ference of the property in satisfaction of the debt, with a faculty of redemption within a limited time; meanwhile the debt is understood to be extinguished, and the land comes in place of it. Hence the right of the land must go to the heir of the adjudger; the bygone rents not levied, to his executor. By a judicial sale the land is adjudged to the purchaser,—the price to the creditors: thus, as, in adjudications, the land comes in place of the debt, so, in a judicial sale, the price comes in place of the lands; and consequently the interest of the price is on the same footing with the rent of the lands. In this view, the principles laid down in the case of the Creditors of Clapperton, agree with those laid down by the defender. As bygone rents of land go to the executors of the adjudger; so also, upon a sale, ought the bygone annualrents of the price.

Although an adjudication be not purged by a sale, but remains an incumbrance upon the land until the price is paid, yet the incumbrance reaches no farther than to the share of the price allotted to the adjudger. The holder of the land, by paying that share, however small, disencumbers the land. Admitting, therefore, that this price, being a real burden, goes to heirs, and that it is upon the same footing with money heritably secured, the consequence is, that the capital must go to the heir, but the bygone annualrents to the executor; and, of course, fall under the *jus mariti*.

On the 19th November 1766, "the Lords adhered, and refused the petition."

For the Petitioner, James Ferguson.

OPINIONS.

PITFOUR. The petitioners compare an adjudication to a property in lands; whereas the decision, Creditors of Clapperton, considered it as a sale and the bygones as an eik.

AFFLECK. Here the pursuer, who competes with the petitioners, has right to a share in the adjudication itself.

1766. *November* 21. COLIN CAMPBELL of Ederline, Trustee for Angus Campbell of Dunstafnage, *against* Mrs ISOBEL M'NIEL, LILIAS and MARGARET CAMPBELLS.

FIAR.—PROVISION TO HEIRS, &c.

1. The fee of lands taken to the father in liferent, thereafter to the son in liferent, and his heirs-male; whom failing, the father's heirs in fee, found to be in the father, and, after his death, in the son.
2. How far the father can burden, in favour of the children of a second marriage, an estate settled upon the son of his first marriage by that son's marriage-contract.

[*Faculty Collection, IV. p.* 246; *Dictionary*, 4287.]

NIEL CAMPBELL of Achnard, afterwards of Dunstafnage, had, by his first marriage, a son, Angus, and a daughter.

In 1727, he married a second wife, and settled competent provisions on her; as also a provision of 6000 merks to the daughters of that marriage, one or more.

In the 1751, Angus Campbell, his son, entered into a marriage-contract with Margaret Campbell: To it his father Niel was a party, and became thereby bound to settle his estate of Dunstafnage, to which he had by this time succeeded, in favour of himself in liferent, and, after his decease, to Angus Campbell in liferent; and the fee of the same, after both their deceases, to the heirs-male of the body of Angus; which failing, to Neil's heirs-male. By this contract, Niel restricted himself from further burdening the estate with any debts, excepting such provisions as he should make to his children.

Niel, by his second marriage, had two daughters. He executed a deed in 1752, whereby he provided 4000 merks to the eldest, and 3000 merks to the youngest. This deed proceeds upon the narrative that it was just and reasonable that he should, in implement of the faculty reserved to him in his son's marriage-contract, condescend upon the provisions that he shall make to the children already procreated of his body.

He, moreover, reserved power to diminish this provision, if an heir-male should thereafter exist of his own body, and to augment it, failing heirs of his body.

Angus having no sons, and in a declining state of health, Niel thought proper to make several additions to the provisions in favour of his wife and his daughters of the second marriage.

The provisions made in 1752, and previous to that period, left a free income to the heir of between L.30 and L.40 sterling.

The additional provisions not only exhausted the income of the estate, but laid an annual burden of L.14 sterling upon it.

Niel died, and Angus, in name of a trustee, raised a reduction of those additional provisions, as *in fraudem* of the marriage-contract in 1751. A question occurred, whether Niel or Angus was fiar.

On the 14th January 1766, the Lords pronounced the following interlocutor, on report of Lord Pitfour: "The Lords repel the objection to the pursuer's title, and find that the fee of the lands was in the father, and after his death in the son; and remit to the Lord Ordinary to hear parties' procurators further on the value of the estate, and extent of the debts affecting the same, and to do therein as he shall see cause."

The Lord Ordinary, having adjusted the yearly value of the lands, and the extent of the burdens imposed by Neil, again reported the cause.

ARGUMENT FOR THE DEFENDERS:—

Neil was fiar of the estate, and had, from the nature of his right, a reasonable power of providing for his wife and daughters. The additional provisions which he made are not exorbitant. The defenders are willing to produce a person who will take a long lease of the whole estate at L.300 per annum, or buy it at the rate of L.10,000. By such lease or sale there will remain more than a competency to Angus Campbell, who has not any male issue, and in all probability never will have any. It is more reasonable that the provisions made by Niel in favour of his wife and daughters should be sustained, than that they should be reduced to straits in order to secure a more lucrative succession to the distant heirs-male of Niel.

