

**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

retoured ; and a father was *in terminis* decerned to secure a sum, provided in a contract of marriage, 13th February 1677, Fraser against Fraser, No 23. p. 12859. ; and, lately, in a process pursued by Thomas Wylie's children against him, upon their mother's contract of marriage, the LORDS found him obliged to implement the obligations, but gave him the power of distributing and dividing it amongst his bairns, as he thought they best deserved. THE LORDS sustained process, at the grandchild's instance, to cause his grandfather resign and infest, in the precise terms of his obligation in the contract of marriage ; but would not oblige him to take it *nominatim* to the grandchild, but only in general terms, to the heirs of that marriage ; so that if this grandchild should die before his grandfather, (as his father had done) the nearest of kin would not be put to require the same to be re-implemented to him, but this would accresce and serve for all.

No 27.

*Fol. Dic. v. 2. p. 278. Fountainhall, v. 2. p. 264.*

1715. July 26. HUGH LYON against GARDEN of Laton.

IN a process of ranking, of the children of the first and second marriages of Lyon of Balgillo, upon their respective mothers' contracts of marriage, and diligence by adjudication thereon ; this question having occurred, whether both their adjudications were null, their decreets of constitution, as heirs of provision, proceeding without a service ? and, in general, whether services be needful, in case of sums provided to bairns in a contract of marriage ?

No 28.

An adjudication at the instance of an heir of a marriage, found defective as without a service.

It was *alleged* upon the one side, That, by our law, heirs, or bairns of a marriage ought to be served before they could assign or establish a title for doing diligence, as was found in the case of Drumelzier, the Earl of Tweedale's son of the second marriage, and his brother, the Earl, 21st July 1676, where Drumelzier was bound to serve heir of the marriage *cum processu*, to found his title, No 21. p. 12587. ; *2do*, It is certain, that the ordinary and legal way of establishing a right in the person of bairns of a marriage, is by serving them heirs of provision to their father, otherwise *non constat* they were children of the marriage, or how many survived.

*Answered* for the other side, That there is a distinction betwixt bairns and heirs of a marriage ; for bairns require no legal solemnity, but *eo ipso* that they are procreated of the marriage, they have the designation of bairns ; so that Balgillo's provision being in favour of the bairns of the marriage, it is effectually transmitted to them without any service ; but the title of heir is a legal character, competent properly to such only, as have established the same in their persons, by the solemnities required in law. And, as to the decision, it did not meet the present case, seeing the provision, in the contract of marriage, to which it relates, was in favours of the heirs of the marriage ; *2do*, Our law makes a distinction betwixt lands and sums of money, as to manner of trans-