1685. *January.*
BORTHWICK of Cruickston *against* CRAIG his Mother, and GEORGE HUME her Husband.

No 21.

FOUND, that the goods in a man's testament received a bipartite division to him and the children, in respect his relict had, in her contract of marriage, renounced her third; but in respect she had got thereafter an assignation to the half of her husband's goods, she was found to have an half share.——Perhaps this should be Borthwick of Pilmoir.

Fol. Dic. v. 1. *p.* 545. *Harcarse,* (EXECUTRY.) *No* 464. *p.* 126.

1694. *December* 4. FOUBISTER *against* ——.

No 22.

WHITELAW reported to the Lords a query, in the case of one Foubister, who left only a son and a daughter. She married, and in her contract had accepted of a tocher, and given a renunciation of all she could ask or crave. Now, her brother offering to confirm executor, she interposed, and craved the office, in regard he could not be both heir and executor, and she was willing to collate her tocher with him. *Answered,* She had renounced. *Replied,* She was still one of kin.—THE LORDS found she was to be repute as out of the field, and that the sole office and benefit accresced to her brother.

Fol. Dic. v. 1. *p.* 544. *Fountainhall, v.* 1. *p.* 647.

1726. *January* 18.
JANET, JEAN, and WILHELMINA NISBETS *against* NISBET of Dirleton, their Brother.

No 23.
The wife accepting a voluntary inſtead of her legal provision, the moveables receive a bipartite division betwixt the legitim and dead's part, equally as she were removed by death.

THE deceased William Nisbet of Dirleton, in his contract of marriage with Mrs Jean Bennet, his second lady, provided her 'To a liferent-annuity of 'twenty-six chalders ten bolls victual, which she accepted in full satisfaction 'of terce of lands, third of moveables, or others, which she might claim by law, 'in and through her said husband's decease.' In the same contract, 'he ob- 'liges himself, his heirs and successors, to make payment to the daughters of 'the marriage, if three or more, the sum of 60,000 merks;' and the term of payment is after the said William Nisbet's decease, at their respective ages of eighteen years complete, with annualrent, &c.

After the death of their father, Janet, Jean, and Wilhelmina Nisbets brought an action against the present Dirleton, as executor nominate, to account to them for the half of the defunct's free moveables, as their legitim. Amongst other

Provisions to children, unless so ex-

No 23.
pressed, are not imputed in their legitim, but they can draw both separately.

defences, it was *pleaded*, That the legitim could in no event be more than the third of the free gear, seeing the defunct has left a relict as well as children.

In fortification of the libel, it was *contended*, Though there both be a relict and children existing after the father's decease, if either the relict or children have accepted of a provision in satisfaction of their legal claim, the division of the free moveables falls to be bipartite, equally as where children only, or a wife only is left. The reason is, that the wife, children, and executors of the husband, having each a right *pro indiviso* in the defunct's moveables, as this necessarily falls to make a tripartite division when they all concur, the same reason points out a bipartite division when but two concur; and it has no influence, that the not concurring happens through the death of the third party, or any other reason; because, from the nature of the thing, each has a right to the whole subject, unless he is restricted by the actual concurrence of the two other parties. To enforce this, let it be considered, were it even possible, that the husband could acquire his wife's third, so as to add only to the dead's part, making it two parts, and the legitim one; yet, 1*mo*, The wife's acceptance in satisfaction is not a conveyance, but a renunciation; which, in as much as the wife's right is not a *jus crediti* against the husband, (whereby a renunciation might be pleaded as a consolidation of her share with his) but a right of division, which would need a conveyance, the consequence is inevitable, that her renunciation can have no other effect, but to increase the capital of the testament to be the subject of a bipartite division betwixt the legitim and the dead's part. But, 2*do*, Supposing the wife's renunciation had been in form of a conveyance, it would have come to the same, from this consideration, that all acquisitions of moveables by the husband go to the common fund of executry, and are at his death subject to the common rules of division above explained. Nor nor can there be any difference, whether the provision accepted in satisfaction, and upon account of which the renunciation is made, was out of the executry, or any other subject, for the case here is the same as where a land-estate is given to younger children, which they accept in satisfaction of their interest in the moveables, whose renunciation would have the individual same effect as if they had got so much for their share out of the executry. In the *next* place, As the pursuers are well founded in the nature of the thing, they want not sufficient authority beside to influence a decision in their favours. In the instructions given to the Commissaries *anno* 1666, which they are ordered to observe in the confirmation of all testaments, the rules of division are laid down to the same purpose; thereby it is appointed, that if the defunct was single, and had no bairns *in familia*, the whole free gear should pay *quot*; that if he left both wife and bairns *in familia*, the testament should divide in three parts, and the third part only pay *quot*; that if he left a wife, and no bairns, the testament should be divided in two, and the half of the free gear pay *quot*; and that the same division should be observed, though he left bairns behind him, if they were all forisfamiliate. Now, though the case of children *in familia*, and

