

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.

No 19.

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.

No 20.

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

No 21.

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