SECT. VI.

Whether Heirs of a Marriage can transmit to their Representatives their *jus crediti* without service?

1682. *February.* CLERK of Pennycuik *against* His SISTERS.

No 34.

A SUM provided to children in a contract of marriage, must be taken up by the children as heirs of provision, and therefore if any of them die before their father, they will transmit nothing to their representatives.

Fol. Dic. v. 2. p. 279. Harcarse.

*** This case is No 3. p. 6330. *voce* IMPLIED CONDITION.

1697. *December 7.* CUMING *against* KENNEDY.

No 35.

THERE being an obligation in a contract of marriage to provide the conquest to the children of the marriage, the LORDS found, That a daughter, the only child of the marriage, had right to the conquest *ipso jure*, though she was neither confirmed nor served heir of conquest, and consequently that her husband *jure mariti*, after her death, was entitled to what part of the conquest was moveable.

Fol. Dic. v. 2. p. 279. Fountainhall.

*** This case is No 41. p. 6441. *voce* IMPLIED DISCHARGE.

1716. *December 27.*
EUPHAN M'INTOSH *against* M'INTOSH of Abberarder.

No 36.
A father in his contract of marriage with a second wife, obliged himself to secure the children of that marriage in a certain sum. Three of them survived their father, but of these three

LAUCHLANE M'INTOSH of Abberarder, father to the said Euphan, by contract of marriage with her mother, his second wife, obliges himself to secure the children of that marriage in 6000 merks. Three of the children survived the father, but two died thereafter under pupillarity, without being served heirs of provision; so that Euphan now being the only child of the marriage, serves herself heir of provision to her father, and intents process against William M'Intosh of Abberarder, her father's heir of the first marriage, for the whole 6000 merks; in which process, among other points, this came to be discussed, viz. whether she, as heir of provision to her father, had right to the whole sum

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two died in pupillarity. The survivor found to have the sole right to sue for implement of the provisions in the contract.

provided, without serving to the other two children, or only to a third part thereof?

And here it was *alleged* for the pursuer; That the obligement being to provide the above sum to the children of the marriage, these children were thereby heirs of provision to their father; and there could be no action sustained at their instance upon the said contract, until they were cognosced children of the marriage, and heirs of provision with their father; and therefore, any of them who died without a service, could not certainly transmit their right to the said service to their heirs; for, in all cases where provisions are made to the children of a marriage, that necessarily implies a mutual substitution in case of the decease of any of these children, and has the same effect, as to the titles that are necessary for establishing a right to the sum, as if the father had taken bond to himself and either of those children, with a substitution of the rest; in which case, if the child who was first instituted had died without service, the other substitutes would have followed in the succession; but not by a service as heirs to the child, but as heirs of provision to the father, who was the last person who had right to the bond; and it would be of no effect to serve heir to these children, since they never had a title in their persons by being cognosced heirs of provision and children of the marriage; and now that they were dead, no such title could be made up; and therefore, since, in any event, the children of the marriage, one or more, must have right to the whole 6000 merks provided in the contract, and the pursuer being now the sole surviving child of the marriage, and served heir of provision to her father in that sum, she undoubtedly had a sufficient title in her person to insist for implementing the contract.

Answered for the defender; That the contract obliged the father only to provide 6000 merks to the children of the marriage, by which every child surviving the father became *eo momento* creditor that his father expired, and had undoubted right to demand and receive implement of the contract; and if actual payment had been made, or security given by the heir of line to any of the children, it was certain that no other child of that marriage could force the heir of line to pay over again, though the child paid or secured had died without service, and that no action would have arisen from the contract to the heirs of the child deceasing, but only from the security given him by the heir of line; so that the several children by their survivance obtaining a *jus quæsitum* to the sums in the contract, the said contract could afford no action to the pursuer.

"THE LORDS found, That the pursuer being the only child on life of the second marriage, and the other children deceasing not having been served heirs of that marriage, she had thereby the sole right and title to pursue for implement of the provision in the contract."

Act. *Patrick Grant.* Alt. *Dun. Forbes.* Clerk, *M'Kenzie.*

No 36.

1717. *January* 23.—THE cause betwixt these parties is stated in a decision that passed, touching one point in this cause, the 27th December last, which will be found in this session's collections. The question now betwixt them turned upon this article, viz. whether a provision of a sum being made to children of a marriage, these children acquire and transmit their right by surviving the term, *ipso jure*, without the necessity of a service, or if a service is necessary? And it was *argued* for Aberarder, That such children have right to those sums without a service;

1*mo*, From the nature of the right by which they are entitled to the sums, not at all *per modum successionis*, but merely by an obligation *in diem certum*; which obligation may happen to fall due during the life of the granter; in which case no service was possible.

Answered for the pursuer; That this has been over-ruled by the Lords, particularly in the case betwixt Hay and the Earl of Tweeddale, 21st July 1676, No 21. p. 12857, where their Lordships found, That in all obligations in favours of heirs of a marriage, except as to those to be performed during the father's lifetime, services are requisite.

Replied for the defender; 1*mo*, That the question there was concerning the heir of provision his title in a process where the Lords actually found process, the pursuer serving *cum processu*; and that additional clause in the interlocutor is only a declaration, that the Lords, in processes at the instance of heirs of provision, would find services necessary before extracting, lest heirs substitute should give defenders further trouble; 2*do*, That the decision expressly regarded heirs of provision, and not children of a marriage; 3*tio*, That the decision expressly concerned the case of a provision in general in favours of heirs of a second marriage, to which the heir of provision could never have had access till after his father's decease; and consequently the father (as in all other causes of the like indefinite nature) is constructed fiar, and therefore a service requisite; which is quite otherways in the present case; which distinction is neither imaginary nor groundless, but well founded on our practics, as is observed by Gilmour, July 1665, Edgar against Edgar, No 1. p. 6325.

