

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.*