given to his sons, I think that has been satisfactorily answered and shewn to be immaterial. He had given to one of his sons £2000, subject to the deduction of anything that he might advance to him, and which should appear in his ledger, and to the other £6000, in the same way. Afterwards, to make all that right, and to prevent any question about it, he says, as to the one who was to have £2000, I have already advanced him £1900, and which with the interest goes far beyond £2000; therefore that will be found in my ledger, and therefore I revoke all that I have said about the gift of £2000 to him. I desire that he may not be at all harrassed or molested as to that which is a debt of more than £2000 appearing in my ledger. And just in the same way with regard to the son to whom he had given £6000, he says, I have advanced him that which I choose to call £2000, (it is rather more than less,) he says that it is to be cancelled, and his legacy is to be reduced to £4000. These provisions seem to me to have no bearing upon the question.

I have thought it my duty to state very shortly the grounds which, if this had been argued as *res integra* before me, and not in your Lordships' House by way of appeal from the Court below, would have led me to a contrary conclusion from that at which my two noble and learned friends have arrived; and I must conclude as I began, by saying, that, considering the great preponderance of authority that there is both here and in Scotland against the view which I have taken, I must, of course, say, that I arrive at that conclusion with very great diffidence.

LORD WENSLEYDALE.—My Lords, the first question which arises in this case is, whether it is a rule of Scotch law, that a provision of tocher by the marriage contract of a daughter is to be presumed, *primâ facie*, to be in satisfaction of former testamentary provisions in her favour.

It is not contended to be a *presumptio juris et de jure*, but a *primâ facie* presumption of fact, throwing the *onus probandi* on the party insisting on the contrary; and unless that *onus* is discharged by shewing the balance of evidence to be against the presumption, it must prevail.

This question is of great importance in a general point of view, as every general rule is which must, when established, be applied to all cases that come before the Court; though I must say,

that on the view I take of the facts in this case, I am inclined to think it would not make any difference in my opinion, if it were established.

By the law of Scotland, a subsequent voluntary provision by a father given to a child, I conceive, is considered, *primâ facie*, as not being a satisfaction of a former similar provision. There is no *primâ facie* presumption against double portions. But there is now established, by the law of England, what is said to be an artificial rule, founded upon a leaning against double portions, that, where a parent gives a legacy to a child, not stating the purposes with reference to which he gives it, the Court understands him as giving a portion; and if he afterwards advances a portion on the marriage of that child, it is to be deemed a satisfaction of the legacy (*Ex parte Pye*, 18 Ves. 140). This rule is now, by a long course of decisions, firmly and fully established, and cannot be disputed, and any comment upon it would be worse than useless. It by no means follows, however, that because it has been adopted by the Courts in this part of the United Kingdom, it must be followed in another part. This case depends entirely upon Scotch law. I have made a careful examination of the several authorities referred to by the Lords of Session in their full and elaborate judgment in the Court of Session, and quoted in their very able arguments at your Lordships' bar, and I concur in the opinion of my noble and learned friend on the woolsack. I am not satisfied that there is any rule of the law of Scotland, that a settlement on a daughter in a marriage contract is presumed to be a satisfaction of previous provisions for children, unless these provisions are *ex obligatione*.

There is certainly no decided case in which such a rule is laid down where the testamentary provisions are voluntary, and I am not satisfied, that the passages cited from Ers' ine, 3rd book, title 3, and § 93, and the other text writers which have been quoted, are anything more than illustrations of the general rule, *debitor non præsumitur donare*. It is quite true, that observations are often made in the cases as to the weight to be attached to a provision for tocher in a marriage settlement, when the question is, What was the intention of the parent?

In the case cited by Mr. Anderson, of *Dows* v. *Dow*, M. 11,477, on which he much relied, where the provision was not *ex obligatione*, it was stated at the bar, that tochers in contracts of marriage by the father are ever presumed to be in satisfaction of all former provisions, for parents would never omit to accumulate their children's provisions in these contracts, that their reciprocal conditions might be better. This is not, I think, a statement of a rule of law, but an observation which, when made in contracts of that description, may be entitled to weight, the question being, as I conceive it always is, of the intention of the father in giving the portion. There is, however, an observation of the Lord Justice Clerk and the Lord President worthy of remark, that in such cases the father stipulates only for what he means to be bound to do, not for all he may do.

The other cases which were cited seem to me to be of the same kind. The observation is made on the marriage settlement as evidence of intention, but those cases do not establish, that it is a rule of law, that tochers in contracts of marriage constitute a *primâ facie* case of satisfaction. If there were a case of a portion by a testamentary instrument of a sum of £1000 to a daughter, and a marriage contract in which nothing more was stipulated than to give £1000 tocher to the wife, I am not satisfied, that there is any rule of law in Scotland, that one is to be taken *primâ facie* to be in satisfaction of the other; and if there were no further evidence on either side, the decision of the Court ought to be in favour of the daughter. It is, I think, always a mere question of the actual intention of the father, and must be determined in each instance upon the whole evidence applicable to such a subject.

