

No. 28. money under Sir John and his father, from whom he possessed a lucrative farm.

THE LORDS found, That the general discharge at the foot of the accompt, of charge and discharge, betwixt the pursuer and the deceased William Barnsfather, did not comprehend the sums in the bond discharged by the said William Barnsfather.

Act. Arch. Hamilton, sen. Alt. Ja. Graham, sen. & And. Macdowal. Clerk, Dalrymple.
Fol. Dic. v. 3. p. 250. Edgar, p. 72.

S-E-C-T. VIII.

If presumed to comprehend legal provisions and undelivered bonds of provision.

1672. July 13.

CHISHOLM against CHISHOLMS.

No 29.

A father granted bond of provision to his younger children, whereby he obliged himself and his heirs to pay them, but declared his executors should not be burdened; he declared also, that the provisions "shall be in full satisfaction to the bairns of all portion natural, and bairns-part of gear, that they can claim from his heirs and successors." The father having died without testament, it was found, that seeing this clause did not bear

UMQUHILE Thomas Chisholm of Hairhope having given a bond of provision to his younger children, beside his heir, whereby he obliges himself and his heir to pay them; but declares that his executors shall noways be burdened therewith; and declares also that these provisions shall be in full satisfaction to the bairns of all portion natural, and bairns part of gear that they can claim from his heirs and successors; and having died without making testament, this bond of provision being found by the mother in the father's pocket, the children pursue exhibition thereof; in which the mother having deponed that she found the bond in her husband's pocket after his death, the same was decerned to be exhibited and delivered, albeit it was never delivered to the children, seeing their father's custody was their custody; albeit it was offered to be proven that the father did declare that he intended not to burden his estate with his bairns. The bairns now pursue their brother the heir for payment, who *alleged* that he could not be liable for payment, unless the pursuers would assign him to their portion natural, and bairns-part, and all that they could claim from his father's heirs or successors, seeing this sum was granted to them expressly in satisfaction thereof, and therefore behoved to come in place of the same; and it was against reason, and the intention of the defunct, to give these children any more than these portions, which were very great; and if they should obtain both the portions and executry, the heir offered to confer and communicate the lands with them, that all might come in proportionably, both in lands and moveables. The pursuers *answered*, That there was nothing in the bond of provision, directly nor indirectly obliging them to assign their bairns-part to the heir, neither

was it the father's intention that the heir should be executor, as if the children were all excluded from the executry ; because he expressly binds his heir, and declares his executors shall not be bound ; which clearly imports that he intended to have an executor besides his heir ; and if he had nominated his executor, the heir could not have claimed from that executor any part of the executry ; so that now the children succeeding to their father as executors, they have the whole executry, and their bairns-part which they renounced, doth neither accresce to the heir, nor ought to be assigned to him, but it accresces to the executor ; and if there were an executor nominate, albeit the pursuers should assign their bairns-part to the heir, he could not recover the same from the executors, who have this relevant defence, that the bairns accepting this sum in satisfaction of their bairns-part, is no more than if they had renounced or discharged their bairns-part ; in which case there being no wife, the bairns-part falls in to the dead's part, and the defunct by his nominations and legacies might affect the whole, as if there were no bairns, which is most ordinary ; when bairns are married, and get portions, and satisfaction of their bairns-part, then if there be any bairns remaining unmarried, the bairns-part of these that are unmarried accresces to them, and if none, the bairns-part accresces to the executors ; which is either divisible in two, if there be a wife, or wholly disposable by the husband, as dead's part, as it is in this case ; so that these children having two interests, their portion natural, or bairns-part, which terms do always signify the same thing, and their right of succession in dead's part, whereby if there was an executor nominated, they have right as nearest of kin to be confirmed executors, and thereby have the whole executry ; yea, if a stranger were nominated executor, and not universal legatar, he was countable to them for all except a third of the dead's part, which the law gives him for the execution of his office. The defender *answered*, That whatever any other person that the defunct might have named executor, and universal legatar might pretend, there is no reason that these children should get their bairns-part twice ; first by this bond, and then as executors, by the accrescing of the bairns-part to the dead's part ; nor can it be thought to have been the father's intention, but only that he might have disposed of his executry, but not that his children should have had the same, and so great portions also ; neither is it granted, that these bairns-part is only discharged by accepting this sum, but likewise their portion natural that they could claim from their father's heirs or successors ; which necessarily imports all right they could have to the executry ; for if a stranger had been named executor, and not legatar, the bairns, if they had pursued him, or an executor dative, to pay to them the executry, above his own allowance, this clause would have excluded them, for they could have claimed no more from him as their father's successor ; and it cannot be thought that it would accresce to the executor dative, or a stranger ; and therefore of necessity it behoved to belong to the heir, who as to that point was the only nearest of kin to the father ; and albeit through the ignorance of the notary, the bond

No 29.
 in satisfaction of all the children might claim from their father's heirs and successors, but only 'of all bairns-part and portion natural,' in other words, the legitim, which would not exclude them from the dead's part or from being executors, that *qua* executors they must have the moveables over and above the bond of provision.

No 29.

bears not in satisfaction of the portion-natural, and bairns-part, and all they might succeed to by their father; yet both the father and notary have thought that the portion natural did signify more than the bairns-part, and likewise did exclude them from any thing they might claim from the father's heirs or successors. It was *replied*, That here they claim nothing from their father's executors, but they are executors themselves, and there is nothing to hinder them to be executors, and so to enjoy the whole executry, without being countable to any.

THE LORDS found that the portion-natural did extend no further than the bairns-part, and that the conception of the bond did not exclude the bairns from being executors, and that the bairns-part did accresce to the executry, and did belong to themselves; but found that the heir might confer and communicate the heritage, and all to be equal sharers together; for they found that the clause did not bear, in satisfaction of all they might claim from the father's heirs and successors, but only of all bairns-part and portion natural that they could claim from their father's heirs and successors, which would not exclude them from recovering the executry against a stranger, executor nominate, or an executor dative.

Fol. Dic. v.1. p. 344. Stair, v. 2. p. 99.

1685. December.

MAXWELL against IRVING.

No 30.

Found that a discharge of all a party could ask or crave as heir to his father, did not exoner as to what belonged to the granter as heir to his grand-father; though his father survived, and was heir apparent to his grand-father.

JOHN MAXWELL of Barncleugh having pursued Agnes Irving, Lady Garnsallock and her Husband, to count for several years rent of certain lands belonging to the said John Maxwell as heir to his grandfather, and whereof the Lady as tutrix to him, either did intromit, or ought to have intromitted; *alleged* for the defender, That she was not liable to count, because the pursuer had granted her a discharge of all that he could lay to her charge, either for omissions or intromissions with any goods or gear belonging to him as heir to his father. *Answered*, That the discharge being only as to what the pursuer could ask or crave, as heir to his father, it could not exoner the defender of what he could crave as heir to his grandfather. *Replied*, That the pursuer's father having survived the grand-father, so that any estate that belonged to the grand-father being *hereditas delata* to the son, the discharge ought to comprehend the rents of any estate that belonged to the grand-father, especially seeing the pursuer's father being apparent heir to the grand-father, any interest that the pursuer had in the grand-father's estate did only accresce and belong to him by the decease of the father. *Duplied*, That the father had a separate estate of his own, wherein he was infest, distinct from that which belonged to the grandfather, which was intromitted with by the defender; and there being an surplus rent more than satisfied the defender's liferent, that was the only subject that fell under the dis-