No. 50. heritable subjects in favour of a man and his heir; so that the defender's argument upon the alleged nature of substitutions was erroneous, and did not touch the question.

The Lords adhered.

Lord Ordinary, *Monboddo.* Clerk, *Ross.*

For Gabriel Campbell, *Rae.*
For Elizabeth Campbell, *Elphinston, Ilay Campbell.*

Fac. Coll. No. 52. p. 147.

1774. *June* 22.

JOHN MURRAY, Sailor in Alloa, *against* ALEXANDER FLINT.

No. 51.
Import of the word *heirs* substituted to the children *nascituri* in a settlement in a marriage-contract, upon a competition for the succession, on the failure of such children, between the person claiming as nearest heir to them, and the father's heir of line.

John Murray, merchant in Alloa, was twice married; first, to Jean Finny, by whom he had two sons, John and James; and, secondly, to Margaret Lindsay.

John Murray was proprietor of, and stood infeft in, certain tenements in Alloa; and, by contract of marriage, entered into upon the 6th March, 1733, between him and Margaret Lindsay, his second wife, disponed " to her, her heirs, executors, or assignees, in life-rent, and to the child or children, one or more, of the intended marriage, equally amongst them, their heirs or assignees, in fee or property, the half of these tenements, reserving to himself the life-rent thereof; and providing, that in case there should be no child or children of that marriage existing at the death of him, the said John Murray, then the subjects so provided should return to, and be at the disposal of, his nearest and lawful heirs and assignees; and the said John Murray bound himself and his above written, to grant a valid disposition and assignation of the above subject, in the terms above specified, to the said Margaret Lindsay, and the child or children of the said marriage.

Of this marriage there were two sons, viz. Charles, the eldest, who predeceased his father, and Peter, who survived him, and died only about six years ago, but without making up titles in his person to any of the subjects provided by the foresaid marriage-contract, and without issue.

John, the eldest son of the first marriage, died, leaving a daughter, Mary, who intermarried with Alexander Flint.

As no infeftment had followed upon the marriage-contract, so the foresaid subjects did, by the last investiture thereof, stand in the person of John Murray, devised to him and his heirs whatsoever; and as Mary Murray, his grand-daughter by his eldest son of the first marriage, was heir under that investiture, so she made up titles thereto, as heir to her grandfather, by a precept of *clare* and infeftment; and the feudal right of the subjects being thereby vested in her person, she, by settlement, executed with consent of her husband, for love and favour to him, and in consideration of his having paid a debt affecting the heritable sub-

jects belonging to her, and for several other onerous causes and considerations, disponed these subjects in favour of herself and her husband, and longest liver of them two, in conjunct fee and life-rent, and to the child or children procreated, or to be procreated, equally betwixt them, in fee; whom failing, or not existing at the dissolution of the marriage, to the said Alexander Flint, his heirs and assignees. Upon which disposition infeftment was taken; and the said Mary Murray afterwards died, without issue. No. 51.

James Murray, second son of the said John Murray, by his first wife, having obtained himself served heir of provision to his father, and John Murray, sailor in Alloa, his son, having procured himself served and retoured heir in general to his father, in order to carry the personal right to the foresaid subjects, as established by said contract, brought an action against Alexander Flint, concluding to have the foresaid disposition, granted by Mary Murray to her husband, set aside; and to have it found and declared, that the pursuer, as heir called to the succession under that contract, had the only undoubted right to the subjects thereby provided.

Pleaded for the defender: That the pursuer has no right to quarrel the deed in question, as not being called, by the above-mentioned contract of marriage, to succeed as heir to his grandfather in the subjects provided to the children of that marriage, in the character of heir of provision to him.

It could by no means be in the view of parties, when the above-mentioned contract was entered into, to create any other heirs of provision to John Murray, the proprietor of both halves of these subjects, in the half thereof so provided to the children of the second marriage, than these children themselves; and, therefore, the word "heirs" therein expressed, upon which word alone the pursuer's claim depends, can only be meant the heirs succeeding in the right of these children, or, in other words, the heirs of such of these children as had properly established in their person a right to these subjects, which it is not pretended any of them ever did.

For elucidating the intention of the parties with regard to the present question, it was observed, 1*st*, That the object in their view could only be to provide for the children of the second marriage. If ever, in virtue thereof, there came to be a right established in the person of any of these children, that right naturally fell to the heirs of these children; and, therefore, it was proper, at least not improper, to mention their heirs; but in case the children of that marriage should fail, without making up a title to the subject so provided to them, it was quite foreign to the purpose of a contract of marriage to call in any other persons to succeed in the character of heirs of provision; and, in the next place, the defender founded upon different other clauses in the same deed, as favourable to the construction contended for by her, viz. that, in the present case, the natural meaning of the word "heirs" is the heirs succeeding to the children of the second marriage, in the right once established in them.

Answered: The cause resolves into this simple qestion, Whether, failing issue of the foresaid marriage, the succession devolved upon the person who was near-

No. 51. est heir to the children, or upon the heir of line of the father?—This question must depend upon the construction of the settlement, and it is impossible to put another coustruction upon it than that, failing the children, the nearest heirs of the children are called to the succession. The pursuer does not pretend to say that his father could take any thing in the right of his brother Peter, who never had made up titles, but died in a state of apparency; and it is no doubt true, that the subjects must be taken up as heir to the person who was last in the right. At the same time, the pursuer's plea is very plain and simple: He contends, that, failing the children, the heirs of the children are, by the marriage-contract, called to the succession; and, therefore, the pursuer's father, who was undoubtedly the heir *designativè* of his brother Peter, was, upon Peter's dying without issue, entitled to take up the subjects, by a service, as heir of provision under the marriage-contract, not to Peter, in whom no right was ever vested, but to his father, who stood vested in the fee of the provision.—Bankton, vol. 2. p. 339. § 54.—Dirleton's Doubts, Tit. De feudo pecuniæ et nominum, Quæst. 12.

It is inconceivable how the substitution should be affected by the heir's making up his titles, or by possessing only upon the apparency. If Peter had indeed made up his titles, it behoved the pursuer's father, in place of serving to his own father, to have served to his brother Peter; but as, in both the one case and the other, the succession must be taken up, upon the precise same substitution, the person entitled to take, under that substitution, must be the same, whether Peter had made up his titles or not.

The defender's doctrine, that the substitution in favours of the heirs of the children can only take place in the event of the children taking the succession, and vesting the right in their person, has no foundation in the law of Scotland. It was at no period of our law ever made a doubt, that the substitute was entitled to take up the succession, upon the failure of the institute, in the case where titles had never been made up in the person of the institute.

In marriage settlements, the chief object of the contract, no doubt, is to make provision for the wife and issue of the marriage; but, at the same time, it was very common, in marriage-contracts, to carry the settlement farther than the issue of the marriage, which, if not altered, the deed must regulate the succession in favours of the extraneous substitutes, as much as in favours of the issue of the marriage.

Lastly, As the words of the deed are, in this case, liable to no ambiguity, it is in vain to have recourse to presumed will or intention. What the parties have expressed must be understood to be agreeable to what they intended.

The Lord Ordinary "sustained the reasons of reduction, and reduced, decerned, and declared, in terms of the libel;" which was adhered to on a reclaiming bill and answers, in respect of the words of the deed being so express, whatever doubt there might lie as to the father's intention in the event that had happened.

Act. *Macqueen.* Alt. *D. Græme.* Clerk, *Ross.*

Fac. Coll. No. 115. *p.* 307.