On the 10th March 1768, the Lords, having heard the judgment of the House of Peers, refused the petition.

On the 23d November 1768, they adhered.

Act. H. Dundas. *Alt.* D. Rae.

Diss. Kaimes, Gardenston, Barjarg, Hailes, Monboddo.

1768. *June* 15, and *November* 23. HENRIETTA SINCLAIR *against* CHARLES SINCLAIR of Olrick.

LEGITIM.

1. Effect of a discharge in a contract of marriage upon the wife's right of legitim, or claim upon her father's executry. 2. In what cases the heir is entitled to Legitim.

(*Faculty Collection*, p. 519; *Dictionary*, 8188.)

PITFOUR. A discharge of all claims implies all claims whereof the party discharging can compel performance. The legitim is of this nature; for a father cannot disappoint a child of the legitim: but the stipulation of a discharge of a right of succession is inept; for why should I desire a discharge from a child, of what I may settle without the child's consent? It is true that there sometimes occurs a discharge of all that the child can succeed to, and this is held to be a virtual testament in favour of the other children. In heritage, the heir cannot be prejudiced by exclusion, for it is necessary that another heir be instituted. But there is a difference in moveables; there, exclusion of one child implies an institution of other children. General words of *ask and crave*, will not apply to the dead's part.

GARDENSTON. There are here additional words,—Upon any account whatever. They are such as must have a meaning. A discharge of what could be asked through the husband's death, has been extended to what could be asked through the wife's death.

PITFOUR. There the words were only descriptive and explanatory, and the clause was so complete without them, that it implied all. The Court found it to imply.

MONBODDO. I would give some operation to the general discharge; but a right of future succession must be discharged in express words. This sort of renunciation was quite improbated by the Roman law: It has been admitted, indeed, in modern practice, as appears in Antonius Faber's *Decisiones Sabaudicae;* but the renunciation must be upon oath. I do not know whether this ever took place with us. The same decisions show, that the renunciation must be in express words; and this, I think, is also the rule with us. Had the words been in and through decease of the father, the case might have been different.

COALSTON. There is a distinction between the case of heritage and that of moveables. An heir cannot effectually renounce, but an executor may. If

that had been the import of this clause here, I should have thought it sufficient. The general words are not altogether ineffectual. They would import a renunciation of what Henrietta Sinclair could have claimed by her mother's marriage-contract, or the like.

On the 15th June 1768, the Lords found the discharge does not exclude the daughter from her father's executry.

For the daughter, T. Swinton, junior. *Alt.* A. Lockhart.

Reporter, Auchinleck.

[A petition was given in against this interlocutor: on advising which, the following opinions were delivered:]—

PITFOUR. The legitim is not extinguished. Though Henrietta Sinclair has renounced, her brother has not; and he is entitled to it. Legitim, in law, is not confined to younger children: the only thing that bars the elder brother, is his obligation to collate. I question whether there is here room for collation; the legitim belongs to all the children. This is laid down by Lord Stair and by Sir James Stewart, and so it was found in the case of *Justice*, 1737. It is a principle, that, whenever a child renounces its legitim, *habendus est pro mortuo*; and it is so laid down in all our books. Can the sister say to her brother, You must collate? No; for collation is only to be claimed by parties who have a right in the subjects to be collated; and she has none, because she renounced. Suppose the sister died without renouncing, and left children, the heir has the legitim: the children of the sister cannot make him collate, for that they are excluded from the subject by their mother's death. Suppose the father has left a universal legatee, he concurs with the brother and seeks the executry. Good: But the legitim goes to the brother notwithstanding. So, in the same way, the universal legatee excludes the sister, because she has renounced. Suppose the relict competes with the brother, she will not exclude him, but she will exclude the sister. The only thing that creates a difficulty, is *Agnew's* case in 1749, where the direct contrary was found. In that case the Bench was divided, and the decision was not relished. A decision in an arbitrary question is of great authority; not so when pronounced on wrong principles. The cause was not fully pleaded at first; and some Judges are like the old Bishop, who, having begun to eat the asparagus at the wrong end, did not choose to alter.

BARJARG. The case of *Agnew* is in point: that cause was fully argued, and I would follow it.

MONBODDO. Foreign law is matter of fact; but our law ought to be a matter of reason and principles. I am not determined by precedents. I think the judgment in the case of *Agnew* was demonstratively wrong, as Lord Pitfour has shown.

PRESIDENT. It is an error to say that an heir is not entitled to the legitim: He is entitled; but he may sometimes be debarred from taking it, unless he collates. The decision in the case of *Agnew* was not unanimously pronounced. The President, Justice-Clerk, (Tinwald,) and Drummore were for it; but Kilkerran and Elchies were against it.

On the 29th July 1768, the Lords found Charles Sinclair entitled to the legitim.

On the 23d November, 1768, they adhered.
Act. J. Swinton, D. Rae. *Alt.* A. Lockhart, D. Armstrong.
Reporter, Auchinleck. No votes at last hearing.

1767. *July* 21; and *25th November* 1768. DUKE of ROXBURGH *against* EARL of HOME.

SALMON-FISHING.

A Fishing in the Tweed possessed jointly by a Scots and English Heritor, how far subject to the regulations of the Act 1696, cap. 33, and to the cognisance of the Court of Session.

[*Dictionary,* 14,272.]

HAILES. Of the opinion of the Lord Ordinary's interlocutor: the slop on the south side of the river can never be the slop intended by the Act 1696, for that it is without the jurisdiction of the Court of Scotland; and, consequently, Lord Tankerville may shut it up whenever he inclines. The argument, from custom, does not affect me: a public law is not abrogated by particular consuetude. So was found, not only in the case of *The Fishings of Ness,* but also in the case of *The Fishings of Craigforth.* The case of *The Water of Ericht* was a singular one. The bulwark, there, was ratified by Parliament, and the immemorial possession followed upon that Act.

MONBODDO. The Act 1696 was never in use in this river. I cannot divide the river, nor the dam-dike. If one part is not in Scotland, the other cannot be regulated by the law of Scotland. Possession and custom go far towards the interpretation of the statute. The case of the water of Ericht is rather stronger than the present case, where there was a bulwark quite cross the river from time immemorial. The interest of the mill is to be considered.

AUCHINLECK. As to the interest of the mill, undoubtedly that is the primary use of the river, and the mill must be served. The Acts concerning salmon-fishings have been considered by the court as relative to public police; the Act 1696 is a general law; and I do not see that the Tweed is exempted from it. It is true, that part of the river is not under our jurisdiction; but, so far as our jurisdiction reaches, we must support this salutary regulation of the mid-stream. If Scots people were convicted of killing smelts in this river during forbidden time, they would be punished: the mill-dam has no mid-stream; but, what is equivalent, it has holes, which will answer as well whenever the nets are taken out. This was ordered by the sheriff, and approved of by the Lord Ordinary, and is a good expedient: it makes no difference that the law has not been put in execution as to the fishers of this river. The Ness fishers also pleaded that they were *legibus soluti;* but their plea was disregarded. The case of Ericht is a *strong* case, and I doubt of its justice. Besides, in that case,