But are only heirs of Designation or such as May be heirs in due tim
16 Decemb. 1628 L. Granton contra L. Colding town 13 feb. 1677
Frazer contra Frazer 31 January 1705 Cairns contra Cairns of Bon
Stair ibid 54 M Kenzie Instit lib. 3 Tit. 8 §23. A Man being obliged
in his Contract of Marriage to Employ a sum upon Bond land
Annual rent or other Security, and take the Rights to himself and
his Spouse in liferent and to the Children of the Marriage
fee, May be pursued for Implement of the Contract in his own
life time; And was found Not to have Implemented it by taking
rights in the terms aforesaid to a Doing in Edinburgh bonds
by him and estimated by knowing persons to be over the Mu
29 Decemb. 1710 Hay and Farquhers contra Doctor Hays Becau
a Dwelling house before the Children could Come to enjoy it by the
fathers death, might happen thro' Decay for Not Repairing Which
life rents are Very quitly off or thro' some fatal Accident of Fire
to be Worth little or No thing. Tho Where the Contract obliges him
to employ the Money upon Security, that the father should thin
Sufficient at the time, the Disponing a Dwelling house in the
said terms, was found to be a fulfilling of the Contract 16 Janua
1711 Inter Eadem. Because in that Case the father being lia
ble in the Matter, it Could Not be thought but that when
bought the house, he Looked upon it as a sufficient Security
what it Cost him. But there can by No Action for Implem
of a provision of Conquest (till the death of the father) who may Not withstanding the
dispose of the Conquest for any Rational or Necessary use al
time in his Life. 7 Novemb. 1684 Anderson and Simson contra
Anderson. 16 June 1676. Mitchel contra Children of Little John. Ge
A fathers provision of the Conquest during his first Marr
to the heirs of that Marriage, was found Not effectual to Bar
a Disposition Made in favour of the heir of a posterior Mar
riage of lands Acquired by the father during his first Marria
Albeit the father afterward Acquired and left a Sufficient
to have provided the Children of his posterior Marriage. Al
In Respect at the Date of the posterior Contract of Marriage
was a Rational deed to provide the Children of that Marri
3 January 1679 Gibson contra Thomson.

It has been Controverted, Whether a provision Made in
favour of heirs and bairns of a Marriage, will go to the Male
Excluding females, or to the eldest son Excluding the Rest. Sir
James Stuart answers to Diclet doubts Tit. Heirs of provis
and substitutes. Distinguisheth betwixt lands and Summes of
Money so provided. If Lands Says he, be provided to the heirs
of the Marriage, or to the Bairns of the Marriage, or to the

or Bairns; the eldest son would succeed to the Whole, Such a Variation
arising More from Style, than from the Intention of parties. But where
Sums of Money are provided either to the heirs of the Marriage, or to the
Bairns of the Marriage only, or to the heirs or Bairns; the Children
Male and female come in pari passu, are Called equally to the
Succession, Albeit some of the sums be Payable at a certain Term
Succeed. But the Lord
Stair Lib. 2 Tit. 3 §43 Vers. Conjunct Infeftment) Makes No such
Distinction, but holds that Joint Infeftments are granted to a Man
and Wife and to the Bairns of the Marriage, Male and female come in
pari passu. Nor do I find any Decision Authorizing such Distinc-
tions. On the Contrary, Not only was a Sum of Money provided to
the heirs of a Marriage found to Divide amongst the Children
equally feb. 1627 M Donal contra Colonel M Donal. But also
lands provided to the Bairns of a Marriage were found to be Com
to Sons and Daughters Equally 13 feb. 1677 Carnegy and Aleorn contra
Carnegy 10 July 1677 Carnegy contra Smith. In Heritable bonds &
Infeftment being granted to Man and his Wife in Conjunct fee, and
to the bairns procreated betwixt them: The Whole Children of that
Marriage Male and female Jointly and Equally, were found heirs
of provision to their father 14 January 1663 Bee contra Nicolson.
A Clause of liging the husband to take lands or Annualrents
he should acquire during the Marriage to himself and to the
heirs or Bairns of the Marriage was found to Make all the Bairns
Male and Female equal heirs of provision 29 January 1675 Stu
arts contra Stuart. The Reason why heirs of a Marriage succeed
equally Male and female is because they are Not heirs by the course
of Law, but by the provision of parties who May appoint their
heirs as they please.

Sir James Stuart answers to Diclet doubts Tit. Heirs of
provision and Substitute & Tit. Provision in favour of bairns
tells us, that What ever way the heirs or Bairns come to succeed,
the Father hath a free power of Division among his Children
if he please to Exercise it: Tho if the father make No Division they
will succeed Equally. For says he, Albeit it may be alledged for their
succeeding Equally, that as the father cannot Bar any of his
Children of that which is given them by law Viz. The Legitime
which must Divide equally; So he ought not to Exclude any of
them from an equal share of that Bairns provided by Contract
unless that give him such Arbitrium or power Expressly, as
some times is done: Especially Considering that a power of that
Kind might be abused by a Father, who Intending to Marry again
may by Collusive transaction with one of the Children Settled
upon that Child and get a great part of it back from him
to the prejudice of the other Children, for giving to that Child
More than his proportion of the provision in the Contract. And