

July 1677, *Carnegie contra Smith*, *IBIDEM*; 29th January 1678, *Stewart contra Stewart*, No 4. p. 12842.; 17th February 1736, *Ranken contra Ranken*, *voce SUCCESSION*; 13th February 1768, *Kemp contra Kemp*. * But the majority of the Judges were of opinion, that the question fell to be determined by the meaning of parties as expressed in the deed; and as that meaning was sufficiently clear, they did not think themselves at liberty, from the authorities of lawyers and decisions which the parties had never heard of, to give it any other explanation

No 9.

The following judgment was given 1st December 1769: "In respect it appears from the conception of the several clauses in the contract of marriage, that the whole provisions in the contract were intended to be in favour of the whole children equally, and the whole subject to the power of division by the father; and failing of him by the nearest of kin; find, That the whole subject must be divided equally amongst the whole children of the marriage." And upon advising a petition and answers, they adhered.

Lord Ordinary, *Pitfour*. For the Pursuer, *Crosbie*. For the Defender, *Lockhart, J. Graeme*.
Clerk, *Gibson*.

R. H.

Fac. Col. No 5. p. 12.

S E C T. II.

Import of a Provision to be a Bairn in the House.

1619. February 14. M'MATH against M'CALL.

MARGARET M'CALL and her spouse pursue Patrick M'Call her brother, executor to John M'Call their father, and M'Call her other brother, and heir, for his interest, for payment to her and her spouse of the equal half of the goods in their father's confirmed testament, and for the half also of the bonds libelled due to her father, and assigned by him to Patrick, whereto Patrick has right as executor or bairn; *hoc medio*, because their father by his bond was obliged, his heirs and executors, to make her at his death as meikle of his gear as any of his two sons, and should noways defraud her thereof, and that she

No 10.

A bond to a married daughter, bearing that she should have as much of her father the granter's gear, at his death, as the rest of the children,

* Not reported.

No 10.
found to bind another child who was left executor, although he was assigned to a bond by his father, inhibition having been served before the assignation.

should be equal portioner with his two sons. *Alleged*, By the bond she has no right but to such gear as he had the time of his decease, and it is confessed by the summons, that before his decease he had assigned the bonds libelled to Patrick. *Replied*, Oppones the bond and inhibition thereon, before the assignation. Repels the allegiance, in respect of the reply.—In that same case, defalcation of debts and legacies left to relict bairns and oyes, but only to strangers. *Alleged*, Defalcation of sums paid, given up by the heritor, owing to the persons specified in the testament, and of sums left in legacy, which debts and legacies he has paid. Find the allegiance relevant for the debts and legacies left by John, and contained in his confirmed testament, to infer allenarly defalcations of such debts and legacies as are left therein to strangers, noways of legacies left therein to the relict bairns and oyes.

Clerk, Hay.

Fcl. Dic. v. 2. p. 276. Nicolson, MS. No 172. p. 122.

1622. February 8.

FINLAYSON against VEITCH.

No 11.
A daughter was in her contract provided to be a bairn of the house at her father and mother's decease. This was found to comprehend her portion-natural and her share of the dead's part.

JANET FINLAYSON, daughter to umquhile Adam Finlayson, being married upon one Veitch, the said Adam obliged himself by contract, that the said Janet, notwithstanding of her forisfiliation, should have her bairn's part of gear and portion-natural, with the remnant of his bairns the time of his decease, and of Elizabeth Wallace his spouse; whereupon the bairns of the said umquhile Janet Finlayson being decerned executors to their mother, who died after the decease of Adam her father, pursue the said Adam's executors for payment of her portion-natural belonging to her, as one of the defunct's bairns, and also for her part of the dead's third, who died intestate, and, consequently, claiming her part of the said defunct's third to be divided betwixt her and the rest of the defunct's bairns. Against which the defender *alleged*, That the foresaid clause of the contract gave her right only to the portion-natural, and could not be extended in her favour for any of the dead's part, which behoved totally to pertain to the bairns unforisfiliated the time of the father's decease, who of the law only were his executors; seeing the pursuer Janet could not be his executrix of the law, being then forisfiliated, as said is, at his decease. And as to the provision of the contract, he *alleged*, That by the express words thereof above written, the pursuer had right allenarly to the portion-natural, which excluded her from all benefit of the dead's part. The pursuer *replied*, That she behoved to have both a portion-natural and a part of the dead's third, seeing the contract appoints, that she should have a bairn's part and portion-natural with the rest of the bairns, notwithstanding of her forisfiliation; which clause gave as much right to the pursuer of the defunct's goods as the rest of the bairns