

charge; as also, the pursuer only grants the discharge as heir to his father, and not as heir to his grandfather. No 30.

THE LORDS found that the discharge of all that the pursuer could ask or crave as heir to his father, did not extend and exoner the defender as to what belonged to him as heir to his grandfather.

*Fol. Dic. v. 1. p. 344. Sir P. Home, MS. v. 2. No 747.*

1701. July 12.

EXECUTORS OF MAGDALEN BOYES *against* Mr PATRICK SANDILANDS.

DAVIDSON of Cairnbrogie, and other Executors of Magdalen Boyes, late spouse to Mr Patrick Sandilands of Cotton, pursue the said Mr Patrick for a share of all the moveables he had the time of the dissolution of the marriage-communion by her decease. The *defence* was, she being a widow, and opulently provided by her first husband, when Cotton came in suit of her, she was so well satisfied with the marriage, she declared she would have no jointure nor liferent provision by him, seeing he had children by a former wife; and therefore before the marriage, she gave him a free discharge of any thing that could belong to her as relict, in case she should survive him, by law or any other manner of way whatsoever. *Answered*, The discharge evidently relates to an event which has not existed, viz. his deceasing before her, that then she discharges and renounces the benefit of any jointure by him; though even in that case it might have been pleaded to be *donatio inter virum et uxorem*, on the matter being after the intervention of the *sponsalia et nuptiarum repromissio*; but that is not the case; for there is not one syllable in the same, discharging her share in his moveables in case she die before him; and so the discharge being taxative cannot be extended *de casu in casum*, seeing *casus amissus habetur pro omisso per industriam*. *Replied*, The mentioning her survivance is not restrictive nor conditional, but demonstrative; and these words in the discharge, 'or any other manner of way whatsoever,' are general and full, comprehending all events; and in the interpretation of dubious clauses, *expositio est facienda contra preferentem qui potuit apertius dicere*; and it is absurd to think she would have provided more carefully for her executors than for herself; and seeing she has discharged in the event of surviving her husband, much more will it militate against her executors, she being the first deceiver, especially seeing she made no testament or legacy, knowing she had no power; and if she had been interrogated, 'What if you die first, is it your intention that your nearest of kin claim a third of Cotton's moveables?' it is plain her answer would have been, They are to have no more right than I myself would have if I happen to be the longest liver. THE LORDS extended the discharge to comprehend both cases, and

No 31.

A woman, in her contract of marriage, discharged her husband of any thing that could belong to her as relict, in case she should survive him. She having died before him, in an action against the husband for her third, the Lords extended the discharge to comprehend both cases.

No 31. assoilzied. Judges oft-times make testaments and discharges different from what the parties designed, which must necessarily fall out where ambiguous clauses come to be interpreted.

*Fol. Dic. v. 1. 344. Fountainball v. 2. p. 119.*

No 32.

A man provided his son of a first marriage to some lands, and took a discharge from him. He afterwards disposed other lands to a son of a second marriage. In a reduction of this disposition at the instance of the first son, the Lords found that the sole import of this discharge on which the defender founded his defence, was to cut off the eldest from the executry and moveables, and was not to be extended to heritage, which is a particular of greater importance than that expressed.

1702. December 25.

GORDON against ROSS.

MR THOMAS ROSS of Morinshie having two sons by two several marriages, he provides the son of the first marriage to some lands and houses, and takes a discharge from him; then, in 1656, by a holograph disposition, he disposes his lands of Morinshie to George Ross, his son of the second marriage, with the burden of two liferents, and 2000 merks of debt. Adam Gordon of Inverebry having adjudged the eldest son's right, on a bond granted by him to be a foundation of a diligence, he raises a reduction, against the said George Ross, of the said holograph disposition *ex capite lecti*, because *non probat datam*, being without witnesses, and so is presumed to be done in the last moments of his life, and consequently on death-bed. THE LORDS sustained the disposition only for a security of the onerous causes for which it was granted; whereupon an act was extracted, allowing Morinshie to support his disposition by what onerous causes he could instruct, and Inverebry to prove his intrusions with the rents to extinguish these onerous causes. And probation being led by either party, at advising it was *alleged* by Morinshie the defender, Absolvitor, because the son of the first marriage had granted an ample discharge and renunciation of all he could ask or crave by his mother's contract of marriage or otherwise, except good will, *quæ exceptio firmat regulam in casibus non exceptis*. *Answered*, The sole import of that discharge was to cut him off from the executry and moveables, and can never be extended to heritage, which is a particular of greater import than that expressed; and if the father had died without making a disposition, would not the eldest son, as heir of line, have succeeded to these lands by the course of law, notwithstanding of his discharge? THE LORDS repelled the defence in respect of the answer. *2do*, It was *alleged* for Morinshie the defender, The he being *bona fide* possessor, the bygone fruits could not be imputed to pay and extinguish the debts owing him; but they being *percepti et consumpti* by virtue of a colourable title, they became unaccountably his own, as brooking by a disposition never quarrelled till of late, and who had reason to believe the discharge given by his brother would exclude him. *Answered*, This was wholly incompetent now, because, by the extracted act, it was found his intrusions were to go towards extinguishing of the onerous causes of his disposition *pro tanto* in the first place; and which act he had homologated by extracting it, leading probation thereon, and never quarrelling it till now. *Replied*, *Imo*, An act was not *res judicata*, and had not the privilege thereof. *2do*, Competent and omitted takes not place in acts; but defences either consisting