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. 1. 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 disponed 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 ex-'istence 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 intromissions, 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

the discharge he had granted to him, which proceeded on the narrative, that the Bailie had advanced sums of money to him in full of all intromissions he had had with Robert's effects; as also, 'In full of his bairns part of gear, or 'any other claim or demand he might have against his father, by and through 'his decease, or for any other cause or occasion whatever.' And then it proceeds to discharge the Bailie, his heirs, executors, and successors, of his intromissions, and also of his bairns part of gear, and of all he (Robert) could ask, claim, crave, exact, or demand of, or from him, and his foresaids, by and through his decease, or for any other cause or occasion whatever; and concludes with this declaration, 'That the generality of the said discharge should be as valid 'and effectual to all intents and purposes, as if every particular had been men-'tioned and inserted therein; whereanent he (Robert) dispenses for ever.' No 35.

Answered for Robert; That it was obvious from the discharge, that the only two claims the parties had in view, of which they treated, were, *1mo*, To discharge Bailie Anderson of his intromissions with his son's effects; *2do*, To discharge the Bailie of all claim his son had to a *legitim* after his death, and which Robert could not be disappointed of without his own consent; so that there was nothing in the deed to lead one to think that Robert was excluded from the dead's part, or that this succession was at all under the view of parties at the time of this transaction. That, in no sense could it be said, that this succession was what the son could ask, claim, or crave, or that it could be the foundation of any process, action, *&c.* at the son's instance against his father, since it depended entirely in the father's power to dispose thereof at pleasure. That the dead's part was not a claim competent to a son against his father's representatives; for if the father settle his succession, and name to himself heirs *in mobilibus a testato*, the son has no claim against these heirs for any share of the dead's part. And if the father do not, but leaves it to fall *ab intestato*, the son's share in that succession is not a claim which he has to exact of his father's representatives, but he is, in that case, himself one of his successors *in mobilibus*, and is entitled in his own right to continue or recover the possession of his father's effects. As this succession does not come under the words of the discharge, so it cannot be supposed to come under the intention of parties. For what occasion had the father to ask a discharge from his son, of a succession which he could never take but from the father's own free will? It is proper for a debtor to take a discharge from his creditor, or where the person who takes it lies under restraints, which the granter of the discharge only can release him from, as in the case of legitim; but that a father should take a discharge for what was in his own power to dispose of by two lines, would be very idle, and ought not to be presumed; more especially as the Bailie made several settlements in favours of the children of the second marriage, and yet executed no testament, which he would not have omitted, if he had intended to exclude the children of the first marriage from the succession of the dead's part. That it was a rule of interpreting general clauses of deeds such as this, That

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 executor 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 forisfamiliated. 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 executors; 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 executors, 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 executors, 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.

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

No 36. A daughter, in her contract of marriage 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