SECT. 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 concourse 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-

No 18.
fered to renounce and betake themselves to the provision. Not permitted.

ceived in favours of the bairns of the marriage, beside the heir; *ita est*, The pursuers are the heirs apparent of the marriage, there being no sons, and will succeed to the estate by the contract, and so cannot demand the provision made to the other bairns; for if there had been a son of the marriage only, he could not have claimed this clause; and the pursuers can be in no better case than he. It was *answered*, That in contracts of marriage, the meaning of the parties is chiefly to be respected, which has been, that in case there were an heir-male, or son of the marriage, this sum should belong to the remanent bairns, and therefore it is conceived under the name of heir in the singular number, and being introduced in favour of the daughters, it ought not to be interpreted against them, but that they may renounce to be heirs, and be satisfied with this provision only; otherwise they may be absolutely excluded, the father's estate being apprised by John Boyd, whose legal is near to expire, and who makes use of the father's name without his warrant. It was *answered*, That law allows not in any contract to make up new clauses; and seeing the provision is express in favour of the bairns beside the heir, it can never quadrate to these pursuers, who are the only heirs.

THE LORDS found the provision not to be extended to the pursuers; but because it was suggested that the father did not propone it, they desired the Ordinary to enquire, whether the pursuit was for the father, and by his warrant, that then they might consider, whether John Boyd, the appriser, could have interest to propone that allegeance.

1671. *December* 20.—By contract of marriage betwixt Boyd of Temple and his wife, the lands of Temple and others are provided to the heirs of the marriage, and there is 20,000 merks provided to the bairns, beside the heir, which the husband is obliged to employ and re-employ for them, reserving his own liferent, whereupon they have obtained decreet against their father for implement; and there being an inhibition upon the contract, they pursue a reduction of certain bonds granted by their father in favour of John Boyd after the inhibition, and of all infeftments following thereupon; who *alleged*, Absolvitor, because the clause in the contract can only take place in case there were bairns beside the heir; *ita est*, There are only two daughters of the marriage, and the wife is dead, which two daughters are not beside the heir, for they are the only two persons who can be heirs of the marriage, and though they have obtained decreet against their father, yet it is clear thereby to be of consent, and that the father disclaimed this defence. It was *answered*, That albeit the clause runs in the terms foresaid, yet contracts of marriage being *optimæ fidei*, must be interpreted according to the meaning of the contractors; and it cannot be thought, that a father who provided this unusual clause in favour of the bairns of the marriage, beside the heir, though there had been an heir who was provided to the estate, that he would not much more have secured that 20,000 merks for all they could claim, both as heirs and bairns; for now the estate is

No 18. apprised, and if this clause have no effect, they will get nothing. It was *answered*, That unusual clauses ought not to be extended, and there is no consequence to make up new articles of a contract, though they were more reasonable than those expressed; and for the clause itself, it can have no doubtfulness, there being a provision of the lands to the heirs of the marriage, and of this sum to the bairns beside the heir, so that the contractor's meaning has still been, that the heir should have the hope of succession, which was much better than this sum at that time, though by accident it may become worse; neither is it of any importance, though the pursuers should renounce to be heirs, because that can never make them bairns beside the heir.

THE LORDS found, That the clause could have no effect, unless there were bairns beside the heir, without prejudice to the decreet against the father, in regard of his consent and disclaiming this defence.

Fol. Dic. v. 2. p. 278. Stair, v. 1. p. 658. & v. 2. p. 28.

*** Gosford reports this case:

BOYD of Temple being obliged by contract of marriage to provide the bairns of the marriage by the heir, each of them to 10,000 merks, his two daughters, after the death of their mother, did pursue their father for securing each of them in 10,000 merks after his decease, and that because his estate was comprised by John Boyd, and the legal thereof near expired. It was *alleged* for the father, That the two daughters being themselves the apparent heirs, could not crave the benefit of that clause of the contract which was conceived only in case there should be an heir, and other bairns by the heir. It was *replied*, That the daughters being now majors, were content to renounce to be heir, and being bairns, had good action to pursue for the benefit thereof.

THE LORDS finding the daughters' case very favourable, and if the legal of their comprising should expire they would be altogether prejudged, both of their portions and of their father's heritage, did recommend to the father and compriser to take some course for selling of the lands, that the comprising might be satisfied, and they secured in the remainder after the father's death; but did incline not to sustain their interest upon the renunciation to be heir in case they had given their interlocutor *in jure* anent the conception of the clause.

Gosford, MS. No 220. p. 88.

No 19. 1695. *February* 19. SHORTS *against* BIRNIES.

RANKIELER reported Shorts in Stirling *contra* Birnies, children to my Lord Saline. THE LORDS found Saline's bairns were but trustees, in case James Short should happen to have children; for James being a prodigal, the mother would