

No 35.

wherever it appeared, that there were particular claims under the view of parties, which gave rise to the discharge, to interpret no general words, so as to comprehend other claims. And even where the general words, in strict propriety, are sufficient to include it, yet where it is apparent that such claim did not come under the view of parties, even the propriety of the words, in that case, will not be sufficient to comprehend it. See 27th January 1670, Innes, No 26. p. 5043; 27th July 1671, Bailie, No 27. p. 5044; and 8th February 1740, Pringle against Pringle, *voce* PRESUMPTION.

Replied; That it was plain from the two discharges granted by Agnes and Robert, that the father intended to free his executer from any claim or demand that might be made by the children of the marriage; and that it was a very common method for fathers to settle their executry, or secure it to certain children, to take discharges, or renunciations from such of them as were foris-familiated. That here it was admitted, the father was transacting for the bairns part, or portion natural, whereby he was plainly clearing his succession from an incumbrance upon it, in favours of other executers; and when he was doing this, it was natural for him, at the same time, to bar the other demand that would arise upon the executry, in case, either by neglect or unforeseen accidents, he should die without making a testament. And in order to do this, it was not necessary that the narrative of the discharge should bear, that the transaction was upon that particular account, in regard an onerous cause was not necessary; it being sufficient, that the discharging words clearly and plainly comprehend it. Nor is the observation, that the succession to the dead's part is not a claim on the father, of any force; for neither is the portion natural a demand upon the father, but it is not dubious, that the succession to the dead's part is a demand upon the other executers, and a claim against them, who may confirm the whole. And the discharge here is not only of the portion natural, but of all claim and demand of, or from Bailie Anderson, or his executers, by and through his decease, or for any other cause or occasion whatsoever; words which clearly cut off the son's right of succession *ab intestato*, and shew that the intention was to redd marches betwixt the children of the different marriages, still reserving power to the father, in so far as not tied up by contract of marriage, to have given part of his executry, by testament, even to those who renounced.

THE LORDS found, that the discharge granted by Robert Anderson does not comprehend his right of succession to his share of the dead's part.

Fel. Dic. v. 3. p. 250. C. Home, No 250. p. 403.

No 36.
A daughter,
in her con-
tract of mar-
riage accept-

1785. June 24.

JANET HEPBURN *against* JAMES HEPBURN.

JANET HEPBURN and her Husband, in their marriage-contract; accepted of the tocher given by her father in full contentation and satisfaction to them of all

' bairns part of gear, portion natural, legitim, or *others whatsoever*, that the said Janet Hepburn or her said husband, for his interest, could ask, claim, or crave, *by and through* her father's decease.'

Her father having died intestate, Janet Hepburn insisted, after her husband's death, against James Hepburn her brother, for a proportional share of her father's executry.

The defender opposed the discharge above recited, as exclusive of his claim; and

Pleaded; Our municipal law has not rejected pactions *super hæreditate viventis*. Nothing is more usual, in the marriage-settlements of children, than renunciations of their rights of succession, to the effect of transmitting those subjects to the other relations, which would have descended to the renouncer. Nor, in this instance, can the intention of parties admit of any reasonable doubt. The pursuer had no claim against her father in virtue of any contract of marriage or bond of provision; so that her only other interest in his moveable estate, that of the legitim having been expressly renounced, was the share due to her of his executry or dead's part. To this alone she could be entitled 'through her father's decease;' an expression, with the utmost propriety, applicable to what might fall to her by way of succession, in opposition to her legal and conventional claims. The general scope of the decisions has been agreeable to this reasoning. A discharge of all that a child can claim or crave from her father, does not exclude her from the dead's part, which is not, like the legitim, a vested right, but merely an expectancy of succession. But where she has farther renounced all she can claim through her father's decease, she is thereby cut out of every demand of that sort. Erskine, book 3. tit. 9. § 23; Bankton, book 3. tit. 8. § 20; Fountainhall, 4th December 1694, Foubaster, *voce* LEGITIM.

Answered; The claims arising to children against the representatives of their father are either legal or conventional; the former consisting of the legitim, and the latter of the obligations due by him, and prestable at his decease, either in virtue of his marriage-contract, or by bonds of provision, or from any other cause. In regard to these, the children have a proper *jus crediti*. And their father accordingly has an obvious interest to obtain a discharge, that his estate, disburdened of such incumbrances, may lie open to his unlimited disposal.

Of a nature altogether separate from these, though likewise taking effect at the father's death, is the children's privilege of inheriting that part of his moveable funds, which alone, by our customs, he is at liberty to settle, in case of children unforisfamiliaried, by a testamentary deed. Here the children have no claim against their father or his representatives. They are themselves the representatives; and a discharge from them must be quite superfluous, because this part of his effects must of necessity descend to them under every limitation he is pleased to impose.

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 ed of her
 tocher, ' in
 ' full conten-
 ' tation and
 ' satisfaction
 ' of all bairns
 ' part of gear,
 ' portion na-
 ' tural, legiti-
 ' tim, or o-
 ' thers what-
 ' soever, that
 ' she could
 ' ask, claim,
 ' or crave, by
 ' and through
 ' her father's
 ' decease.'
 The Lords
 found that she
 was not pre-
 cluded from
 claiming a
 proportional
 share of her
 father's exe-
 cutry or
 dead's part.

No 36.

Since therefore it is an established rule, that a general clause subjoined to a discharge, shall not comprehend particulars of a nature different from those specially mentioned, the one occurring in the deed in question, which expressly refers to the pursuer's legal claims against her father, cannot be construed, by implication, into a renunciation of her right of succeeding to him. A transaction of the latter sort, though not prohibited by the usage of Scotland, must be expressed in terms clearly denoting the father's purpose of excluding his child from any share of his inheritance; as, for example, by taking a renunciation of what she might succeed to at her father's death, or of her father's executry. This distinction accordingly has been recognised by an uniform train of decisions for many years past. Pringle *contra* Pringle, 8th February 1740, *voce* PRESUMPTION; Anderson *contra* Anderson, No 35. p. 5054; 22d February 1749, Martin *contra* Agnew, *voce* LEGITIM; 29th July 1768, Sinclair *contra* Sinclair, *IBIDEM*.

Several circumstances were stated for each party, as tending to support their respective pleas; but the case was determined on the general import of the clause, which the Lords considered as perfectly ascertained by the more recent decisions.

After advising a reclaiming petition for the defender, with answers for the pursuer, the COURT adhered to the judgment of the Lord Ordinary, which found, ' that the clause contained in the pursuer's contract of marriage did not preclude her from claiming a legal share of the moveable effects left by her deceased father.'

Lord Ordinary, *Kennet*. Act. *M. Ross*. Alt. *Wight, Rolland*. Clerk, *Menzies*.

£. *Fol. Dic. v. 3. p. 250. Fac. Col. No 214. p. 335.*

See No 7. p. 1402.

See LEGITIM.

See APPENDIX.