No 51.

For, *1mo*, It supposes the case of an universal *fideicommiss.* to restore the whole succession settled by the granter to a collateral relation, in case of the decease of the heir, or other person *honoratus.* There the condition, *si sine liberis decesserit*, has been implied, because it was thought the testator would not have tied him to give up the whole succession, if he had foreseen the event of his having issue of his own body. Whatever reason there may be for this presumption in an universal succession, it would be taking too much liberty with the express wills of defuncts, to imply such condition in every special legacy, and thereby to interpolate substitutes whom the testator has not called.

2do, It is agreed upon, in the construction of this law, that the implication only takes place when the event was unforeseen by the testator. For instance, if there were children existing at the time, they will not be understood to be *in conditione positi*, if they were not named; for the law will not interpolate, in a settlement, heirs whom the testator had in his eye, and did not think fit to give a place to in it; Vot. Tit. *D. Ad senatusconsult. Trebellian.* § 18. And, for the same reason, where the children are afterwards born during the testator's life, and he makes no alteration of the substitution in their favour, the presumption is, that he meant the destination to subsist in the terms it was expressed; Bankton, v. 1. p. 227.

THE LORDS found, that Joseph had a right to the bonds.

Act. *J. Dalrymple, Lockhart.* Alt. *Montgomery, Miller, Ferguson.*

J. D. *Fol. Dic. v. 3. p. 300. Fac. Col. No 150. p. 267.*

1760. *July* 30. Next in Kin of ISOBEL WATT *against* ISOBEL JERVIE.

No 52.
A settlement by a man, of his whole effects, on his wife, is not voided by the unexpected birth of a child, who lives but a few months.

IN the contract of marriage betwixt William Watt and Isobel Jervie, she was provided to an annuity of 200 merks, and the children to 6000 merks. William Watt, some years after his marriage, having no children, made a settlement of the whole effects, heritable and moveable, which should belong to him the time of his death, upon his wife Isobel, but reserving a power to alter. At the death of William Watt, which happened about seven months after, his wife was near her time. She produced a female child, who lived but a very few months. The next in kin of the infant, believing that the settlement in favour of the relict was *ipso facto* voided by the existence of the child, brought a process against Isobel Jervie to account to them for her husband's moveables. Isobel Jervie was assoilzied upon the following ground, The settlement in her favour is effectual at common law. It was even effectual at common law against the posthumous child; and that child had no relief against it but in a court of equity. But a court of equity never declares void what is good by the common law. It only gives relief against such a deed as far as necessary to fulfil the rules of justice. Applying this principle to the present case, it is in the *first*

No 52.

place uncertain, whether the granter might not intend that the settlement should be effectual, even upon the supposition of a posthumous child. He must have known his wife's pregnancy, as in fact she was delivered no later than five weeks after his death. He had an opportunity to make an alteration; and since he did not alter, it has a strong appearance that he did not intend to alter. *2do*, It is not likely, at any rate, that he intended an alteration in the case which happened of the child's living but a few months; for, in that case, the child was not in any degree hurt by the settlement. *3tio*, Supposing an intention to alter in that case, yet this supposed intention could not have the effect to void the settlement *ipso jure*. It could only have the effect to privilege the child in equity, to bring a reduction of the settlement; and as this was never attempted, the settlement must stand good. See January 7. 1762, Jervey *contra* Watts, *voce* LEGITIM.

Fol. Dic. v. 3. p. 301. Sel. Dec. No 167. p. 228.

*** See Oliphant, 19th June 1793, *voce* IMPLIED WILL.

SECT. X.

Intention presumed contrary to words.

1752. *July* 10. Lady MARY DRUMMOND *against* The KING.

No 53.
By a clause in a marriage contract, a provision is stipulated to a daughter, in the event of no male issue of the marriage. The estate was forfeited in the person of the second, and only surviving son. The provision was found not to take effect.

IN the contract of marriage betwixt James Lord Drummond and Lady Jean Gordon, *anno* 1706, the estate of Perth is provided to the heirs-male of the said marriage; whom failing, to Lord Drummond's heirs-male of any other marriage; whom failing, to the heirs-male and of tailzie contained in the infeftments of the estate. And the contract contains the following clause in favour of daughters: 'And seeing the Earldom of Perth is tailzied to heirs-male, so 'that if there be daughters of the said marriage they will be secluded from the 'succession; therefore the said James Lord Drummond binds and obliges him 'and his heirs to pay to the said daughter or daughters the sums of money fol'lowing, viz. if there be but one daughter, the sum of 40,000 merks; if two, '&c. to be divided amongst them as their father shall think fit; obliging him 'to pay the said respective sums to the daughters at their ages of 18 years 'complete, or marriage, which of them shall first happen after the dissolution