

cision where a settlement in a contract of marriage was presumed to be in satisfaction of a prior bond, *quia debitor non præsimitur donare*, doth not concern the present case, where there was no posterior payment made to John, which could be reckoned in place of the assignation. 3<sup>to</sup>, The assignation could not be taken away by the general disposition; *quia specialia derogant generalibus*, whether the special right be prior or posterior to the general, L. 4. § 3. L. 99. § ult. ff. de Leg. 3. l. 15. ff. de Peculio, L. 1. Pr. ff. de Auro Argent. Leg. Inst. § 1. de Codicil. Vin. Comment. *ibid.* 29th Jan. 1679, Aikman *contra* Boyd's Heirs, *vide* PRESUMPTION. The practique betwixt Mr Hall and the Lady Gordon doth not meet; for there Cesnock had expressly revoked the right in favours of the Lady Gordon; but here the question is, Whether Sir Alexander Monro hath revoked this assignation. Had the general disposition carried the African money, Jean's right to it would have been as good without this paper, as with it; consequently it was not delivered to her as an instruction of her right. Nor could the delivery of the assignation to Jean be an extinction of John's right; on the contrary, it made it as effectual as if it had been delivered to John himself, since it went thereby out of the granter's hands. Nay, Jean, who was the father's trustee, and presumed to understand his intentions best, delivered the assignation to John as his proper evident after the father's death. 4<sup>to</sup>, The discharge upon the decret arbitral could go no further than the submission, which was only in relation to depending processes; and the pursuer had then no clag nor claim against the Major in relation to the African money, the present claim having arisen from his subsequent deed of uplifting that money. Nor could either party have in their view at that time when the discharge was granted, that any difference would emerge concerning such a fund, which in all human appearance was then desperate.

THE LORDS found, the assignation in favours of John is a valid assignation without delivery, being betwixt father and son. And found the general disposition by Sir Alexander Monro to Jean his daughter of his heritable and moveable estate, with the delivery to her of the assignation in favours of John of his interest in the African Company, is not a revocation of that assignation in favours of John. And found, that the discharge granted by John to the father, doth not extend to the money in the African Company. And also found, that the discharge following upon the decret arbitral granted by John to the Major, doth not exclude this claim.

*Fol. Dic. v. 1. p. 345. Forbes, p. 644.*

1736. February. GRAY *against* The CREDITORS OF DRUM.

A WOMAN being confirmed executrix as nearest of kin, after her decease, the next in blood made up titles by confirmation to some moveable debts, omitted out of the inventory of the former testament, and insisted against the debtor

No 34.

for payment. The defence was laid upon a general discharge granted by the husband of the executrix, of all he could ask or crave from the debtor in virtue of his wife's claim for executry, &c. which must be presumed to include the present claim; and though it should be supposed the husband could not effectually discharge this claim, by reason titles were not made up in his wife's person, yet the same, bearing absolute warrandice, must bar the pursuer, who is the husband's representative, and liable to fulfil his deeds. *Answered*, No presumption that this claim fell under the general discharge, seeing the wife had no title to claim, nor power to discharge. *Replied*, She had the *jus fundatum* by the right of blood, was confirmed in a part, and had a licence to pursue for the remainder; so that in the utmost rigour of law, there was nothing wanting but an eik to the testament, which might be done at any time. THE LORDS sustained the defence upon the general discharge. See APPENDIX.

*Fol. Dic. v. I. p. 344.*

1743. November 22.

ROBERT ANDERSON, SON TO BAILIE ANDERSON by his first Marriage, *against* PATRICK, &c. ANDERSONS, Children of the second Marriage.

No 35.

Discharge granted by a son to his father, of portion natural, and of all the son could ask or claim, through his father's decease, upon whatever cause or occasion, does not cut off the son's right of succession to his share of the dead's part.

THE deceased Bailie Anderson intermarried with Jean Haxton, with whom he got 5000 merks, besides several other sums, which Jean Harvie, her mother, gave him from time to time. She likewise disposed several heritable subjects to Robert, Jean, and Agnes Andersons, procreated of this marriage, her grandchildren.

Jean Haxton died; whereupon the Bailie married Isabel Anderson, and, in the postnuptial contract with her, he bound himself to add 6000 merks of his own to 6000 he received with his wife; and further provided the conquest, to ' the children of that marriage, of all lands, tenements, annualrents, debts, sums of money, which he should happen to conquest, and acquire, during the existence of the said marriage.'

The Bailie managed the effects left to his children of the first marriage, and obtained a discharge from Robert, and Agnes, (Jean being then dead) not only of his intronissions, but likewise of their bairns part of gear. Before his death he made several settlements in favours of his children of the second marriage; so that a small part of his moveables (such as corn, wine, &c.) remained after his death, that fell under the dead's part, and was not comprehended under the clause of conquest in the second contract of marriage.

Robert and Agnes applied to be confirmed executors *qua* nearest of kin to their father, in order to take up these subjects; but before the processes were determined, Agnes died, who had likewise granted her father a discharge; but, which is unnecessary to resume, as she was not in the competition.

The children of the second marriage appeared, and *pleaded*, That Robert was cut out of any claim he could have to his father's effects, by the tenor of