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-

No 28. ' sion heretofore conceived, and of any substitution or destination of succession ' in their favour.' Thus, then, they are excluded from the benefit of the settlement formerly made in their behalf, as well as in that of their youngest sister, and consequently she is entitled alone to claim under that deed.

If, however, their renunciation were not understood to have the effect of precluding the claims of the other children under the deed of settlement, still it would confessedly bar their pretensions to any part of the legitim at least, which, therefore, must wholly belong to her; Erskine, b. 3. tit. 9. § 23. For though, by the last mentioned deed, a particular provision is conceived in her favour, yet this does not infringe her right to the legitim. A posterior voluntary provision to a child is not interpreted to be in satisfaction of a prior one; Stair, b. 1. tit. 8. § 2. *in fine*. Much less is it to be construed as coming in place of the child's legal claim to legitim; Dict. *voce* PRESUMPTION. Nothing, therefore, less than an explicit declaration, could have that effect; nor is the claim barred by the generality of the settlement, as it is limited in express terms to the moveable effects ' belonging to him at his death,' which words can be properly understood only of the dead's part.

Answered; The elder children have indeed renounced every claim which at the time was competent to them against their father, as of legitim, of provision under the marriage-contract, or of any other provision then effectual in their favour. But, as their father's deed of settlement was undelivered and revocable, no claim could accrue to them from it until his death; and consequently prior to that event, there existed not any right to be the subject of renunciation. Such a claim, it is true, has supervened on his death, but is long posterior to the discharge and renunciation.

With respect to the legitim, it is to be observed, that the deed of settlement comprehended the whole effects of George Henderson, heritable and moveable; as, notwithstanding the criticism on the phrase, ' belonging to me at the time ' of my decease,' is plain from the terms of the deed, agreeably to the interpretation of the Court in a similar case; Riddel *contra* Dalton, 28th November 1781, No 51. p. 6457. The subject of the legitim was therefore disposed of, as well as the dead's part. As Elizabeth cannot both approbate and reprobate this deed, though she may do either, so, if she claim any benefit from it, she must resign her pretensions to the legitim, which are thereby precluded; or, if she insist on the latter, she can no longer challenge an interest in the former, so much more valuable to her.

THE COURT were of opinion, That as the deed of settlement was not delivered, but remained in the granter's repositories at the date of the discharge and renunciation, this could not be understood to comprehend the effect of that deed. They further considered the settlement, being a total one, as incompatible with the claim of legitim, however consistent with this claim a particular provision might have been.

THE LORDS, therefore, "assoilzied John, James, and Margaret Hendersons from the claims of Elizabeth."——*See* PRESUMPTION. No 28.

Lord Ordinary, *Kennet.* For Elizabeth Henderson, *Maclaurin, Rolland.*
For the other Children, *Hay Campbell, G. Fergusson.* Clerk, *Colquhoun.*

S. *Fol. Dic. v.* 3. *p.* 384. *Fac. Col. No* 59. *p.* 94.

1791. *June* 7. REBECCA HOG *against* TAOMAS HOG.

No 29.
One or more of the children *in familia* having renounced the legitim, their shares fall to those who have not renounced.

THE father of Thomas and Rebecca Hog had six children, three sons, of whom Thomas was the eldest, and two daughters, beside Rebecca. On the younger sons and the daughters he made provisions; and from all of them, except Rebecca, having given the securities in his lifetime, he received discharges, and renunciations of their legitim. Rebecca had offended him by her marriage; and though he intended to make her portion equal to that of her sisters, who had married with his approbation, he did not chuse to advance it to her, or settle it irrevocably during his life; by which means she had not the occasion of renouncing her legitim, as all the rest had done.

On the death of the father, two of the other children being predeceased, it came to be a question between Rebecca, and Thomas his heir, who was also his general disponee, whether she, who alone had not renounced her legitim, and who now repudiated the provision destined for her by her father, was entitled, unquestionably contrary to his intention, to claim a full half of his moveables under that denomination, or only one third of such half, while the shares of the other two surviving children accresced by their renunciation to Thomas, in the room of his father. In an action at the instance of Rebecca, to enforce her claim to the half of the moveables, she

Pleaded, The present question relates to the effect of the renunciation of legitim by a part of the children entitled to it, whether the father is to be considered as having purchased their shares, so as proportionally to increase the *dead's part*, or to give him, as coming into their place by implied assignment, the absolute power of disposal of them; or if the portions of the renouncers, still remaining in the same situation as the rest of the legitim, will fall to the child or children who have not so renounced.

The legitim resembles a right of property. Though a husband, from his power of administration, may waste the goods in communion, in the same way as any other part of his fortune, and so impair or annihilate the subject of the legitim; yet he cannot, by a testamentary deed, or even by a deed *inter vivos*, if calculated for that end, disappoint his children of their shares, which they take, not as in right of succession, but *proprio jure*.

When a father, in giving portions to his children, obtains a renunciation of the legitim, it is plainly nothing but a transaction, by which they receive their shares, or what is held as equivalent, by anticipation, the fund for division as at