

No 12.

defunct was thought to be, that Elizabeth should be a bairn of his house, if she were alive at his decease. Next they questioned about the quantity, *alleging*, That the pursuer could not have the third of the whole goods contained in the testament, but only the third of the dead's part, because she was tochered before; and it were unreasonable, that she should have as much yet of her father's gear as his sisters, who had got no tocher, unless she would come in and make collation of her tocher with the rest of the gear, that altogether might be equally divided in three parts. THE LORDS found she should have the third of the whole contained in the testament, notwithstanding of her former tocher.

Fol. Dic. v. 2. p. 276. Spottiswood, (TESTAMENT.) p. 339.

* * * Durie reports this case :

1631. February 9.—CORSAN the father being bound in his daughter's contract of marriage with John Macmillan her spouse, that his said daughter should have an equal portion of his goods at his decease, suchlike as his other two daughters shall have; and they two dying before the father, and the father having begotten other two daughters upon a second wife, after the foresaid contract, the said — Corsan and John Macmillan, after the father's decease, pursue the said two daughters procreated in the second marriage, as being executors confirmed to him, to make payment of the equal third part of the defunct's gear, viz. both the third part of her bairns' part, and the third part of the defunct's part, conform to the clause of the said contract; which action the Lords sustained, and found that the pursuer had right thereto, albeit that the defenders *alleged*, That she had no right to seek the same, seeing the contract gave her right only to such part as her two sisters named in the contract should have after their father's decease, and they dying before their father, they could have no part of their father's goods, and consequently neither this pursuer. This allegiance was repelled; for albeit these two sisters were deceased before their father, yet that clause was not extinct, but that she should have her equal part with the bairns surviving; and if he had no bairns but the pursuer, the whole would have befallen to her, far more this part which was less.

Act. —.

Alt. *Lawrie*.

Clerk, *Hay*.

Durie, p. 566.

* * * See a subsequent branch of this case, No 4. p. 2367. *voce* COLLATION.

1686. *March*.

IRVINE *against* Mr WILLIAM CRAWFURD.

No 13.

A FATHER having provided his eldest daughter, in her contract of marriage, to 3000 merks, and also obliged himself, that she and her children (should) suc-

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.