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.

In 1754, Margaret Mathieson, daughter of John, was married to Andrew Miller. At that time, Alexander Mathieson, her grandfather, was dead, but both her father and mother were alive. The father of the bridegroom and the father of the bride were parties to this antenuptial contract of marriage. By it John Mathieson became bound to pay to Andrew Miller, his heirs, successors, and assignees, in name of tocher, the sum of 3000 merks at Martinmas 1754. In this contract there is no reference made to the contract 1730, nor any general discharge of provisions.

At that time the heir-male of Balmaduthy was a minor. The next immediate heir-male was absent from Scotland, but the heir-male next to him signed witness to the contract. It is to be observed, that Balmaduthy, on his attaining majority, ratified the marriage 1754, as that seemed to be required by the marriage-contract 1730. After the marriage 1754, Elizabeth M'Kenzie died, leaving issue four daughters, whereof Margaret was the oldest.

Margaret Mathieson, with concourse of her husband, brought an action against her father, John Mathieson, concluding for payment of the 6000 merks provided by the marriage-contract 1730, to the *eldest or only daughter*.

Lord Kennet, Ordinary, took the debate to report.

ARGUMENT FOR THE DEFENDER:—

The pursuer, as *eldest* daughter of the marriage, has no right to 6000 merks, for she is not only daughter also. The 6000 merks were intended for the whole female issue of the marriage, and not for the *eldest* daughter alone.

The words, *eldest or only*, are in the marriage contract considered as synonymous. The whole female issue were intended. Thus, by an after clause, in the event of an heir-male of the marriage succeeding, mention is made of the *eldest or only daughter*, and the defender is taken bound to educate the *eldest* or only daughter according to her degree.

As a father is naturally bound to aliment the younger daughters as well as the eldest, the word *eldest* and the word *only* must have the same meaning; and the sense is, that, although there be but one daughter, she should be entitled to the whole 6000 merks; but, if there more than one, the eldest could not in any just construction carry off the whole.

There is no example of a marriage-contract whereby a large provision was settled to the eldest daughter and nothing to the younger daughters; more especially when the eldest daughter is not to succeed to any land estate.

As there are four daughters of that marriage, and a son and a daughter of another marriage, if the eldest draws 6000 merks, the younger children cannot be provided at all out of so small an estate. The 3000 merks, which she has already received, is her full proportion.

But, *2dly*, Supposing her a creditor for the 6000 merks, yet she cannot demand it, by reason that that sum was granted under a condition which has not existed. The contract 1730 provides, "that, if the *eldest*, or only daughter of said marriage, shall marry without the consent of the heirs-male of the said William Mackenzie 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 at subscribing the said contract.

Now the heir-male of Balmaduthy did not adhibit a previous consent; and, though the defender consented, yet his consent must be understood as implying that the 3000 merks was to be in full of every provision.

The terms of the provision must be strictly interpreted, as the tendency of the present claim is to carry off a much larger sum than was meant to be bestowed on the pursuer.

Thirdly, The 3000 merks given in her marriage-contract 1754, must impute *pro tanto in pay* of the 6000 merks. It is a rule universally established, that *debitor non presumitur donare.* See *Dict. tit. Presumption*, § 2, *p.* 146; and if the father was a debtor to his daughter in the provision of 6000 merks, he must be understood to have advanced the 3000 merks as a partial payment.

ARGUMENT FOR THE PURSUER :—

As to the *first* defence, the construction put upon the marriage-contract is contradictory to the words there used. The word *eldest*, and the word *only*, can never be synonimous, for eldest supposes that more than one do exist. The idea of primogeniture runs through the contract; in it no provision is made for younger sons more than for younger daughters.

As to the *second* defence, the heir of Balmaduthy did not previously consent, because at the time of the marriage he was a minor. It could never be the intention of parties that Margaret Mathieson should marry without a portion, in case the heir-male of Balmaduthy was a minor. All was done that could be done. The heir-male of Benagefield, the father, consented. The nearest heir-male of Balmaduthy, who could consent, signed witness, and the heir-male himself consented as soon as he could.

As to the *third* defence, the maxim, *debitor non presumitur donare*, does not apply; for, in 1754, the marriage-contract 1730 still subsisted, and an heir-male of that marriage might exist, so that it could not be known whether Margaret would ever have right to the 6000 merks. Her claim was uncertain and eventual; the provision of 3000 merks could not be a payment; for payment cannot be presumed when there was no *jus exigendi:* If it was not payment, it was a donation; and, if it was once a donation, no after event could change its nature.

On the 20th November 1766, the Lords found that the pursuer was a creditor for the 6000 merks. But found, that the 3000 merks provided in the marriage contract 1754 must impute in payment thereof.

Act. A. Crosbie. *Alt.* C. Gordon. *Rep.* Kennet.

OPINIONS.

GARDENSTON. The *eldest* is as well entitled as the *only*. The consent of the heir-male was not necessary here. The father might have dispensed with this stipulation. He did what was equivalent, by consenting to the marriage-contract of his daughter. The 3000 merks must be imputed.

PITFOUR. The 3000 merks must impute, notwithstanding the critical argument in the information for the pursuer. A wife may be supposed physically capable of heirs-male of her body, while at the same time there is no probability of such event.

PRESIDENT. The deed most inaccurate. Failing sons of the marriage, it was reasonable to provide one daughter: no example of settling a provision upon an eldest daughter.

KAIMES. Doubts as to the consent of the heir-male. If the first claim is to be interpreted literally, why not the second? (*i. e.*) I presume, if the L.3000 merks are to be held as additional, and not to impute to the part payment of the 6000, because it is not so said unequivocally; why not also, as the heir-male of M'Kenzie of Balmaduthy, did not actually consent before the marriage of the eldest daughter, take from her the 6000 merks which had been provided to her upon *that* and another condition.

1766. *November* 21. WILLIAM BUCHANAN *against* JOHN CLARK.

RUNRIDGE.

The Act 1695 *found* not to apply where the fields required to be divided amounted to Thirteen Acres.

[*Faculty Collection, IV.* 83; *Dictionary* 14,142.]

THE twenty-shilling lands of Little Udston belong to Buchanan and Clark; 56 acres to Clerk, 55 and some fractions to Buchanan.

The several fields and acres belonging to each lie not contiguous, but intermixed. The infield land consists of about 12 narrow small fields, containing from four to one acre each. Of them seven belonged to Clark, five to Buchanan.

The outfield land consists of two fields, 13 and 29 acres, and of a field of 41 acres. The former two belonged to Clark, the last to Buchanan.

The field of 41 acres, marked G. in the plan, lies between the fields of 29 and 13 acres, marked in the plan V. T.

Clark insisted, in an action before the Sheriff of Lanark, upon 41st Act Par. 1, Car. II, setting forth that he was about to inclose the fields of 29 and 13 acres, and concluding that Buchanan should be at equal charge with him in making a march dyke to park their inheritances.

On the other hand, Buchanan insisted, in an action before the Sheriff, subsuming that the parcels G. V. T. fell within the statute 1695, and concluding to have them divided.

On the 8th November 1765, the Sheriff found that the ground craved to be inclosed by Clark does not fall within the Act made anent runrig, and that Buchanan is liable in the one half of the expenses of properly inclosing the