

ferred that it was a tacit ratification of the assignation done by the pursuer's mother.

No 2.

Act. *Peebles, Henderson and Dalry.*Alt. *Hope.*Clerk, *Gibson.**Fol. Dic. v. 1. p. 543. Durie, p. 12.*

** See a similar case, 17th February 1663, Forsyth against Paton, No 6. p. 2941, *voce* CONDITION.

SECT. II.

Who entitled to Legitim.

1622. July 15. JAMES KENNEDY against His FATHER'S RELICT.

No 3.

JAMES KENNEDY executor dative to Robert, his father, pursues his relict for the goods and gear confirmed. She excepts she has retention of the half, because the defunct had no bairns extant the time of his decease, but this pursuer, who is heir, and cannot be both heir and have a bairn's part, and be counted a bairn, to make the testament divide in three, in prejudice of the relict. *Simile*, if there were more bairns nor the heir, and all forisfamiliate but he, the testament would divide in two only. *Ergo*, the like where there is no bairns at all by the heir. *Replied*, the heir is excluded by another, but when there is no other, he is a bairn *et facit partem in testamento*. THE LORDS repell the allegiance, in respect of the libel and reply.

Reporter, *Reidhouse.* Act. *Ayton & Fletcher.* Alt. *Nicolsons, sen. & jun.* Clerk, *Hay.**Fol. Dic. v. 1. p. 543. Nicolson, MS. No 41. p. 22.*

** See a similar case, 12th January 1681, Trotter against Rocheid, No 12. p. 2375., *voce* COLLATION.

1631. June 17. CHAPMAN against GIBSON and FINGASK, her Spouse.

No 4.

THE deceased Thomas Gibson having begotten a daughter, the only bairn of his first marriage, after whose decease, he having married Marjory Murray, his second wife, who dying also before her husband; Chapman, her executor, pursues the bairn of the said first marriage and her spouse, to make payment of the equal half of the goods, which the said umquhile Thomas Gibson had

The husband's children of a former marriage come in with the wife's executors to make a tripartite division.

No 4.

the time of the said Marjory her decease; wherein the Lords found, that the said relict, nor her executors, had no right to the half of the said goods, but only to the third part, seeing there was one bairn living the time of the relict's decease, whereby her husband's gear could not fall in a two-fold division, but in a threefold division. Neither was it respected, as the pursuer replied, that this bairn was not a bairn of the second marriage; and also he *alleged*, that she is that person that is heir, and hath gotten a great inheritance, so that she cannot claim any part of the moveables, being heir by her heirship. This was not respected, for it was found nevertheless, that the testament ought to have a threefold division; and albeit she be heir now since her father's decease, yet her father being then living when Marjory Murray, the second wife, died, she could not be then respected as heir, but as a bairn; for heir she could not be, her father being in life; and seeing there are no more bairns but she, she ought to have a bairn's part also; though it were proper to other bairns, if any had been, to have excluded the heir, as is not in this case. And it being also *alleged*, that by contract of marriage betwixt the said Thomas Gibson and his second spouse, it was provided, that the husband's goods should pertain to him and his executors, and the wife's to her and her executors, and none of them should seek or have right to any of others gear, but to their own allenary; this contract being alleged not to be obligatory to prejudice the defunct, nor her executors, in her part of the husband's goods, because he alleged it to be a contract *contra bonos mores, et contra leges, et consuetudinem patriæ*, and against the right and division of goods, observed ever in this kingdom betwixt man and wife; this allegiance against the contract was repelled, and the contract found good and lawful, and the allegiance thereon sustained.

Act. — —.

Alt. *Craig*.Clerk, *Gibson*.*Fol. Dic. v. 1. p. 543. Durie, p. 591.*

No 5.

1634. July 18. HENDERSONS *against* SANDERS, Minister.

Found in conformity with Chapman against Gibson, No 4. *supra*.

ONE Henderson's Bairns pursuing their mother's second husband, which mother was executrix to her first husband, their father, likeas her second husband was executor to his wife, their mother, for payment to them of their bairn's part of the gear, and of their part of the money pertaining to them, falling by their father's decease, together with the annualrent of the said money continually since the father's decease, and since the time of their mothers intromission therewith; and also for payment of the equal half of the goods and gear contained in their mother's testament, whereto they had right as bairns, and nearest of kin to their mother; this pursuit being moved before the Commissary of Murray, and sentence given thereupon against the defender, viz. the bairn's goodfather, the second husband of their mother, as