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.

No 52. THE LORDS sustained the defence, That Magdalen Scot had accepted of her provision. *See* PRESUMPTION.

Reporter, *Shewalton.* Act. *Lockhart.* Alt. *R. Craigie.* Clerk, *Pringle.*
Fol. Dic. v. 3. p. 124. D. Falconer, No 239. v. 2. p. 291.

1763. *June* 16.

JOHN WISHART *against* MR GEORGE GRANT, Minister of the Gospel at Ruthven.

No 53.
A person bequeathed the residue of his effects to the *children* of his two sisters. A grandson of one of the sisters claimed a share. Found, that the legacy was confined to the immediate issue of the two sisters.

ALEXANDER ANNAND, a native of Scotland, went to Pensylvania when very young, and, after remaining there many years, executed a testament, in which, after bequeathing to Elizabeth Annand, his brother's daughter, and, in case of her predeceasing him, to the surviving children of his sisters Anne and Barbara, the sum of L. 30; and, after leaving several other special legacies, he added a clause in these words: 'And, if there be any thing remaining, after my just 'debts, funeral-charges, and legacies are paid, I give and bequeath the remain-'der to the children of my sisters Anne and Barbara.'

Anne, the testator's eldest sister, had, by Alexander Hamilton her husband, issue, two daughters, Janet and Elizabeth, who were both alive at the time of their uncle's death, which happened on the 7th of September 1754.

Barbara, the other sister, who was married to Harry Wishart, had also two children, Harry and Isobel. Isobel was alive at the testator's death; but Harry had died before the testament was executed, leaving issue, one son, John Wishart.

The executors having remitted the residuary effects to Scotland, John Wishart claimed a fourth part in right of his father; upon which a question arose between him and Mr George Grant, who had acquired right to Elizabeth Hamilton's proportion, and was also empowered, by Janet Hamilton and Isobel Wishart, to receive their shares.

Objected by Mr Grant to John Wishart's claim; That his father having died even before the will was made, the residue of the testator's effects fell to be divided among his three nieces, who were the only surviving children of his sisters Anne and Barbara.

Answered for John Wishart, *1mo*, The term *children* is by no means limited in its signification to a person's immediate issue, but, according to the best authorities in the English language, comprehends more remote descendants; *2do*, By the Roman law, grand-children are uniformly held to be comprehended under the general term *children*, when no particular person is pointed out; *L.* 220. *ff. de Verb. Signif.* Nay, in favourable cases, the term *son* was so interpreted as to include *grandson*; *L.* 201. *ff. eod. tit.*; *3tio*, There is nothing in the will tending to shew that the testator meant to confine his bounty to the immediate issue of his two sisters; and, as he had been abroad upwards of 30 years,