No 29.

bears not in satisfaction of the portion-natural, and bairns-part, and all they might succeed to by their father; yet both the father and notary have thought that the portion natural did signify more than the bairns-part, and likewise did exclude them from any thing they might claim from the father's heirs or successors. It was *replied*, That here they claim nothing from their father's executors, but they are executors themselves, and there is nothing to hinder them to be executors, and so to enjoy the whole executry, without being countable to any.

The Lords found that the portion-natural did extend no further than the bairns-part, and that the conception of the bond did not seclude the bairns from being executors, and that the bairns-part did accresce to the executry, and did belong to themselves; but found that the heir might confer and communicate the heritage, and all to be equal sharers together; for they found that the clause did not bear, in satisfaction of all they might claim from the father's heirs and successors, but only of all bairns-part and portion natural that they could claim from their father's heirs and successors, which would not exclude them from recovering the executry against a stranger, executor nominate, or an executor dative.

Fol. Dic. v. 1. *p.* 344. *Stair, v.* 2. *p.* 99.

1685. *December.* Maxwell *against* Irving.

No 30.
Found that a discharge of all a party could ask or crave as heir to his father, did not exoner as to what belonged to the granter as heir to his grand-father; though his father survived, and was heir apparent to his grand-father.

John Maxwell of Barncleugh having pursued Agnes Irving, Lady Garnsallock and her Husband, to count for several years rent of certain lands belonging to the said John Maxwell as heir to his grandfather, and whereof the Lady as tutrix to him, either did intromit, or ought to have intromitted; *alleged* for the defender, That she was not liable to count, because the pursuer had granted her a discharge of all that he could lay to her charge, either for omissions or intromissions with any goods or gear belonging to him as heir to his father. *Answered*, That the discharge being only as to what the pursuer could ask or crave, as heir to his father, it could not exoner the defender of what he could crave as heir to his grandfather. *Replied*, That the pursuer's father having survived the grand-father, so that any estate that belonged to the grand-father being *hæreditas delata* to the son, the discharge ought to comprehend the rents of any estate that belonged to the grand-father, especially seeing the pursuer's father being apparent heir to the grand-father, any interest that the pursuer had in the grand-father's estate did only accresce and belong to him by the decease of the father. *Duplied*, That the father had a separate estate of his own, wherein he was infeft, distinct from that which belonged to the grandfather, which was intromitted with by the defender; and there being an surplus rent more than satisfied the defender's liferent, that was the only subject that fell under the dis-

No 30.

charge; as also, the pursuer only grants the discharge as heir to his father, and not as heir to his grandfather.

THE LORDS found that the discharge of all that the pursuer could ask or crave as heir to his father, did not extend and exoner the defender as to what belonged to him as heir to his grandfather.

Fol. Dic. v. 1. p. 344. Sir P. Home, MS. v. 2. No 747.

1701. *July* 12.

EXECUTORS of MAGDALEN BOYES *against* Mr PATRICK SANDILANDS.

No 31.
A woman, in her contract of marriage, discharged her husband of any thing that could belong to her as relict, in case she should survive him. She having died before him, in an action against the husband for her third, the Lords extended the discharge to comprehend both cases.

DAVIDSON of Cairnbrogie, and other Executors of Magdalen Boyes, late spouse to Mr Patrick Sandilands of Cotton, pursue the said Mr Patrick for a share of all the moveables he had the time of the dissolution of the marriage-communion by her decease. The *defence* was, she being a widow, and opulently provided by her first husband, when Cotton came in suit of her, she was so well satisfied with the marriage, she declared she would have no jointure nor liferent provision by him, seeing he had children by a former wife; and therefore before the marriage, she gave him a free discharge of any thing that could belong to her as relict, in case she should survive him, by law or any other manner of way whatsoever. *Answered*, The discharge evidently relates to an event which has not existed, viz. his deceasing before her, that then she discharges and renounces the benefit of any jointure by him; though even in that case it might have been pleaded to be *donatio inter virum et uxorem*, on the matter being after the intervention of the *sponsalia et nuptiarum repromissio*; but that is not the case; for there is not one syllable in the same, discharging her share in his moveables in case she die before him; and so the discharge being taxative cannot be extended *de casu in casum*, seeing *casus amissus habetur pro omisso per industriam*, *Replied*, The mentioning her survivance is not restrictive nor conditional, but demonstrative; and these words in the discharge, 'or any 'other manner of way whatsoever,' are general and full, comprehending all events; and in the interpretation of dubious clauses, *expositio est facienda contra preferentem qui potuit apertius dicere*; and it is absurd to think she would have provided more carefully for her executors than for herself; and seeing she has discharged in the event of surviving her husband, much more will it militate against her executors, she being the first deceaser, especially seeing she made no testament or legacy, knowing she had no power; and if she had been interrogated, 'What if you die first, is it your intention that your nearest of kin claim 'a third of Cotton's moveables?' it is plain her answer would have been, They are to have no more right than I myself would have if I happen to be the longest liver. THE LORDS extended the discharge to comprehend both cases, and