No 25. *Quere*, Would it bar also the descendants of the renouncer? So it is thought, though claiming in their own right, and not representing the renouncer, because of its being effectual against the renouncer, who was *in titulo*. It is otherwise in heritage.

Fol. Dic. v. 3. *p.* 383. *Kilkerran*, (LEGITIM.) *No* 2. *p.* 333.

1768. *July* 29.

HENRIETTA SINCLAIR, and BENJAMIN MOODIE of Melsetter, her Husband, *against* CHARLES SINCLAIR of Olrick.

No 26.
Effect of a discharge in a contract of marriage upon the wife's right of legitim or claim upon her father's executry.

DONALD SINCLAIR of Olrick had one son, Charles Sinclair, and one daughter, Henrietta, who, in 1755, married Mr Moodie of Melsetter; and, by the contract of marriage, the estate of Melsetter was settled upon the issue of the marriage; and, on the other part, Olrick gave a portion of L. 500 Sterling with his daughter, which sum, by the contract, 'she, with consent of her said future 'husband, and he, as taking burden upon him for her, accepts of, in full satis-'faction to her, of all she can ask or demand as portion-natural, legitim, or 'upon any other account whatever, excepting good will allenarly.'

In 1766, Donald Sinclair died, and his son and heir Charles *contended*, That, by the above recited clause in Mrs Moodie's contract of marriage, she was cut off from every claim upon her father Olrick's executry. It was, on the other hand, insisted for Mrs Moodie and her husband, that said clause did not exclude her from her father's executry, or cut off her legitim; and she obtained herself decerned executrix *qua* nearest in kin to her father, before the Commissary of Caithness, and brought an action against her brother Charles, as intromitter with his father's moveable effects. Charles raised a reduction of the confirmation obtained by Mrs Moodie. The Lord Auchinleck, Ordinary, reported the question to the Court.

And, on advising the cause, 16th June 1768, "THE LORDS found, That the pursuer, Henrietta Sinclair, is not excluded from her father's executry by the discharge in her contract of marriage, but has right thereto by the confirmation produced; assoilzie her and her husband from the process of reduction and declarator brought against them by Charles Sinclair, and decern therein accordingly; and remit to the Lord Ordinary to proceed in the cause."

Charles Sinclair reclaimed against this interlocutor; and, on advising his petition, with answers for Mrs Moodie, 29th July 1768, "THE LORDS adhered to their former interlocutor, finding, That Henrietta Sinclair is not excluded from her father's executry by the discharge in her contract of marriage, but has right thereto by the confirmation produced, and assoilzie her from the process of reduction; and in as far refuse the desire of this petition; but find the petitioner,

Charles Sinclair, is entitled to the legitim, and to heirship moveables; and remit to the Lord Ordinary to proceed accordingly." No 26.

Pleaded, in a reclaiming petition for Mrs Moodie, against this last interlocutor; By the law of Scotland, children are entitled to a portion of their father's moveable estate at his death, of which he cannot fraudulently disappoint them. This legitim, or legal share, by the civil law, extended to heritage as well as moveables, though, by our law, it is confined to moveables. The heir is excluded from the legitim, being considered as drawing his *pars legitima* by succeeding to the heritable estate; and the single exception to this general rule is, that, where the heir finds the heritable estate of less value than a rateable share of the whole estate, heritable and moveable together, he may collate or throw the whole into one common stock, and draw his share along with the other children.

This legal portion, or legitim, is a *jus crediti* in the persons of the younger children who survive their father, and will transmit to their representatives without confirmation; and, where one or more of the younger children discharge or renounce their legitim during the father's life, those who renounce are considered as if they had predeceased the father, and their right will accresce to the other children entitled to the legitim; and, if the father shall, in his lifetime, obtain discharges from all the children entitled to the legitim, it is thereby extinguished, and the whole executry becomes dead's part; and where, in such case, the father leaves no wife, and all the children but the heir have renounced their legitim, the question comes to be, Whether such renunciation of the other children shall be understood to increase the dead's part? or shall it operate in favour of the heir, so as to transfer the legitim to him? And it is thought that, while any of the younger children are alive, the heir cannot be entitled to reap any benefit from these renunciations, as, *proprio jure*, the heir has right to no share of the legitim; and, by his acceptance of the land estate as his legal portion, he is excluded from any share of the moveables, so long as there is any child or children of the father existing; for though the renunciations of the younger children may extinguish their claim of legitim in favour of their father, it cannot create a right in the heir which otherwise had no existence. And it is nowise inconsistent with this doctrine, that the heir, where he is the only child, has right to the legitim, as, in that case, he is the only person who can discharge the obligation incumbent on the father; whereas, where there are younger children, their discharges may extinguish that right, so as to liberate the father, without giving any right to the heir, in a question with whom their right will still be good, as he, by law, is entitled to no legitim while there is, at the father's death, a younger child existing; and, in support of this plea, several authorities and decisions were referred to.

Answered for Charles Sinclair; Mrs Moodie's whole argument proceeds upon the supposal that the heir *proprio jure* has no right to the legitim, which is not the case. It may be true, that, where there is an eldest son, and younger chil-

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,