

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.