

ceed to a share of his estate and goods with the rest of his own bairns, did, at the time of his decease, after the rest of his children were also provided, dispone to his eldest son, by a lucrative deed *in liege poustie*, his estate, consisting of bonds and goods; which disposition was quarrelled by the daughter's children, as made in defraud of the obligation in their mother's contract of marriage.

No 13.

It was *alleged* for the defenders; That the obligation imported only, that the daughter was not cut off from her legitim; and the father may at any time in his *liege poustie* dispose of his moveables, even *titulo lucrativo*, without regard to the legitim, though he could not prejudice it by a testamentary deed.

(*Answered*;) The obligation imports more than a reservation of the legal provision of legitim, or third; for the latter implies the condition, if the defunct have goods the time of his decease; whereas, by the obligation, in prospect whereof the husband gave his wife a suitable jointure, the wife and her children of the marriage are creditors, and the contract is onerous; nor is the clause conceived thus, "without prejudice, &c." but thus, "I oblige me, &c."

THE LORDS inclined to prefer the children, in respect of the obligation.

Thereafter it was contended for the defender; That some rents uplifted for years during the father's life, were *bona fide consumpti*. This allegiance the LORDS sustained.

*Fol. Dic. v. 2. p. 277. Harcarse, (CONTRACTS OF MARRIAGE.) No 381. p. 98.*

1737. November 18.

JANE BEG *against* JANE LAPRAICK.

No 14.

JANE BEG, in her contract of marriage, being provided to a certain sum in name of tocher, in satisfaction of legitim, &c. with this provision, "that she should be a bairn in the house at his decease, with the rest of his daughters, but not in the least with his sons;" the LORDS found, that the sons have right to the same share of legitim as if Jane had not existed at the time of the father's decease; and in respect that Jane is only provided to be a bairn in the house with the rest of the daughters, and that the father could not, and hath not by any clause in the contract, prejudged the daughters as to their legal share in the legitim; found, that each of the daughters, excepting Jane, must have an equal share in the whole legitim, according to the division of law among the whole children, including Jane; and therefore found, that after deducting the shares of the sons as if Jane had not existed, and after allowing to each of the other daughters such share as should belong to her according to the division of law, taking in Jane as a bairn of the house, the remainder of the legitim belongs to Jane, and no more. See APPENDIX.

*Fol. Dic. v. 2. p. 277.*