a wife who has renounced her share, is not here expressly mentioned, it may readily be gathered from analogy; for, since children non-existing and forisfamiliate are put upon the same footing in these instructions, there cannot possibly be a solid reason given, why the determination should be different, whether the wife be dead, or if she has accepted a conventional instead of her legal provision; which will be evident from this consideration, let the children's right be supposed either a right of division, which the pursuers contend it is, or only of credit, still the renunciation of the wife can never operate more in the husband's favours, than the like renunciation from the children. But not to dwell upon authorities by way of analogy, where they are to be had expressly upon the point, see act 19th Parl. 1669, where it is statuted, 'That the Commissaries admit of no divisions in testament, in favours and upon account of 'the relict, where, by her contract of marriage or otherwise, she is secluded 'from all part of her husband's moveables.' Now, as this was consequential to the instructions of the Commissaries 1666, so it was in exact conformity to the analogy of our law and practice; for it being admitted, that where the law secluded the relict from any share in particular moveable subjects, as the act 1661 does with respect to bonds bearing annualrent, the division was bipartite as to these subjects betwixt the dead's part and childrens part; there was the same reason for the like division, where the wife's interest was, in virtue of her own paction and agreement, excluded by her own marriage settlement. No 23.

The *answer* for Dirleton was as follows; Where a husband gives his wife a provision in satisfaction, the greatest part whereof is commonly out of his heritable estate, the rational meaning is, that the husband has purchased his wife's claim, for a valuable consideration, to the effect he may have the more ample disposal of his goods; for no man is presumed to tie down his own hands. As this must be presumed Dirleton's intention in his contract of marriage, the method he chose was very proper for that end; for, let it be considered, that the wife's renunciation or acceptance of the provisions in the contract in satisfaction, was not an extinction of her legal claim; her right in the communion still was subsisting at her husband's death; and she was entitled to draw her share in opposition to the children, though not in opposition to the husband's executors, who had a personal objection against her, arising from her contract of marriage, wherein she had renounced her right in the moveables, not indeed absolutely, but in favours of her husband; and the husband's executors take the wife's share, not as a conveyance from her, but in the defunct's right, just as they take the whole when none concur. Whence it is, that this being a personal paction betwixt the husband and wife, the children cannot found upon it, and can draw no more than if such a paction had never been made. And as a further evidence, that a renunciation in such a case does and must operate only in favours of the husband, it cannot be doubted, but, notwithstanding such a clause in satisfaction agreed to by the wife, the husband may discharge it, and declare that she shall come in for her third; which he could not do if there was

No 23. a *jus quæsitum* to the children; nor could the discharge restore her, if there was any absolute extinction of her right. It cannot have influence, that the renunciation was in the contract before the marriage, and before the wife had any interest in the communion of moveables; whence it might be argued, that by her contract she had debarred herself from ever having any interest; for, as it was not the design to increase the common fund for the children's behoof, so the personal paction in favours only of the husband was no absolute exclusion of her legal interest, more than if the contract had been after the marriage, and after her *jus quæsitum* in the moveables. It is said, 'That the childrens 'renunciation does increase the common fund of moveables in favours of the 'wife, and that there is the same reason the wife's renunciation should benefit 'the children.' But it is doubted, whether it be law or be reasonable, when all the children renounce their legitim, that the wife must have half of the executry. It is not established in practice, or expressly said by any of our lawyers; and before this be established, it would be necessary to give an example, where the wife is preferred to the half of the executry upon the childrens renunciation, notwithstanding a testament by the defunct disposing of the moveables otherwise; and indeed there seems to be no good reason for it, since the father can, notwithstanding such renunciation, admit the children, if he pleases, to be bairns in the house; which shews that the renunciation is in his favours. Thus, then, upon the whole, there are three persons to whom the law has given a division in the moveables; and if any of them, by a deed, have barred themselves from the benefit of that division, the person in whose favours the deed was made can alone have benefit thereby. To come now to the authorities adduced for the pursuers; it cannot be admitted, that either the instructions or act of Parliament determine any thing about the extent of the respective interests in the communion of moveables; they are calculated without any other view, but for ascertaining the extent of the *quot*, which was the bishop's share. And of this there is good evidence from Lord Stair, who, though well acquainted with these instructions, published by himself, with the act of Parliament, and with the method of division that was practised by the Commissaries, yet he, in his Institutions, states this point as dubious and undetermined, namely, Whether the childrens renunciation of their legitim would give any benefit to the wife, or entitle her to any more than a third of the free moveables, l. 3. t. 8. § 46.

