No 26. dren unforisfamiliate, the heir has no title to demand any share of the moveable estate, unless he collate; but this clearly shows, that, where there was no heritable estate, the eldest son has a right to the legitim, along with the other children; and the law, by giving the heir an option, in cases where there was an heritable estate, either to come in along with the other children, or take the heritable estate, gives the heir an indulgence, but by no means shows that he has, *proprio jure*, no right to the legitim. By the civil law, the right of the whole children to their legitim was upon the same footing; there was no distinction between one and the rest; the right belonged to the whole children *proprio jure*; and the principles of the civil law, in this point, have been adopted into ours. Where there is, of a marriage, but one child, a son, and universal heir, he is entitled to the legitim, and his father can no more exclude him from that right than he could younger children; and, in a division of the moveable estate with the relict, he will draw, without collation, the legitim, in the same manner younger children would have done, which could not be the case, if the doctrine pleaded by Mrs Moodie was well founded; because, as her right of legitim was extinguished by her discharge, she must maintain, that, in no case whatever, has an eldest son, who succeeds to an heritable estate, any right to legitim; yet, the contrary of that is clear, from an only son and heir being entitled to the legitim, in a question with the relict. And the decisions of the Court have been agreeable to these principles, the case of Martin *contra* Agnew, No 8. p. 8167. excepted, which, being a single decision, and contrary to the whole train of the judgments of the Court, ought not to be followed; as, upon attending to the rise of this right of legitim, and sense in which it has been understood, it is plain, that, where younger children, in consequence of a proper consideration from the father, discharge their right of legitim, their right accresces to the heir.

"THE LORDS adhered."

For Mrs Moodie, *Jo. Swinton*, jun. and *David Rae*.
For Charles Sinclair, *Lockhart* and *David Armstrong*.

A. E. *Fol. Dic. v.* 3. *p.* 383. *Fac. Col.* No 75. *p.* 319

1777. *February* 6. LAWSON *against* LAWSON.

No 27. ANDREW LAWSON left to his fourth son, John Lawson, all the effects belonging to him at the time of his death. David, an elder brother of John's, who, at his marriage, had received 200 merks from his father, granted the following discharge: 'I hereby discharge the said Andrew Lawson of the said 200 merks, 'part thereof being 500 merks, left among us by our grandfather, and I here-'by discharge him of all bonds and bills, or sums of money belonging to me, for 'ever.' David pursued his brother Andrew for payment of his legitim, and share of the effects belonging to their mother at her death. Urged in defence,

No 27.

The provision of 200 merks was given and accepted, in lieu of legitim and all claims, as the discharge above-mentioned bears. As to the executry of the mother, it is impossible to ascertain it, as she has been dead twenty years; and this delay of claiming it affords further evidence, that the pursuer meant to renounce it, with all other demands, by the said discharge.——THE LORDS repelled the defences, both with respect to the legitim and share of the mother's moveables.——*See* APPENDIX.

Fol. Dic. v. 3. *p.* 384.

1782. *July* 26.

ELIZABETH HENDERSON *against* JAMES HENDERSON and Others.

No 28.
A provision to a child in a general settlement executed by the father of his whole effects upon his children, was found incompatible with the claim of legitim.

GEORGE HENDERSON, by his marriage-contract, made certain provisions in favour of the children of the marriage. He afterwards, having acquired many additional funds and subjects, executed a total settlement of his effects on the children then existing, James, John, Margaret, and Elizabeth; but, in that deed, which was not delivered, he reserved a power of revocation.

Several years posterior to its date, he conveyed to his three elder children a certain debt secured by heritable bond, 'in consideration of their exonering and 'acquitting him not only of the provisions conceived in their favour by his con-'tract of marriage, but also of whatever they could ask or claim by or through 'his marriage with their mother, and communion thereby formed, or by and 'through the dissolution of that communion by her death; and that whether 'conquest, legitim, or dead's part, natural, or bairn's portions, or any provi-'sion heretofore conceived in their or any of their favours.' They accordingly granted to him a discharge and renunciation 'of the provisions in the contract 'of marriage, and of any other provisions, substitutions, or destinations of suc-'cession, conceived in their favour, and of all claims arising from the dissolu-'tion of the marriage, or the death of their father, whether of dead's part, con-'quest, or legitim.'

Upon George Henderson's death, the total settlement in favour of his whole children was found unrevoked in his repositories.

Elizabeth, however, his youngest child, having no share in the conveyance of the heritable debt, and not having concurred in the discharge, laid claim to the whole of her father's succession, challenging the office of executor exclusively of her brothers and sister, and insisting in an action of declarator of her right. In a process of advocation from the Commissaries, conjoined with this declarator, she

Pleaded, By their acceptance of the disposition, and by their discharge and renunciation, the other children have abandoned every claim, not only arising from their father's and mother's contract of marriage, from the dissolution of the marriage, or from the death of their father, but likewise from any 'provi-