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ter his fa-
ther's death,
was found to
require a ser-
vice.

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. *2do*, 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 exonerated, 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 obligations 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 obligation 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 father's heirs male whatsoever; an inhibition upon the said contract, at the instance of the eldest son of the marriage, and reduction thereupon, was not sustained; 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, *Glendoch*.

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

Laird of Innes of the wadset, as being after the inhibition, after which the said Alexander Innes could not otherwise dispose of the wadset, than conform to the foresaid contract of marriage. The defender *alleged*, Absolvitor, because the pursuer, by this contract, had no interest to reduce his father's disposition of the wadset; because, as to the last clause in relation to the eldest son, it is vitiated, and for the former clauses, thereby the father is fiar, and the son hath no interest but as heir-male of the marriage, and so in his father's life cannot at all pursue, nor after his death, because he could have no interest till he was served heir to him, and so could not quarrel his disposition, but behoved to warrant it; and albeit upon such clauses the wife hath interest to cause the husband employ the sums for her liferent, yet the apparent heir hath thereby no interest, neither are such clauses in the condition of those clauses which have their effect during the defunct's life, wherein heirs are interpreted as bairns.

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THE LORDS found the vitiation visible by inspection, and had no respect to that clause; and found the former clauses could give the son no interest to reduce the father's deed.

Stair, v. 2. p. 302.

* * * A similar decision was pronounced 18th January 1622, Silvertonhill against his Father, No 1. p. 9451, *voce* PACTUM ILLICITUM.

1677. February 13.

FRAZER *against* FRAZER.

ALEXANDER FRAZER pursues James Frazer of Drumballoch, his father, for employing and securing a sum of money, and all lands and conquest during the marriage betwixt him and his deceased wife, conform to the contract of marriage, by which he is obliged to bestow the sum of upon land or annualrent to himself, and his then future spouse in conjunct-fee, and to the heirs of the marriage, and to provide all lands and annualrents conquest during the marriage, the one half to her in liferent, and totally to the heirs of the marriage. He doth also pursue for modification of an aliment, his father being married again, and himself a man, that he may follow some employment. The defender *alleged*, No process, because the pursuer is neither, nor can be heir of the marriage, during his father's lifetime; and though employment were made, the father will be fiar, and so may dispone at his pleasure; and, by the contract, the half of the conquest is only provided to the wife in liferent, and totally to the heirs of the marriage, which cannot import the whole conquest, but the fee of the half; and as to the aliment, the defender is only obliged to entertain him in his family, having no particular calling obliging him to be elsewhere.

THE LORDS found, That the pursuer had interest as an apparent heir, to crave employment of the sums and others, conform to the contract; and as to

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An heir apparent was found to have interest to pursue his father to employ a sum for him in fee, as the heir of marriage and of conquest.