No 19.

with such bonds of provision, did thereupon recur to seek that share of the bairns part which was satisfied by the bond of provision; neither is there any odds whether the provision were by legacy or bond, for the reason of recourse being, because the heir or executor is burdened to satisfy that bairn, and so in either case doth claim the share of that bairn; neither was it ever so understood, that fathers granting such bonds of provision did not thereby leave entire the bairns part to the remanent bairns.

The Lords found, that Mrs Mary's share of her bairn's part did accresce to the rest of the bairns, and did not belong to the executor, either as a part, or in place of any part, of the L. 10,000, but the same did solely burden the dead's part.

Fol. Dic. v. 1. p. 544. Stair, v. 1. p. 723.

1672. *July* 19. Chisholm *against* Chisholm.

No 20.
By bond of provision, from a father to his children, bearing in satisfaction of all portion natural, the father acquires only *facultatem testandi*, and he dying without leaving his effects in legacy, they will not fall to the heir, but their portion natural will return to the children as their bairns part.

One Chisholm, having many children, granted bond of provision to the younger children, whereby he burdened his heir with the particular sums provided to the rest, with this clause, that it should be in satisfaction of all portion natural. Thereafter, the father dying, and the heir being confirmed executor dative, one of his sisters did pursue, as one of the nearest of kin, for payment of her part, due to her, of the moveables confirmed. It was *alleged*, That the bond of provision being granted in satisfaction of all portion natural, the bairns could never crave any part of the moveables which did fall to them. It was *replied*, That that clause in the bond, for satisfaction of all portion natural, could import no more, but that the father had *facultatem testandi*, as well of the bairns part as his own third; but he having deceased without any testament, or leaving any legacy, the bairns, as nearest of kin, had right to all that belonged to the father; whereupon he might testate, which did extend both to the bairns part and to his own third, which he might leave in legacy by testament. It was *duplied* for the heir, That he being burdened with the children's provisions, in contemplation whereof they had renounced all portion natural, it ought to accresce to him, and can never return to the children, who had renounced, by the death of their father.——The Lords did find, that the said renunciation of all portion natural did import no more but that the father should have *facultatem testandi* upon the bairn's third, as well as his own part of the moveables, which not having been done, their portion natural did belong to them, he had good action against the executor for the same, as likeways for the sums of money contained in the bond of provision; but the executor being likeways heir, if he found himself overburdened, and the rest of the children in a better condition than he, they allowed him to confer, that they might all come in alike, and succeed to the whole estate.

Fol. Dic. v. 1. p. 544. Gosford, MS. No 515. p. 272.

*** Stair's report of this case is No 29. p. 5046, *voce* General Discharges and Renunciations.