In England, if the case were to arise before a tribunal of which a jury formed a part, this question would, I conceive, be determined by them, subject to the construction of the terms of each written instrument by the Court. In our Courts of Equity, and in the Courts in Scotland, it would be the duty of Judges, exercising in this respect the functions of a jury, to decide the question of fact. It is obvious that decisions of such Courts upon a mere question of fact are comparatively of little value as precedents to be followed, one case very seldom forming a satisfactory guide in another, any more indeed than the decision of one jury would be a binding authority for another.

The question for us to decide is, whether we are satisfied that Mr. Kippen, by the marriage settlement of December 14, 1850, giving his daughter Margaret £5000 as a tocher, meant thereby to satisfy the provisions he had made by his own marriage contract of the 2nd of August 1815 for his children, which in the result amounted to £800, and the sum of £4000, which he provided by his voluntary trust disposition and settlement of the 17th of July 1849, for each of his three daughters, Margaret, Jane, and Elizabeth.

As to the first provision of £800 due *ex obligatione* under the onerous contract of Mr. Kippen's own marriage contract, the established rule of law applies *debitor non præsumitur donare*, and Mr. and Mrs. Edmiston cannot have a legal claim for £800. It must clearly be taken to be satisfied by the tocher. On this point all are agreed. The question in the case is, Whether the evidence shews that it was Mr. Kippen's intention, that the £4000 should be satisfied by the provision in the marriage contract? Upon this question the Judges decided, eight being of opinion that he did not, and five that he did, the Lords giving their reasons most ably on both

sides, and apparently exhausting the subject. I have considered their reasons with great attention, and have satisfied myself, that the majority are right, and that the truster, Mr. Kippen, did not mean the marriage tocher to be a satisfaction of the legacy.

The grounds upon which I have come to this conclusion are, first, that the marriage contract with Mr. Edmiston contains no clause of renunciation and discharge of her claims against her father; whereas in the previous settlements on the marriage of Mr. Alston with Marianne Kippen on the 17th of June 1848, and of Mr. Shaw with Christiana on the 12th of May 1849, there is contained a renunciation of every provision, legal or conventional, competent to be made against William Kippen or his estate after his death. It must be considered, at all events, a very doubtful question of law whether a contract of marriage was by law *primâ facie* a satisfaction of a testamentary portion; and if Mr. Kippen meant, that, in this case, the £5000 should be so, it cannot, I think, be doubted that he would have caused it to be inserted in the contract.

This difference between the deeds is attempted to be accounted for by the circumstance, that a different law-agent was employed to draw Mr. Edmiston's marriage contract; Mr. Kippen's son, a writer at Glasgow, having prepared the other two settlements. But I think we cannot attend to this, by whomsoever prepared; all the instruments must be taken to express the intention of the party to them; and it is a very strong circumstance to shew, that he meant, that it should not operate as a discharge, that one settlement contains no discharge, and the two others do.

It has to be observed that the suggestion made, that he did not employ his son to draw the last settlement, because he did not like his son to know that he gave a larger portion to Mrs. Edmiston than to her other married sisters, fails, for it appears that his son had failed in business, and was no longer acting as a writer at the time this marriage contract was prepared.

The second circumstance which weighs with me is, that after the alterations made by the second codicil of January 6, 1852, he confirms his first disposition and deed of settlement in all other respects, which *primâ facie* indicates his intention, that the £4000 provided for Mrs. Edmiston therein should be paid. It is argued, that if that provision had been already satisfied by the gift of a tocher of £5000, it would not be revived by this provision, as it certainly would not by the law of England, according to the authority of *Powys* v. *Mansfield*, 6 Sim. 637; and 3 M. & C. 376. But, in this case, which is one purely of intention, I cannot help attributing more weight to that circumstance, than my noble and learned friend on the woolsack and my noble and learned friend opposite have done. Facts strike men's minds very differently. I own that it strikes mine, as very strong evidence to shew, that he meant the settlement to be in force with reference to this £4000. The importance of the codicil seems to me to consist in this, that he notices his advance to William Kippen of near £2000, and therefore revokes the bequest of £2000 given by the settlement to him, and he also notices his advance to his son George of £2051, 1*s.*, and therefore reduces the bequest of £6000 to him to £4000, but takes no notice of the gift of £1000 which he had made to his daughter Margaret on her marriage in 1851, nor of his engagement to pay £4000 more. It is impossible he could have forgotten that transaction, and his confirmation of his trust disposition in all other respects than as so altered, is, I think, clearly a confirmation of the bequest to her of the £4000. It is true, that by his trust disposition he provides for a deduction of moneys advanced to William, from the legacy of £2000, and of all sums of money owing to him from George from the legacy of £6000, and the legacy to William would, without the clause in the codicil, have been, according to the form of expression used in England, adeemed. But this appears to me very little, if at all, to weaken the force of the above observation; and the bequest to George would suffer a greater diminution than he has provided by the codicil, by reason of the debt due from him being more than £2000.

