estate not only to descend to the issue, but that it shall descend *tanquam optimum maximum*, and consequently not under irritant and resolutive clauses, by which the issue would not be fiars, but liferenters of that estate. In the *second* place, That abstracting from the general point, this particular entail was an irrational deed, and fraudulent, tending to evacuate the destination in favour of the heir of the marriage. Upon this head it was observed, that the estate was small, burdened moreover with a liferent and considerable debts; 2*dly*, That the heir was not impowered to charge the estate with a shilling to redeem him from slavery; 3*dly*, That the heir had no power to provide wife or children; 4*thly*, That the heir-male of the maraiage was cut out and made a liferenter, and the heirs-female of the marriage postponed, even to the youngest daughter of the maker of the tailzie, contrary to the provision of the contract, which is in favour of the heirs of the marriage. THE LORDS did not determine the general point, but with respect to the particular qualifications insisted on, they found, that this tailzie was not consistent with the provisions in the contract of marriage, and therefore reduced the tailzie. See APPENDIX.

No 112.

Fol. Dic. v. 2. p. 287.

1737. *January* 7. TRAIL *against* TRAIL.

No 113.
Where an estate was provided to heirs whatsoever of the marriage, the contract was found to have been sufficiently implemented by a deed in favour of the heir-male and his heirs.

AN estate being provided, in a contract of marriage, to heirs whatsoever of the marriage; of the marriage there existed two sons; and the father, while the eldest son was yet minor, made a settlement of his estate upon him, and the heirs-male of his body; whom failing, to the second son, and the heirs-male of his body, &c. upon which infeftment was expede. The eldest son died before his father, leaving a daughter behind him, but without accepting of the disposition. In a competition betwixt the heir-female and the heir-male, it was *contended* for the heir female, That she was heir of the marriage, and that the father had it not in his power arbitrarily to disappoint the marriage-settlement. *Answered*, Though the eldest son cannot, strictly speaking, be heir of the marriage while his father is alive, seeing he may die before his father, and so never be capable of succeeding, yet it is received in our law, that a father may implement the obligations he comes under, in his contract of marriage, by disponing in favour of the heir expectant of the marriage; and the contrary doctrine would be highly prejudicial to the heirs of the marriage, seeing it would exclude the father from making a settlement upon them during his life; 2*do*, A provision to heirs whatsomever of the marriage, is not the same with a provision to the heir-male of the marriage; the last points out a particular person, the other is rather negative, barring extraneous heirs, but leaving the father *intra familiam* to prefer one to another, especially males to females, agreeably to the ordinary course of law. *Replied* to the first, Such settlement may be effectual in law, where the heir of the marriage survives the father, because this would

No 113. be implement directly in the terms of the contract; but a disposition in favour of the heir-expectant of the marriage, is not implement of the contract, seeing it is not in favour of the heir of the marriage, but of one who never was heir; and were this doctrine to hold, it would open a door to evacuate obligations in contracts of marriage, however strictly conceived; the father would have no more ado, but the moment his son was born, to settle the fee upon him, with a power to alter, and naming such substitutes as he had amind, excluding possibly the whole other heirs of the marriage; as he had a thousand chances to one, that the infant shall not survive him, he has all these chances for him, to disappoint the obligations he came under in his marriage-contract. To the *second*, a provision to heirs whatsomever, points out the pursuer just as directly as it had been to the eldest son to be procreated, and the heirs of his body; and the granter ought to have no power to prefer the heir-male to the heir-female in this case, more than he has to prefer the second son, when the provision is to heirs-male of the marriage. THE LORDS found, That the contract of marriage was sufficiently implemented, by the father disponing his lands to his eldest son, and his heirs-male, &c. and therefore preferred the heir-male to the pursuer, heir whatsomever of the marriage. See APPENDIX.

Fol. Dic. v. 2. *p.* 288.

1738. *July* 25. NISBET *against* NISBET.

No 114.

WHERE a man was bound, by his contract of marriage, to secure a sum to the heir of the marriage, it was found, that he might substitute whom he would to the heir of the marriage, and the descendants of his body, because he may do rational as well as onerous deeds.

Fol. Dic. v. 4. *p.* 190. *Kilkerran*, (PROVISION TO HEIRS AND CHILDREN.) *No* 2. *p.* 455.

1739. *December* 14. PRINGLE *against* PRINGLE.

No 115.

PRINGLE of Symington being bound, by his marriage-contract, to provide 12,000 merks to the children of the marriage, disponed to his eldest son his land estate, who being pursued by a sister to account for the executry funds, *pleaded*, That the 12,000 merks, being a moveable debt, which affected the executry, the share thereof, to which he was entitled by the marriage-contract, exceeded the sum pursued for, which was, therefore, excluded by compensation. THE LORDS were of opinion, that where a man who, by his contract of marriage, is bound to provide to a certain extent, leaves his estate, heritable or moveable, to descend in the legal channel, it is implement to the children succeeding, as