

No 52.

1688. July. BROWN *against* YOUNG and Sir MARK CARSS.

A HUSBAND being obliged to employ the tocher on security to his wife in liferent, and to the bairns in fee, he, after her death, assigned it for onerous causes; and the assignee pursuing the cedent's father-in-law for payment;

It was *alleged* for the defender; That the husband was obliged to implement the contract; and albeit he might uplift the money, there being no obligation upon him to re-employ, or Creditors might affect it, yet it could not be assigned before implement.

Answered; The wife being now dead, and the obligation to employ being but a simple destination *quoad* bairns, it is *frustra* to implement.

THE LORDS decerned the money to be paid to the assignee, upon his finding caution to be liable to the bairns for any pretence or right they had to the money after the father's death.

Harcarse, (CONTRACTS OF MARRIAGE.) No 397. p. 104.

1696. July 24.

NAPIER *against* IRVINE.

No 53.
An obligation in a contract of marriage, to provide a certain sum to the children of the marriage, was found not to establish any *jus crediti* in the children, to enable them to compete with their father's creditors.

PRESDO reported the competition between Napier of Tayoch and Irvine of Kincooussie, about a sum provided to the bairns of the marriage, in their mother's contract; Whether that clause did so constitute them creditors, as that they could thereupon crave preference to other extraneous creditors? It was *contended*, This ought to prefer them, at least, bring them in *pari passu*, in regard provisions to bairns did not infer a representation, but stated them *tanquam quilibet*; and the Lords had found so in the case of the Children of Preston, 5th July 1691, See APPENDIX.—*Alleged*, There was a great disparity; for in Preston's case, there was a bond of provision granted in implement of their mother's contract; and here nothing was founded on but the destination in the contract itself. THE LORDS found the cases not equivalent; and, therefore, preferred the extraneous creditors to the bairns.

THE LORDS were partly moved by these subtle points, that a fee cannot so properly be given to bairns *in spe*; for, at what period shall their *jus crediti*, or obligation as creditors begin? Not at their birth; because the provisions are made greater or less, according to the number of the children, the fixed number of whom cannot be known till the dissolution of the marriage; because some may die, and others come in their place; and it were absurd, that an obligation to bairns, not obligatory till the father's death, can ever be equal, much less preferable, to onerous creditors. Others said, this was to confound two things very different in law, to wit, the disparity between *cedere diem*