Replied for the pursuers, There is no more presumption, when a husband provides his wife out of other funds, that he intends to exclude the children from any benefit of her third of moveables, than when he sells land, that the children should be excluded from any share in the price; the cases are precisely equal. In a word, if this presumption take place, the children and relict also will be understood as excluded from every acquisition of moveables made by the husband. But there is no such presumption; the husband does not tie down his hands, by encreasing the common fund of executry, as administrator,

No 23.

or rather in some respects as *dominus*, having an ample power of disposal during his life. And, in the present case, there is no presumption that Dirleton intended to exclude his children from his lady's share of the moveables, since this he could do at any time, if he should be so minded, by bestowing it upon land, or by restoring his lady to her legal right in the moveables, which he could do, though her renunciation was absolute, the children having no title to object, amongst other reasons, for this particularly, that they are thereby in no worse condition than if the renunciation had not been made. And this will serve to remove the difficulty drawn from the husband's power of discharging the renunciation, as if, in consistency with that, the renunciation could not be absolute, but only in his favour. To go to another point, the defender, in his answers, is obliged to maintain, that the act above cited, was introduced only to ascertain the bishop's *quot*. But even that will be found a sufficient concession for the pursuers, because these are convertible terms, 'Whatever is dead's part 'pays *quot*, and *quot* is payable out of nothing but what is dead's part.' If, therefore, there is an indisputable rule from the law for establishing the *quot*, that points out the dead's part, and that of consequence ascertains the other proportions of the executry. Thus, wherever *quot* is paid for the half, it is certain the other half must belong to the bairns part, or to the relict; if the bairns have no claim, through their non-existence or forisfamiliation, the relict has it; and where the relict has no claim, cut off by her paction or death, the bairns must have it. And this clearly excludes the notion, that the dead's part may be two thirds, and the bairns part one third; for if this could obtain, the act of Parliament must have enjoined, that in case of the wife's renunciation, the testament should be tripartite, whereof two shares to the dead's part, in his own right and that of his wife, for which *quot* should be paid, and the other third bairns part. But the quite contrary is established; the husband's moveables in that case are to admit of a bipartite division, wherein the wife's share, because of her renunciation, is not at all to be considered.

"THE LORDS found, The defunct's moveable estate admits only of a bipartite division, betwixt the children and the dead's part, by equal portions."

Another defence pleaded for Dirleton, against his sisters' claim of legitim, was, That they cannot draw both the legitim and the 60,000 merks provided to them in their mother's contract of marriage; but the provision in the contract must be imputed *pro tanto* towards the satisfaction of the legitim; which was endeavoured to be made out from the reason of introducing the legitim, viz. that children might not be unprovided. The law, for this end, has thought fit to settle a provision, and determine the extent of it; but where the father has given the child a sufficiency, and reasonable provision, the intent of the law is so far fulfilled, since the child has a proportion of his father's effects, equal to what the law intended him to draw. The legitim, therefore, being only a subsidiary claim given by the law, in defect of other competent provisions, there is no place for it, where the children have already got more than the legitim;

No 23. and if the provisions are less, being in its nature subsidiary, it can only come in to supply what is wanting of a competency; that is, in other words, the provisions must impute in the legitim *pro tanto*. Thus, then, the legitim, from its original design, is no more but a certain share of the moveables, including former provisions; and, therefore, unless the father's *animus* do appear, that the former provisions shall not impute, the rule of law is that they do impute. This will not have the less weight that it is agreeable to the Roman law, whence our legitim is evidently derived. See *l.* 29. *C. Inoffic. Testam.* 2*do*, This is founded in the maxim, *debitor non præsumitur donare*, the father is debtor in the legitim, and what he gives must be understood in satisfaction *pro tanto* of that debt.

