

*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.

**No 26.**  
in fee. The children were found entitled to sue for implement against the father's representatives *qua* creditors, without a necessity of a service.

he is not cognosed a bairn of the marriage. *2do*, The father was obliged to provide the conquest of the first marriage to the defender, and the bairns of that marriage, and he had not so much over the conquest as was contracted with the pursuer's mother. *3tio*, The obligation being a destination to the bairns of the marriage, no annualrent is due till the actual implement; and the pursuer might have been more diligent to have got the contract implemented.

*Answered*; It is notour, that the pursuer is a bairn of the marriage, and hath been alimanted as such by the defender. *2do*, The defender is heir served, and so liable to the father's obligations, though his estate should not answer the burden. *3tio*, The obligation to employ 30,000 merks upon land, imports, that the money was not to be unprofitable; and as it would have paid annualrent to the wife during her liferent, so it ought to do to the pursuer.

*Replied*; The pursuer's right is a kind of succession, and differs from such an obligation in favour of a stranger; and being precisely to employ the 30,000 merks, he doing that fulfils it *in terminis*.

THE LORDS repelled the first and second allegiances, in respect of the replies, and allowed the parties a further hearing as to the third, concerning the annualrent of the money since the father's death. Thereafter, an amicable settlement was recommended to the parties.

*Fol. Dic. v. 2. p. 278. Harcarse, (CONTRACTS OF MARRIAGE.) No 395. p. 104.*

**No 27.**

Found in conformity to Panton against Irvine, No 24. p. 12860.

1705. *January 31.* JOHN CAIRNS *against* EDWARD CAIRNS of Tor.

JOHN, as grandchild to the said Edward, by David, his eldest son, now deceased, pursues the said Edward, on this ground, That, by his contract of marriage in 1647, he was obliged to infest his wife in liferent, and the heirs whatsoever of the marriage in fee, in the lands of Tor, &c. and to free them of all incumbrances; and he being the heir of the marriage, by progress, and his grandfather, by importunity and old age, having granted several gratuitous rights to his prejudice, therefore he pursues him to implement the said contract, and to resign, and take the rights to him in fee. *Alleged*, Though the pursuer be his grandchild by his eldest son, and so he who will be the heir of the marriage, and have right to that obligation, yet he cannot be heir till his grandfather die; and the Lords have often refused process on such clauses, at children's instance, against parents, during their lifetime, it being *contra reverentiam parentibus debitam*; *2do*, The clause is only a mere destination of succession, and he is still fiar, and may contract debt, and grant rights for just, necessary, or rational causes, from which he cannot be tied up. *Answered*, If process were refused, then such provisions would be wholly insignificant and useless, and might be defrauded; and it is enough if he be heir *designative*, though not served and