ARGUMENT FOR THE PURSUER :—

The additional provisions are exorbitant: not in themselves, but from the circumstances of the case; for, according to the defender's own state of the matter, they cannot be rendered effectual but by a total lease of the estate, which would expel Angus Campbell from his paternal habitation; or by a sale, which would anihilate an ancient family. The powers to burden, consistently with the marriage-contract 1751, must be rationally interpreted, or, as it is expressed in England, *salvo tenemento*. Angus, the *predilecta persona*, must not be over-burdened. The family and representation of Niel must not be annihilated.

On the 20th November 1766, the Lords reduced the additional provisions granted since 1752.

Act. A. Lockhart. *Alt.* H. Dundas. *Rep.* Pitfour.

OPINIONS.

COALSTON. No power to provide the wife farther than already provided. Power as to the daughters is of reasonable provisions for supporting the provisions made down to 1758.

AFFLECK. The wife can have nothing but what she was provided to by her marriage-contract: every thing else is beyond Niel's power. As to the daughters, the provisions must be rational. A man who has an estate must uphold it. A man's expenses must be adapted to his annual income, not to the saleable value of his estate.

PITFOUR. No provisions ought to be excessive. No one is obliged to sell: But, if a man has not sufficient funds for paying his father's debts, he cannot say I will not sell. He mentioned the case of Craik of Deuchrae. Here there is a passive title by the Act 1695 and the Act of Sederunt.

PRESIDENT. A right of burdening can never imply a right to sell. There is a difference between debts for which a creditor may adjudge, and rational burdens :—case of *Sir John Dalrymple*. Provisions cannot be rational when the estate must be sold. The case of *Craik* is very particular. There, there was a decreet-arbitral pronounced in minority. On attaining majority the young lady revoked it, and was thereby in the event reduced to beggary. The judgment of the House of Peers, appointing the Court of Session to give her a competent provision, was unexampled. This decision is not to be repeated.

JUSTICE-CLERK. The deed 1728, in favour of Isobel M'Niel, is a gratuitous provision by the husband, and not an implement of the minute 1727. It was therefore revokable, and, by the contract 1751, was revoked. Provisions must mean rational provisions: for how could Niel settle the estate on his son and leave himself power to burden to any extent. The provisions to the children must be reasonable. There is no better rule than that in 1752, which the father deliberately executed. The grounds of the posterior provisions are not sufficient. The representative of the family ought to have been left in a comfortable situation, in so far at least as was consistent with the duty owing to the younger children.

GARDENSTON. The wife cannot have any thing beyond her marriage-contract.

KAIMES. The wife's jointure must be according to the marriage-contract, and the provisions to the children according to the deed 1752. How is the restriction in 1751 to be interpreted in favour of the heir of the marriage, or of strangers? I think, as to the heir of the marriage, it may be good. As to strangers, Niel was left at liberty.

Diss. Pitfour.

1766. *November* 20. MARGARET MATHIESON and ANDREW MILLER of Kincurdie, her Husband, *against* JOHN MATHIESON of Benagefield.

PRESUMPTION.

Found, that an after provision to a child must impute in payment of a former provision, though not purified at its date.

[*Faculty Collection, IV. p. 271 ; Dictionary,* 11,453.]

ON the 16th January 1730, a marriage-contract was executed between John Mathieson, then younger of Benagefield, and Elizabeth M'Kenzie. His father, Alexander Mathieson, and her father, William M'Kenzie of Balmaduthy, were parties in this contract.

By it the lands of Benagefield, and others, amounting to L.100 sterling per annum, were settled on the heirs-male of the marriage, which failing, to return to Alexander Mathieson and his heirs-male.

This contract did also contain the following clause :—" And because the heirs-female to be procreated of the said marriage, are, by the contract, debarred and secluded from succeeding to the said John Mathieson in his lands and estate ; therefore, and in case there be no heir-male of the said marriage who shall succeed to the said John Mathieson in his lands and estate, they, the said Alexander and John Mathiesons, bind and oblige them, their heirs and successors, to make payment to the eldest or only daughter to be procreated of the said marriage, of the sum of 6000 merks, Scots money, and that within year and day of her marriage, with 1000 merks of liquidate penalty, in case of failyie : together with the due and ordinary annualrent of the said principal sum, yearly and termly, during the not payments thereof, after the same falls due, providing, notwithstanding, that, if the said eldest or only daughter of the said marriage shall marry without the consent of the heirs-male of the said William M'Kenzie of Balmaduthy, and Alexander Mathieson of Benagefield, first obtained thereto,—the said provision to the said daughter shall, and hereby is declared to be restricted to the sum of 3000 merks only ; and which previous consent is to be expressed by the said heirs-male their being subscribing witnesses to the said daughter's contract of marriage, or by some other deed in writing, in case they cannot conveniently be present on subscribing the said contract.