"THE LORDS found, That by the clause in the contract of marriage, the sum contained therein is payable to the children surviving the term of payment, not as heirs of the marriage, but as creditors; and therefore, that the pursuer had a direct action for her own share of the 6000 merks."

Act. *Patrick Grant*. Alt. *Grahame* & *Dun. Forbes*. Clerk, *M'Kenzie*.

The father, in the foresaid case, having, in pursuance of the contract of marriage, lent out the 6000 merks, and taken bond for the same, payable to himself in liferent, and the children of the said marriage in fee; but the same having, after the said father's decease, been evicted by his creditors, this question yet remained, Whether, in this case, the above clause of provision in the contract was at all implemented by the providing and laying out the sums as

No 36. aforesaid in the terms of the contract, though no part of these sums come to the children's hands?

It was *contended* for the defender, That the contract was thereby fully implemented; because, that though he acknowledged that these sums were, after the father's decease, evicted by his creditors, and recovered out of the hands of his debtors, which must subject the defender, as heir to his father, to make these provisions forthcoming to the children, in as far as they were duly and lawfully evicted by his predecessor's creditors; yet still he contended, that the contract having been once fairly implemented by these bonds, the pursuer could have no ground of action against him, except to warrant the said bonds from any eviction by his own or his predecessor's deed; since the obligation in the contract of marriage was only to provide and lay out upon good security the sum of 6000 merks for the children, with a declaration, that, if that sum is once provided and secured, the father's other estate shall not be liable to the children for their provision; wherefore, the defender instructing that the 6000 merks were provided and secured to the children of the marriage, these children could not possibly have any action against him, but upon replication, that the provisions were evacuated by his own or his predecessor's deed.

Answered for the pursuer; That contracts of marriage are certainly *uberrimæ fidei*, and must be interpreted conform to the meaning and design of parties, whatever be the precise words of the contract; and therefore nothing can be pleaded as an implement of it, but that whereby it is implemented *cum effectu*; thus, though these bonds be taken in the precise terms of the contract, it might indeed be alleged that the obligement was once implemented; yet, if thereafter the sums contained in these bonds were uplifted by the father himself or his creditors, before or after his death, whereby that implement would become elusory, the contract must be looked upon as if it never had been implemented, because not implemented *cum effectu*, although there was no obligement in the contract, how oft these sums were uplifted, to re-employ them in the same terms. Now, it cannot be controverted, that, if these sums had been uplifted by the father himself, and not been re-employed in name of the children, that in that case the contract could not have been looked on as implemented, though the bond had been first taken in the precise terms of the contract; and yet, the defender's argument for its being implemented in the present case, and that he can only be liable by a process upon the eviction, does equally hold in the other; for there it might likewise be *alleged*, That the father having taken bond in the terms of the contract, it was thereby wholly implemented, there being no obligement to re-employ, and could not afterwards become unimplemented by any event whatsoever; and that therefore he could only be liable by a process upon the eviction, but not upon the contract, which was implemented. But the plain answer in both cases is, that contracts of marriage must be implemented *cum effectu*; and the sums being uplifted by the

father or his creditors, puts it in the same case, as if the bonds had never been taken.

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"THE LORDS found, That the sums in the bond taken payable to the father in liferent, and to the children of the marriage in fee, having been evicted for the father's debt, can be no implement of the provision to the children in the said contract."

Procurators and Clerk *ut supra*.

Fol. Dic. v. 2. *p.* 269. *Bruce, v.* 2. *No* 44. *p.* 59. & *No* 49. *p.* 65.

1726. *February* 4. GIBSON *against* ARBUTHNOT.

No 37.

BY contract of marriage, the husband became bound "to employ the sum therein named, and the conquest during the marriage, to himself and spouse in liferent, and to him, for the use and behoof of the children to be procreated betwixt them, in fee; which failing, &c." There being but one daughter of the marriage, who deceased before her father, after conveying her interest as only child of the marriage, a competition arose about the conquest, betwixt her disponee and her son, who took out brieves to serve himself heir of provision in his grandfather's contract of marriage. The LORDS found, That the husband being obliged to provide the conquest to himself, for the use and behoof of the children of the marriage in fee, he became thereby a trustee for behoof of his children; and that after dissolution of the marriage action was competent to his daughter's assignee; and therefore found there was no place for her son to serve heir of provision to his grandfather.

Fol. Dic. v. 4. *p.* 279. *Home.*

*** This case is No 162. p. 11481. *voce* PRESUMPTION.

1732. *February* 3. CAMPBELL *against* DUNCAN.

No 39.

IN a second contract of marriage, the husband and his heirs became bound, at the term of Whitsunday after the marriage, to employ a certain sum to himself and wife in conjunct-fee and liferent, and to the heirs and children of the marriage in fee. There was but one child of the marriage, a daughter, who, after assigning the provision to her husband, died, without making up any titles. In a pursuit at the husband's instance against the granter's representatives for payment, it was admitted for him, That had the father lent out the covenanted sum in terms of the contract, a service as heir of provision would have been necessary; but while the obligation stood unimplemented, the heirs and bairns were creditors. It is true, when this action is pursued against the father, it can