No 50.

had been ever so many daughters, they would have got no more, though in the event there happened only to be one who had a right thereto: And, if the intention had been that the provision should only be payable by the collateral heir-male, the sum would have been made payable upon the succession's opening to him, instead of which it is made payable upon the Captain's decease; which shows he meant the provision should be effectual, even though he left a son, in which case the daughters could not be 'heirs-female' in a proper sense.

THE LORDS found, That, by the conception of the clause in the tailzie, whereby the heirs of entail were obliged to pay to the tailzier's daughters and heirs-female, one or more, the sum of 10,000 merks, Helen Hamilton, the only daughter of the maker of the entail, was entitled to the provision, in the event which happened of the tailzier's own son succeeding to the estate, as well as she would have been entitled to the said provision if the estate had devolved upon the collateral heirs of entail.

N. B. The above interlocutor was reclaimed against.

Fol. Dic. v. 3. p. 124. C. Home, No 237. p. 384.

No 51.

A person in a post-nuptial contract of marriage, burdened his heir male with provisions to *his daughter or heir-female*. Found, that the term *heir-female* was mere exegetic, and did not comprehend a son's daughter.

1747. *July* 1. EWING *against* MILLER.

IN a post-nuptial contract in August 1699, between Thomas Whitehill, *alias* Ewing, of Keppoch, and Sarah Gordon his spouse, Whitehill obliged himself to provide and secure the heir-male of the marriage in the fee of the L.5 land of Keppoch, *&c.*; and in case there should happen to be no heir-male of the marriage, but one daughter or heir-female, he bound himself and the heir-male succeeding to him in the said lands to pay to the said daughter or heir-female 3000 merks; and in case there should happen to be two or more daughters (without repeating the exegetic *or heirs-female*) to pay to the said daughters L. 3000.

Of this marriage there were two sons and one daughter, all of whom predeceased the father without male issue; but the second son left a daughter Sarah, and the daughter left a son.

The father Thomas being under no restraint as to the settlement of his succession by the failure of the issue male of his body, settled his estate on Thomas Miller his grand-child by his daughter, and gave a bond of provision for for 1000 merks to Sarah the daughter of his second son. With this, Sarah not contented, pursued the disponee Thomas Miller for the sum of 3000 merks, to which she laid claim as the daughter or heir-female of the marriage, to whom 3000 merks was provided by the contract of marriage; for, though not the immediate daughter, she was the only daughter or heir-female existing at the father's death, and as *filii appellatione omnes liberi intelliguntur*, so in many cases, particularly that of the tailzie of Kinfawns, the term *daughter* was extended to grand-children. *See* TAILZIE.

No 51.

But the LORDS found, 'That the provision in favour of the daughter of the marriage did not comprehend a son's daughter, and assoilzied.'

The will and intendment of parties is the governing rule in all questions of this kind; and though in settlements of estates on the daughters or heirs-female of a marriage, daughters of a son are understood to be comprehended, yet in provisions to daughters of a marriage on failure of heirs-male, as the addition of heirs-female is frequently used, though improperly, as in law-stile there can be no heirs-female where there is an heir-male of the same marriage, it is considered as no other than synonimous with the word *daughters*; and the circumstances of the case were thought to confirm that construction.

Fol. Dic. v. 3. p. 124. Kilkerran, (PROVISIONS TO HEIRS AND CHILDREN.) *No 9. p. 462.*

1751. *November 29.* JOHN FIFE *against* The LADY NICOLSON.

No 52.
A man gave his daughter a bond of provision for 3000 merks, in full of all she could claim as legitim, or any other way. He was afterwards pursued for the sum of 2000 merks, left to his daughter by her grandfather; and it was urged, that the bond of provision was only in lieu of whatever she could claim as child of her father. The Lords rejected her claim.

JOHN FIFE, as assignee by Magdalen Scot his wife, pursued the Lady Nicolson, as representing Sir James Nicolson her husband, for 2000 merks Scots, assigned to the said Magdalen Scot, by Sir John Lauder of Fountainhall, her grandfather; for which sum she was confirmed executor-creditor to him; and the same given up in inventory, by Thomas Scot of Maleny, her father, and administrator in law, who was alleged to have intromitted therewith; and in which confirmation Sir James Nicolson was cautioner.

THE LORDS, as is observed 6th February 1750,* found, That Sir James Nicolson was cautioner in the confirmation for Scot of Maleny, the administrator in law.

Pleaded further for the defender, Maleny gave his daughter a bond of provision for 3000 merks, in full of what she could any ways ask or claim of him as legitim, or any other manner of way whatsoever, of which she accepted and has recovered payment.

Answered, The provision was in lieu of all she could claim as a child; not of any debts her father might be owing her. Maleny, by the tailzie of his estate, had power to burden it with four year's rent to his younger children, to whom he granted bond for 23,000 merks, dividing the same among them, and thereby giving this 3000 merks to Magdalen, in full of all they could ask; so that he was not discharging any obligation upon him.

Replied, Maleny had no other fund but this faculty to provide his children; which it was not his purpose wholly to exhaust, or to divide among them; for, estimating his estate at 6000 merks, he gave them only 23,000; whereas he might have given them 24,000 merks; and his eldest daughter being provided, he past her by.

* D. Falconer, v. 2. p. 145. *voce* TUTOR and PUPIL.