

alleged for the defender, That the pursuer had no interest to pursue any such action during her father's lifetime, because the provision being in favour of the heirs of the marriage, she could not have right to the same, unless she were served heir, which could not be done in the father's lifetime, and the defender being fiar of the lands, notwithstanding of any such provision, he might dispose of the lands as he thought fit. *Answered*, That such provisions in contracts of marriage, in favour of the heirs of the marriage, are always understood of bairns of the marriage who have right to such provisions without being served heir; and albeit, notwithstanding of such provisions, the father still remains fiar, so that he may contract debts, or grant rights of the same for one-rous causes, yet he cannot make gratuitous rights to third parties in prejudice of the children, as was decided the 13th February 1677, Frazer against Frazer, *supra*, and if it were otherwise, it were easy for fathers, in such cases, to evacuate these obligations in contracts of marriage. THE LORDS found the father could do no voluntary or gratuitous deed in prejudice of his obligation contained in the contract of marriage in favour of the children of the marriage, and therefore ordained the father to infest conform.

No 24.

Sir P. Home, MS. No. 600. v. 1.

1684. November 28. IRVINE against M'KITTRICK.

No 25.

THE conquest being provided to the heirs and children of a marriage, the LORDS, in a pursuit at the instance of the children who were not yet served heirs, sustained process; but, before extracting of any decret, ordained them to be served heirs.

Fol. Dic. v. 2. p. 278. Fountainhall.

*** This case is No 7. p. 11283.

1688. July 28. CHALMERS against His Elder BROTHER.

JAMES CHALMERS, advocate, in his second contract of marriage, being obliged to add 20,000 merks to 10,000 merks of tocher, and to employ the whole at the next term after the marriage, upon good well-holden land, or other sufficient security, to himself and his wife in conjunct fee, and to the bairns of the marriage in fee; the bairn of the marriage, a matter of thirteen years after the death of both his parents, pursued his elder brother, as heir of the first marriage, to implement the contract, by employing the 20,000 merks in the terms thereof, and to pay the annualrent thereof since the father's death.

Alleged for the defender; No process at the instance of the pursuer, because

No 26.

In a second contract of marriage, the husband became bound to employ 30,000 merks at the next term after the marriage to himself and wife in conjunct fee, and the children.