I cannot help thinking, therefore, that the confirmation of the trust disposition, in other respects, is very strong evidence indeed, of the intention of Mr. Kippen to confirm the legacy of £4000, notwithstanding the marriage settlement.

These are the principal reasons which satisfy me as to the testator's intentions. I do not much rely on the difference of the provisions in the marriage settlement from the trust disposition, because the marriage contract gives £1000 more than the settlement, which Mr. Kippen may have thought a compensation for the difference of the provision in other respects. Nor do I, on the other hand, place any reliance upon the circumstance, that a father must be supposed to regard his children with equal affection, and as equally entitled to his bounty. I agree entirely with the forcible and just observations of the Lord Justice Clerk, against this being a just ground of judicial decision. If, indeed, we were to proceed on this supposition, it is impossible to reconcile with it the different provisions for the children, which, if we consider the marriage contract a satisfaction of the bequest, are obviously unequal.

I think, therefore, that the question in this case being clearly a question of fact, viz., of the intention of the father, the evidence is in favour of the marriage contract not being a satisfaction of the bequest: and I therefore concur with the majority of the learned Judges in the Court of Session, and with my noble and learned friend on the woolsack.

LORD CHANCELLOR.—I submit to your Lordships, that in this case, considering it is a question of very great difficulty, in which a difference of opinion existed amongst the learned Judges below, and also exists among your Lordships, the costs of both parties should come out of the estate.

Mr. Anderson.—That, my Lord, would be no relief to my client, because he is residuary legatee. I submit to your Lordships, that there should be nothing said about costs. I think your Lordships have laid it down as a rule, that when you differ among yourselves, you affirm without costs. That question arose in the case of *Johnson* v. *Beattie*, 10 Cl. & F. 42; where there was a difference of opinion in this House, and the rule was then laid down, that the affirmation should be without costs.

Lord Advocate.—My Lords, this is a case in which the sum claimed by the successful party is comparatively a very small sum, while the residue I believe to be very large. If the interlocutor is affirmed without costs, it will certainly be a case of great hardship upon the respondents.

LORD WENSLEYDALE.—You say it is a very small sum. It is £3200; that can hardly be considered a very small sum.

Lord Advocate.—We understand that the estate is not less than £150,000.

LORD CHANCELLOR.—The interlocutor will be affirmed without costs.

LORD CRANWORTH.—In referring to what Mr. Anderson observed, I must protest against that rule being the universal rule of the House.

Mr. Anderson.—It is, my Lord, a rule, subject of course to exceptions; but, *primâ facie*, I submit that it is the rule.

LORD CRANWORTH.—We did not lay it down as a universal rule.

Interlocutor appealed from affirmed.

James and Alex. Peddie, W.S. *Appellants' Agents.*—James Carnegie, Jun., W.S. *Respondents' Agent.*

JUNE 14, 1858.

ISABELLA GEIKIE or YOUNG and Others, *Appellants, v.* JOHN MORRIS and Others, *Respondents.*

Process—Multiplepoinding—Decree of Preference—Pedigree—Competition—Right to Compear—*After a decree of preference had been pronounced in favour of one of several claimants, in a multiplepoinding involving a question of pedigree, another set of claimants appeared, and insisted on their right to give in a claim.*

HELD (affirming judgment), *That they may be allowed to do so, but under a condition that the compearers should pay one half of the taxed expenses incurred by the party who had been preferred, even though the compearers had not been cited originally, and averred that they had not heard of the litigation till shortly before coming forward.*[1]

The claimants, Mrs. Geikie or Young and others, appealed against the judgment of the Court of 11th March 1856, and pleaded, in their case, that it ought to be reversed, because—"inconsistent (1) with the legal rights of the appellants, as parties who had not been cited in the multiplepoinding; (2) with the equity of the case in its circumstances; and (3) with the practice in processes of multiplepoinding." Bell's Commentaries, vol. ii. p. 299, § 4.

The respondents supported the judgment in their case on the following ground:—"Because the condition as to prior costs was a fair and proper condition, and one within the competency of the Court to impose, and rightly and properly imposed by them." *Thom*, 24th May 1811, F. C.; *Mack* v. *Mack*, 9 S. 524.

Mundell and *Hale* for the appellants.—There is no ground of law or equity for laying on the appellants the large sum of £1533 as a condition for being allowed to lodge a claim; and to exact it is a denial of justice. The appellants were never cited in the multiplepoinding, and they allege that they had never heard of the litigation till lately, and that they had not been guilty of any negligence since they heard of it. The Court had often stretched its rules of practice to encourage rather than punish poor persons seeking to claim—*Leith* v. *Leith*, 1 S. 468; Shaw's Digest, 1209. The appellants were entitled to appear, so long as the fund was *in medio*—2 Bell's Com. 299. It will be found, that in all the cases where the Court has imposed a payment, there

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[1] See previous reports 28 Sc. Jur. 263, 346. S. C. 3 Macq. Ap. 347 : 30 Sc. Jur. 594.