not trust him, but made her own grandchildren by Saline *fide commissarii* to restore, in case he had bairns; and found, That they needed not be served heirs to have a right to it; but that *hæres in sanguine* and heir *designative* was enough here, seeing it was provided to James's heirs, who might succeed; and, in another place of the clause, they were designed children. No 19.

Fountainhall, v. 1. *p.* 670.

SECT. V.

The Husband being bound in a contract of marriage to provide the issue of the marriage, the heir or children, as creditors, may insist for implement without a service.

1665. *January* 13. WALLACE *against* WALLACE. No 20.

One became bound in his contract of marriage to lay out a certain sum to himself and spouse in liferent, and to the children of the marriage in fee. The children, without necessity of a service, were found entitled to pursue their father's representatives for implement.

UMQUHILE William Wallace of Maywholme, by contract of marriage with umquhile Margaret Kennedy, is obliged to employ the sum of 5000 merks received by him in name of tocher, in favour of themselves in liferent, and to the bairns, one or more, to be procreated of the marriage in fee. William Wallace, being the only bairn of the marriage, and his tutor, pursues Hugh Wallace, brother and executor confirmed to the said umquhile William, for implement of that clause in the contract. It was *excepted*, No process at the bairn's and his tutor's instance for implement, because the bairn was not heir served and retoured to his father. THE LORDS found, That heirs or bairns mentioned in a contract of marriage, may pursue for implement of the obligement without necessity of a service.

Fol. Dic. v. 2. *p.* 278. *Newbyth, MS. p.* 18.

*** Gilmour's report of this case is No 3. p. 9650, *voce* PASSIVE TITLE.

1676. *July* 21. HAY *against* EARL of TWEEDDALE.

No 21.

An heir of a marriage pursuing implement of the contract of marriage at

WILLIAM HAY of Drummelzier pursues the Earl of Tweeddale, as representing the late Earl his father, for implement of the contract of marriage in favour of the pursuer as heir-male to the said umquhile Earl of the second marriage. The defender *alleged*, No process, till the pursuer be served heir-male of the marriage. The pursuer *answered*, That he being the only child of the

No 21. ter his father's death, was found to require a service.

marriage on life, needed no service, and that heirs of a marriage are oft-times interpreted those who may be heirs, therefore needed no service, as heirs in tacks needs none. 2*do*, The pursuer offered to produce a service and retour *cum processu*. The defender *replied*, That titles ought to be produced *in initio*, and there is no reason to put the defender to run a course of process with the pursuer on so unequal terms, that if the pursuer find that by the event he had benefit, he will be heir, and if not, the defender shall not be exonered, because the pursuer's successors may enter heirs of the marriage, passing by the pursuer, and renew a pursuit against the defender.

THE LORDS sustained the process, the pursuer producing a retour in November next; and found, That in all obligements in favour of heirs of a marriage to be done before the father's death, as to employing of sums, taking of lands or other conquest to themselves and to the heirs of the marriage, heirs are there understood such as might be heirs, because otherwise the obligement would be elusory, but in other cases an heir of marriage requires a service as other heirs do. See QUOD AB INITIO VITIOSUM.

Fol. Dic. v. 2. *p.* 270. *Stair, v.* 2. *p.* 455.

No 22. 1675. *January* 7. INNES *against* INNES.

BY a contract of marriage a sum being provided to the husband and his wife, and to the heirs male of the marriage, which failing, to the fathes's heirs male whatsomever; an inhibition upon the said contract, at the instance of the eldest son of the marriage, and reduction thereupon, was not sutained; because the father was living, and the son neither was, nor could be heir to him, in respect the father was living; and though he were dead, the son could have no right, unless he were heir, in which case he would be obliged to warrant.

Reporter, *Glendoich.*

Fol. Dic. v. 2. *p.* 278. *Dirleton, No* 214. *p.* 99.

*** Stair reports this case:

ALEXANDER INNES, in his contract of marriage, provided a wadset-right of 3000 merks to himself and his future spouse in conjunct fee, and to the heirs of the marriage, and thereafter obligeth himself to re-employ that sum, with the 2000 merks of tocher to the wife in liferent, and to the heirs in fee, which failing, to his other heirs-male; and last there is a repetition of the same clause as to the tocher to be employed to the wife in liferent, and the clause hath borne to the heirs-male of the marriage and assignees foresaid, but is vitiated and made to the eldest son of the marriage. Upon this contract there is inhibition used, and thereupon there is now reduction of a right made to the