

Answered; She could not determine whether she would claim or not, till she saw a fund, and then she immediately brought her action. No 125.

THE LORDS adhered.

Act. H. Home.

Alt. Millar.

D. Falconer, v. 2. No 145. p. 171.

1751. November 29. FIFE against NICOLSON.

No 126.

A BOND from a father to his daughter, in full of what she could ask as legitim, or any manner of way, was found to be in lieu of a sum left her, with which he had intromitted.

Fol. Dic. v. 4. p. 122. Falconer.

* * This case is No 52. p. 2309. *voce* CLAUSE.

1757. December 1. GORDON against Major MAITLAND.

No 127.

A BROTHER *pleaded*, That no interest was due to his sisters upon their bonds of provision, as they had lived in family with him, and had been alimented by him, *nam debitor non præsumitur donare*.—THE LORDS found, that their aliment was to be deducted from the interest of their bonds; and they modified the said aliment to two-thirds of the current annualrents of their provisions.

Fol. Dic. v. 4. p. 121. Fac. Col.

* * This case is No 359. p. 11161. *voce* PRESCRIPTION.

1766. November 20. MARGARET MATHIESON against JOHN MATHIESON.

No 128.

JOHN MATHIESON elder, being possessed of an estate limited to heirs-male, became bound, by his marriage-contract, to pay "to the eldest or only daughter to be procreated of the marriage," the sum of 6000 merks, in the event that there should be no heir-male of the marriage; or, if such heir-male should exist and succeed to the estate, the sum of 4000 merks.

An after-provision to children imputes in former provisions, though not purified at its date.

In either event, he became bound "to maintain and educate the eldest or only daughter to be procreated of the said marriage, conform to her degree and quality, till she be married."

Four daughters existed of the marriage, but no male issue. During its subsistence, Margaret, the eldest daughter, was married; and John Mathieson became bound to pay her 3000 merks, without any reference to the obligation to his own contract of marriage.

No. 128.

The estate having devolved on John Mathieson's son by a second marriage, an action was brought by Margaret for the 6000 merks provided to the eldest or only daughter of the first.

Pleaded for the defender, *imo*, Eldest or only daughter must be understood conjunctively; and, therefore, the pursuer is not entitled to the provision as eldest daughter, since she is not only daughter also. The father was bound to aliment all his daughters equally; and yet the same expression is used in the clause of aliment, as in the clause respecting the 6000 merks.

2do, The 3000 merks, already paid, must impute *pro tanto* in the 6000 merks, if the provision shall be found to take place.

Answered for the pursuer; The obvious meaning of the terms, eldest or only daughter, is, that the whole 6000 merks should be due to her, whether there should be more than one daughter or not. And so the father understood the clause respecting the daughter's aliment; for, though he maintained his eldest daughter in a suitable manner till her marriage, he dismissed the rest without any provisions.

To the *second*; The presumption, *debitor non præsimitur donare*, does not apply. The pursuer was not creditor in the 6000 merks, at the time the 3000 merks were provided. Her father's first marriage still subsisted. Still there might have been heirs-male of the marriage; and, in that event, the 6000 merks were not due.

"THE LORDS found, that the pursuer was a creditor for the 6000 merks; but that the after provision of 3000 merks must impute in payment thereof."

Reporter, *Kennet*.Act. *Crosbie*.Alt. *Cosmo Gordon*.

G. F.

Fol. Dic. v. 4. p. 123. Fac. Col. No 44. p. 271.

1768. February 19.

GREIG against GREIG.

No 129.

MARGARET MILL, upon the death of her first husband, married David Greig, who, by his testament, appointed her his executor, and gave her the liferent of his effects, computed at about 7000 merks; whereof 2000 merks were provided to each of his two daughters, and 3000 merks to his youngest son, the eldest being already forisfamiliarated.

Margaret Mill having entered upon the management of her husband's affairs, lent out L. 100 Sterling, upon bond, to herself in liferent, and her two daughters in fee.

Upon the death of Margaret, the daughters claimed this L. 100, beside their provisions of 2000 merks, But the LORDS found, "That it must impute in satisfaction *pro tanto*."

Act. *Nairne*.Alt. *Lockhart*.

G. F.

Fol. Dic. v. 4. p. 123. Fac. Col. No 64. p. 304.