

FORISFAMILIATION.

1622. February 1.

SMITH against ELLEIS.

JOHN SMITH and JANET ELLIES convene the executors of umquhile Patrick Elleis, burgess of Edinburgh, to make payment to them of the fourth part of the goods contained in the said Patrick's confirmed testament, by virtue of a clause contained in the said John Smith's contract of marriage, whereby it is provided, that the said Janet shall be a bairn of the said Patrick's house at the time of his decease, and that she should have a portion of the said Patrick's free-gear, with the rest of his bairns, providing that the rest were forisfamiliarated, and provided likewise by their father; against which action it was *alleged*, That absolvitor ought to be granted, seeing, according to the clause of the contract, the pursuer could not subsume, that the rest of Patrick Elleis's bairns were forisfamiliarated before his decease, seeing that there are two of them yet unmarried, and so not forisfamiliarated: And where the pursuer libelled and replied, that the whole bairns were provided to as much lands and goods by the father, before his decease, as surmount the sum given to the pursuers in tocher, it was *answered* by the defender, That that provision was not forisfamiliarating, as the provision of the contract requires in express terms; which can receive no other interpretation, but in case they had been married; neither was that provision given by the father to the saids bairns in satisfaction of all portion which they might acclaim by their father's decease.—THE LORDS repelled the allegiance, and found the summons relevant, albeit the rest of the bairns were not forisfamiliarated by marriage when the father died; and found the provision libelled, made by the father to the rest of his bairns, to as great a quantity as the pursuer's tocher, being proven, to be as sufficient as if they had been forisfamiliarated, and therefore sustained the pursuer's action.

No r.

A daughter, at her marriage, was provided by her father, beside the tocher, 'to be a bairn in the house,' provided all his other children were forisfamiliarated at his death. Found, that two children, who continued to live in the house, and were unmarried at their father's death, but had got as much provided to them as the pursuer's tocher amounted to, were thereby understood forisfamiliarated.

Clerk, Gibson.

Fol. Dic. v. 1. p. 325. Durie, p. 14.