

No 10.
found to bind another child who was left executor, although he was assigned to a bond by his father, inhibition having been served before the assignation.

should be equal portioner with his two sons. *Alleged*, By the bond she has no right but to such gear as he had the time of his decease, and it is confessed by the summons, that before his decease he had assigned the bonds libelled to Patrick. *Replied*, Oppones the bond and inhibition thereon, before the assignation. Repels the allegiance, in respect of the reply.—In that same case, defalcation of debts and legacies left to relict bairns and oyes, but only to strangers. *Alleged*, Defalcation of sums paid, given up by the heritor, owing to the persons specified in the testament, and of sums left in legacy, which debts and legacies he has paid. Find the allegiance relevant for the debts and legacies left by John, and contained in his confirmed testament, to infer allenarly defalcations of such debts and legacies as are left therein to strangers, noways of legacies left therein to the relict bairns and oyes.

Clerk, Hay.

Fcl. Dic. v. 2. p. 276. Nicolson, MS. No 172. p. 122.

1622. February 8.

FINLAYSON against VEITCH.

No 11.
A daughter was in her contract provided to be a bairn of the house at her father and mother's decease. This was found to comprehend her portion-natural and her share of the dead's part.

JANET FINLAYSON, daughter to umquhile Adam Finlayson, being married upon one Veitch, the said Adam obliged himself by contract, that the said Janet, notwithstanding of her forisfiliation, should have her bairn's part of gear and portion-natural, with the remnant of his bairns the time of his decease, and of Elizabeth Wallace his spouse; whereupon the bairns of the said umquhile Janet Finlayson being decerned executors to their mother, who died after the decease of Adam her father, pursue the said Adam's executors for payment of her portion-natural belonging to her, as one of the defunct's bairns, and also for her part of the dead's third, who died intestate, and, consequently, claiming her part of the said defunct's third to be divided betwixt her and the rest of the defunct's bairns. Against which the defender *alleged*, That the foresaid clause of the contract gave her right only to the portion-natural, and could not be extended in her favour for any of the dead's part, which behoved totally to pertain to the bairns unforisfiliated the time of the father's decease, who of the law only were his executors; seeing the pursuer Janet could not be his executrix of the law, being then forisfiliated, as said is, at his decease. And as to the provision of the contract, he *alleged*, That by the express words thereof above written, the pursuer had right allenarly to the portion-natural, which excluded her from all benefit of the dead's part. The pursuer *replied*, That she behoved to have both a portion-natural and a part of the dead's third, seeing the contract appoints, that she should have a bairn's part and portion-natural with the rest of the bairns, notwithstanding of her forisfiliation; which clause gave as much right to the pursuer of the defunct's goods as the rest of the bairns

had, and as if she had been *in familia*: And it is true, that the rest of the bairns had both a portion-natural and a part of the defunct's third, he dying intestate; *ergo*, &c. THE LORDS repelled the allegiance, and found, that the clause of the contract gave the pursuer right both to the portion-natural and to a part of the dead's third, in respect of the clause in the said contract, which appointed her to have her bairn's part and portion-natural with the rest of the bairns, as if she had not been forisfamiliated, which the LORDS found comprehended the defunct's third, as well as the portion-natural: Sicklike the LORDS found, that the same parts were due to the pursuer, at the decease of the father, albeit the clause of the contract was conceived in these terms, viz. that the said Janet should have the said bairn's part at the decease of her father and mother, and that the defender alleged that the pursuer could not seek the same while the mother were dead, who was then living; which allegiance the LORDS repelled, and found the same, as said is, due to be paid at the father's decease, seeing it could not hang *in pendente* in the mean time, while the mother died, and that the mother nor no other had right thereto, being that part of the gear which pertained to the defunct of his third and the bairns' legitim.

Act. Hope.

Alt. Henrison & Aiton.

Clerk, Gibson.

Fol. Dic. v. 2. p. 276. Durie, p. 16.

No 11.

1631. February 18.

JOHN MACMILLAN and ELIZABETH CORSAN against AGNES and MARION CORSANS.

By contract of marriage between John Macmillan and Elizabeth Corsan, Adam Corsan her father obliged himself, that at his death his daughter Elizabeth should have an equal portion of his goods with his other two daughters Janet and Isabel. Adam being dead, John Macmillan and his wife pursue Agnes and Marion Corsans, only daughters alive to umquhile Adam, and executrixes confirmed to him, for the third part of the goods contained in their father's confirmed testament. *Alleged*, The pursuers could have no third part, because Janet and Isabel, with whom she was to have an equal portion, were both dead before their father, and the defenders are other two daughters born after their decease, with whom, not being then *in rerum natura*, it was not provided by the said contract that the pursuers should have an equal portion. This allegiance was repelled. Next *alleged*, That Isabel and Janet, with whom the pursuer should have an equal portion of the defunct's goods, were both forisfamiliated before their decease; so that if they were presently alive, they could have no portion with their sisters the defenders, in respect of their forisfamiliation foresaid; and so likewise no more could the pursuer have, if nothing could be due to them. This allegiance was likewise repelled; for the meaning of the

No 12.

A man bound himself in his daughter's contract of marriage, that at his death she should have an equal portion of his goods with other two daughters. These died before their father, and other two were born. The first was still allowed her proportion.