No 53.

'of the present marriage, with annualrent; and, in the mean time, to educate 'and entertain the said daughters.' It is declared 'that these provisions shall 'be in satisfaction of portion natural, bairns part of gear, and other benefit 'whatever which the daughters as heirs of line, or any other manner of way, 'may claim through the decease of their father and mother, or as heirs of line 'to any of their predecessors.'

There being two sons and one daughter of this marriage, the estate was forfeited to the Crown by the attainder of the youngest, to whom the succession 'opened by the death of his elder brother. Lady Mary the daughter put in her claim for the 40,000 merks provided to her by the said contract of marriage. The answer was, that it is extremely unusual to provide daughters in a contract of marriage, unless where, by the defect of the male issue, the estate goes to a collateral heir-male: That in all cases where a provision is intended for the younger children of a marriage to take place in all events, no distinction is made between males and females; nor is there any reason for making a distinction: That, in the present case, the inductive cause of the provision being, that the estate was tailzied to heirs-male, and the provision itself being to females, make it evident that the provision was only intended to take place failing issue male of the marriage; and therefore, that this must be understood a conditional provision, which is not purified by the existence of the condition.

It was *replied* for the claimant; That the provision being clear, and conceived in absolute terms, is the best evidence, or rather the only legal evidence, of the intention of the granter; and whatever may be one's private conviction, judges cannot take upon them to give another sense to words than they naturally bear; especially when the natural import makes a rational and consistent deed, though a little out of the ordinary channel. For if judges were to give themselves such a latitude, they might come at last to make every man's testament for him, in place of interpreting it.

It carried by a narrow plurality to sustain the claim.

Reversed in the House of Peers.

In this case, it was certainly not the intention of the contractors to provide any sum to daughters, if the estate should be inherited by a son of the marriage. And words beyond intention are not binding in law.

Fol. Dic. v. 3. *p.* 301. *Sel. Dec. No* 16. *p.* 18.

1794. *February* 14.

WILLIAM and PETER ROUGHEADS *against* MARION RANNIE, and Others.

No 54.
A father having granted a provision to his son, and

WILLIAM CRAIG, by a holograph settlement, containing several ambiguous and contradictory clauses, and proceeding upon the narrative of love and affection to his wife and children, conveyed to them *nominatim*, and in the

No 54.
declared, that in case of his dying in minority, and without lawful children, he should be succeeded by his sisters, "or such of them as should then be in life;" and the son having died in minority, and unmarried, his nephew, by a sister who predeceased, was found entitled to his mother's share.

different proportions therein mentioned, his whole heritable and moveable property.

The deed declared, that Marion Rannie, his wife, should have the liferent of part of the subjects; that the provision of Archibald his son should descend to his heirs, executors and assignees; and besides the provisions which the daughters (who were five in number) were to enjoy immediately upon their father's death, it contained, in a subsequent clause, the following substitution in their favour: 'To my said five daughters, or such of them as shall be in life, my 'whole heritage and moveables, at the decease of my said wife and son, and 'longest liver of them two, if my said son die in minority, and without lawful 'children.'

The children, at the date of the settlement, were all minors, and unmarried.

Archibald died in minority, and without issue.

Jean, one of the daughters, who was married after her father's death, died before her brother.

William Roughead, her son, and his father, as his administrator in law, brought an action against the grandmother and surviving aunts, claiming, *inter alia*, the share of Archibald's succession, which his mother would have been entitled to had she survived him; and

Pleaded; If it had not been for the clause of substitution in favour of the daughters, the pursuer would have been entitled, *jure representationis*, to a share of his uncle's heritable succession; and there is no reason to presume that its object was to exclude their children.

Besides, it is a general maxim of law, that when a father grants provisions to his children, without mentioning their heirs, and appoints substitutes to them, the substitution takes place only *si instituti sine liberis decesserint*. The object of such provisions, is to enable the children to settle in the world; and as it would be contrary to the natural feelings of a father, the law, unless it is expressly declared, will not presume an intention on his part to exclude their descendents, Erskine, b. 3. tit. 8. § 46.; Kilk. Clerk Home, 21st November 1738, Magistrates of Montrose against Robertson, No 50. p. 6398.; 20th December 1758, Yule against Yule, No 51. p. 6400.; 26th June 1789, Wood against Aitchison, *voce* Provision to Heirs and Children.

Answered; It seems to have been the intention of the testator, that his son should, at his majority or marriage, have the free disposal of his property; but that, if he died before either of these events took place, such of his daughters as were then in life, to the exclusion of the descendents of those who had predeceased, should succeed to him.

At any rate, as the deed limits the substitution to such of the daughters as should be alive at their brother's death, effect must be given to it, even though there were reason to believe that this was not the intention of the testator;

Judgment of the House of Peers 26th March 1770, Baillie against Tenant, *voce* SUCCESSION; July 1778, Hay against Hay *. No 54.

The Lord Ordinary sustained the defences; but the Court, after advising a reclaiming petition and answers, upon the general ground above stated, almost unanimously gave judgment in favour of the pursuers.

Lord Ordinary, *Henderland*. Act. *Charles Brown*. Alt. *Wolfe Murray*.
Clerk, *Sinclair*.

D. D. *Fol. Dic. v.* 3. *p.* 301. *Fac. Col. No* 104. *p.* 232.

* Not reported.

Clauses when understood conditional, when simply mutual. See MUTUAL CONTRACT.

Legacy, where heirs are named, whether it falls by the predecease of the legatee. See SUBSTITUTE and CONDITIONAL INSTITUTE.

See CLAUSE.

See APPENDIX.