To the *first* it was *answered*, That the legitim is not a subsidiary claim; 'it 'is that direct interest the children have in the communion of moveables, esta- 'blished to them by law and custom, abstractedly from any consideration, 'whether they are otherwise provided or not.' For thus far the law thought proper to make them absolutely secure, leaving them to their parents for what additions should be thought proper. The pursuers, therefore, are well founded in their action. As creditors in virtue of their mother's contract, they can draw their payment out of the common fund of the executry; and of what is left, after satisfying that and other just debts, they come in as children to draw the half, which is their legal provision. These two claims are perfectly consistent, and there is no more reason for imputing the one into the other, than if existing in different persons; and therefore in no case will a provision exclude the legitim, unless where the parent has expressly so determined. This reason is greatly confirmed from analogy of the wife's provision; for before the act 1681, c. 10. a provision to a wife in a contract of marriage, would not have imputed in her legal provision; and to this hour, an obligation in a contract of marriage, to pay a wife a sum of money, will not impute in her third of moveables; the pursuers cannot see, why a separate provision in their favour, should impute into their legal provision, more than in the case of the wife. To the *second* it was *answered*, That the father is not debtor in the legitim, and therefore the maxim applies not. The legitim is a right of division, like the wife's third; it transmits without confirmation, and can be validly assigned the moment the father dies, while at the same time the other third, which is dead's part, is neither assignable, nor transmits without confirmation. But, 2*do*, Granting, for argument's sake, the legitim to be a debt, still it is no such debt to which the maxim can be applied. Indeed, where one is under a strict determined obligation, which the creditor has at any time in his power to enforce by legal execution, there every dubious deed will be interpreted as in order to dissolve the obligation; but every one sees that this has no relation to the case in hand. A father, whatever may be said of his being debtor in the legitim, is certainly under no strict obligation upon that account. He has, notwithstanding, the full and almost unaccountable administration and disposal of the moveables during

his life; and the children must be satisfied with their share as he leaves it. This case, therefore, differs in every circumstance. 3*tio*, Were this maxim applicable, there is a stronger presumption on the other side, that would take away its whole force, viz. the presumption of paternal affection, which has the effect, that bonds of provision to children are not even imputed in former bonds; see *Stair*, *l.* 1. *t.* 8. § 2. *med.* far less in the legitim. No 23.

"THE LORDS found the provisions of the defunct's contract of marriage in favour of his children, the pursuers, must come off the hail head of the executry, as a debt; and that what remains after payment of these provisions, and payment of the defunct's other moveable debts, the children come to have right to the equal half thereof, as their legitim."

Fol. Dic. v. 1. *p.* 545. *Rem. Dec. v.* 1. *No* 66. *p.* 127.

*** The like was determined with respect to the relict's third, in the case betwixt the Lady Balmain and Lieutenant Graham, December 1720; where the LORDS found, that some donations of money and other moveables, made by the husband to his wife, were not imputable in her legal third. *See* APPENDIX.

1728. *June.* MARION HENDERSON *against* DAVID HENDERSON. No 24.

CLAUD HENDERSON had a son and three daughters; the eldest, in her contract of marriage, accepted a provision in satisfaction; the son obtained a general disposition from his father of all his effects, with the burden of certain provisions to the two youngest daughters. After the father's decease, the second daughter ratified the disposition to her brother, accepted of her provision, and renounced any claim she had of legitim; the youngest neglected her provision, and took herself to her claim of legitim. THE LORDS found, That the eldest daughter being forisfamiliated before the father's decease, the brother could claim no share nor interest in the legitim upon her account, and that the second daughter not being forisfamiliated the time of the father's decease, had right to a share of the legitim, and did, by her ratification and renunciation, communicate her share to her brother. *See* APPENDIX.

Fol. Dic. v. 1. *p.* 544.

1738. *July* 2. CAMPBELL and Her HUSBAND *against* CAMPBELLS. No 25.

FOUND, that where a child forisfamiliate had renounced all claim to legitim or dead's part, the renunciation barred him or her from competing with the other children *in familia*, or their descendants, but did not bar him or her in competition with collaterals.