

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.

No 22

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

No 23

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.

No 23.

the special sum, if the defender, as far, did any deed in prejudice of the security to be taken to himself and the heirs of the marriage, that the pursuer charge him to purge the same, or to employ the like sum; and as for the general obligation of the conquest, that the father might dispoise for an onerous cause, or a rational consideration without fraud, but not by an act merely gratuitous; and found, that the word totally being unusual and dubious, was to be interpreted favourably for the heirs of the marriage, and against the contractor, and extended the same to the fee of the whole conquest, being an ordinary provision; but found the father's defence relevant against a modification of an aliment, that he would entertain the pursuer in his family.

Fol. Dic. v. 2. p. 284. Stair, v. 2. p. 503.

No 24.

1684. *March.*PANTON *against* IRVINE.

A SUM by a first contract of marriage, obliged to be employed to the man and his wife in conjunct-fee and liferent, and to the heirs of the marriage in fee; the daughter and only child of the marriage, after her mother's decease, pursued the father to provide the fee to her *nominatim*, and to have it declared, that he could not disappoint her expectation by any gratuitous deed.

Alleged for the defender; The obligation being in favour of heirs of the marriage, and no person appointed at whose instance execution should pass, the pursuer behoved to make up her active title by a service after the defender's death. *2do*, Though the money were employed in the terms of the destination, it would be liable to the father's debt, seeing the heir could not quarrel his predecessor's deed, which himself is obliged to implement.

THE LORDS ordained the defender to implement, only by way of destination to heirs of the marriage, and gave no answer to the conclusion of the declarator.

Fol. Dic. v. 2. p. 278. Harcarse, (CONTRACTS OF MARRIAGE.) No 367. p. 94.

. Sir P. Home reports this case :

By contract of marriage betwixt Francis Irvine and ——— his spouse, he being obliged effectually and sufficiently to infest his wife during her lifetime, and the heirs to be lawfully gotten of the marriage, which failing, to the said Francis, his heirs and assignees, in certain lands, and the wife being deceased, and Anna Irvine being the only child of the marriage, and Henry Paton, her husband, having pursued a declarator against the said Francis Irvine her father, for fulfilling of the contract of marriage, and to secure her in the lands, and that it might be declared, that it is not lawful nor warrantable for him, by any voluntary or gratuitous disposition made, or to be made by him, of the said lands, to frustrate and evacuate the provision in the contract of marriage;