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apprised, and if this clause have no effect, they will get nothing. It was *answered*, That unusual clauses ought not to be extended, and there is no consequence to make up new articles of a contract, though they were more reasonable than those expressed; and for the clause itself, it can have no doubtfulness, there being a provision of the lands to the heirs of the marriage, and of this sum to the bairns beside the heir, so that the contractor's meaning has still been, that the heir should have the hope of succession, which was much better than this sum at that time, though by accident it may become worse; neither is it of any importance, though the pursuers should renounce to be heirs, because that can never make them bairns beside the heir.

THE LORDS found, That the clause could have no effect, unless there were bairns beside the heir, without prejudice to the decret against the father, in regard of his consent and disclaiming this defence.

Fol. Dic. v. 2. p. 278. Stair, v. 1. p. 658. & v. 2. p. 28.

* * * Gosford reports this case :

BOYD of Temple being obliged by contract of marriage to provide the bairns of the marriage by the heir, each of them to 10,000 merks, his two daughters, after the death of their mother, did pursue their father for securing each of them in 10,000 merks after his decease, and that because his estate was comprised by John Boyd, and the legal thereof near expired. It was *alleged* for the father, That the two daughters being themselves the apparent heirs, could not crave the benefit of that clause of the contract which was conceived only in case there should be an heir, and other bairns by the heir. It was *replied*, That the daughters being now majors, were content to renounce to be heir, and being bairns, had good action to pursue for the benefit thereof.

THE LORDS finding the daughters' case very favourable, and if the legal of their comprising should expire they would be altogether prejudged, both of their portions and of their father's heritage, did recommend to the father and comprising to take some course for selling of the lands, that the comprising might be satisfied, and they secured in the remainder after the father's death; but did incline not to sustain their interest upon the renunciation to be heir in case they had given their interlocutor *in jure* anent the conception of the clause.

Gosford, MS. No 220. p. 88.

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1695. February 19.

SHORTS against BIRNIES.

RANKIELER reported Shorts in Stirling *contra* Birnies, children to my Lord Saline. THE LORDS found Saline's bairns were but trustees, in case James Short should happen to have children; for James being a prodigal, the mother would.

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.

Fountainball, v. r. p. 670.

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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.

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 obligation 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.

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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.

1676. *July 21.*

HAY *against* EARL OF TWEEDDALE.

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

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