

S E C T. IV.

Import of a Provision to Bairns beside the Heir.

No 17. 1665. *January 17.* EDGAR *against* EDGAR.

A HUSBAND in his second contract of marriage, obliged himself and the heirs of the first marriage, which failing, his heirs and executors, to pay to his children of the second marriage 4000 merks: The heirs of the first marriage failed: There were two children of the second marriage, whereof one was heir to the defunct: In this case the heir, though a child of the second marriage, was excluded from any share of the 4000 merks. Here the heir of the first marriage was never served heir.

Fol. Dic. v. 2. p. 278.

* * * This case is reported by Stair, Newbyth and Gilmour, No 1. p. 6325., *voce* IMPLIED CONDITION; but, from a subsequent memorandum of the case made by Newbyth, it would appear that the decision had been altered, as follows:

1665. *July 10.*—IN the action Edgar against Edgar, mentioned the 17th January last, (*voce* IMPLIED CONDITION,) the LORDS found that Anna Edgar could only have right to the half of the 4000 merks; viz. 2000 merks in regard of the conception of the words of the contract of marriage, and that there were two elder brothers which were both dead, whose parts did belong to the said David Edgar the defender, who was the person surviving, in whose favour the provision was conceived.

Newbyth, MS. p. 31.

1670. *January 6.*

ELIZABETH and ANNA BOYDS *against* JAMES of BOYD of Temple.

No 18.

In a contract of marriage, the husband bound himself to provide 20,000 merks to the bairns of the marriage beside the heir. There were only two daughters who of-

JAMES BOYD of Temple, in his contract of marriage, and in a bond of provision relative thereto, became obliged to pay to the bairns of the marriage, beside the heir, the sum of 20,000 merks at their age of seventeen years, reserving his own liferent. Elizabeth and Anna Boyds, the only bairns of the marriage, now after their mother's death, and age of seventeen, do, with concurrence of their husbands, pursue their father to employ the said sum of 20,000 merks to himself in liferent, and them in fee. The defender *alleged*, Absolvitor, because the pursuers can have no interest in this provision, being expressly con-