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the special sum, if the defender, as far, did any deed in prejudice of the security to be taken to himself and the heirs of the marriage, that the pursuer charge him to purge the same, or to employ the like sum; and as for the general obligation of the conquest, that the father might dispoise for an onerous cause, or a rational consideration without fraud, but not by an act merely gratuitous; and found, that the word totally being unusual and dubious, was to be interpreted favourably for the heirs of the marriage, and against the contractor, and extended the same to the fee of the whole conquest, being an ordinary provision; but found the father's defence relevant against a modification of an aliment, that he would entertain the pursuer in his family.

Fol. Dic. v. 2. p. 284. Stair, v. 2. p. 503.

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1684. *March.*PANTON *against* IRVINE.

A SUM by a first contract of marriage, obliged to be employed to the man and his wife in conjunct-fee and liferent, and to the heirs of the marriage in fee; the daughter and only child of the marriage, after her mother's decease, pursued the father to provide the fee to her *nominatim*, and to have it declared, that he could not disappoint her expectation by any gratuitous deed.

Alleged for the defender; The obligation being in favour of heirs of the marriage, and no person appointed at whose instance execution should pass, the pursuer behoved to make up her active title by a service after the defender's death. *2do*, Though the money were employed in the terms of the destination, it would be liable to the father's debt, seeing the heir could not quarrel his predecessor's deed, which himself is obliged to implement.

THE LORDS ordained the defender to implement, only by way of destination to heirs of the marriage, and gave no answer to the conclusion of the declarator.

Fol. Dic. v. 2. p. 278. Harcarse, (CONTRACTS OF MARRIAGE.) No 367. p. 94.

. Sir P. Home reports this case :

By contract of marriage betwixt Francis Irvine and ——— his spouse, he being obliged effectually and sufficiently to infest his wife during her lifetime, and the heirs to be lawfully gotten of the marriage, which failing, to the said Francis, his heirs and assignees, in certain lands, and the wife being deceased, and Anna Irvine being the only child of the marriage, and Henry Paton, her husband, having pursued a declarator against the said Francis Irvine her father, for fulfilling of the contract of marriage, and to secure her in the lands, and that it might be declared, that it is not lawful nor warrantable for him, by any voluntary or gratuitous disposition made, or to be made by him, of the said lands, to frustrate and evacuate the provision in the contract of marriage;

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.

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

1684. November 28. IRVINE against M'KITTRICK.

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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

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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.