

S E C T. III.

Whether General Discharges and Renunciations comprehend Claims of Relief.

1674. *January 2.* SIR JAMES DOUGLAS *against* MR JOHN HAY of Haytoun.

IN a reduction of a comprising of the estate of Smithfield, led at Haytoun's instance, as assignee to two bonds, whereby Sir James Hay of Smithfield, and Archibald Hay residing in England, were bound to John Dickson chirurgeon, extending to 700 and odd pounds Sterling, Sir James's interest being a comprising of that estate, likeways for his tocher of L. 200 Sterling, for which Sir James was bound to him by contract of marriage with his daughter; the reasons being first, that the bonds being English bonds, and that albeit by their law Sir James's name was inserted before Archibald's, yet Archibald ought to be reputed principal; because it was offered to be proven by Dickson's oath, who was creditor, that money was truly lent to Archibald, and applied to his use only; the second reason was, that the bonds were retired by Sir James Hay and in his custody, and after his death were taken out of his charter chest by his sons, who delivered them to Haytoun upon trust, to get an assignation thereto from Dickson; upon both which reasons Dickson being examined, albeit in effect he declared the truth in both, and that there were several presumptions arising from missive letters to evince the truth thereof; yet the LORDS did not find the same so full a probation as our law requires, for taking away Hayton's assignation, which was delivered to him, and in his own possession, and whereupon he had done diligence; but the third reason of reduction being, that Archibald Hay, after he was distressed for the said debt, and made prisoner in England, did, in his latter-will and testament, leave to the said Sir James a legacy of 10,000 merks; and besides, did liberate him of all sums of money wherein he was debtor to the said Archibald, and by a codicil subjoined to the testament, did appoint Chaloner Chittie, to whom he disposed his right of Stocklie-park out of the price thereof, first to pay his legacies, and out of the superplus to relieve and skaitless keep Mr Linthall, keeper of the King's Bench, to whom he was prisoner for these bonds made to Dickson, because he had voluntarily suffered him to come out of prison, and thereby was liable for the debt to Dickson; there did upon that reason arise a debate as to the meaning of that legacy, how far it could extend.—It was *alleged* for Haytoun, That it could not comprehend these bonds due to Dickson, to which he was assigned, because the legacy was only of all such sums of money as were due by Sir James to the defunct Archibald Hay; but so it is, that in these bonds Sir James

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A legacy of a sum, with a liberation of all debts due to the testator by the legatee, was found to include an action of relief for cantionry, though the debt was not then paid by the testator; only in a codicil he appointed the same to be paid out of his own proper estate, without declaring that the executor should have an action of relief.

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was principal, and Archibald only cautioner to Dickson as creditor; and Archibald never having made payment of these debts, Sir James was not his debtor to him in these sums of money, and therefore the legacy of liberation could not be extended thereto, which in law ought to be most strictly interpreted; and being in general terms, is never sustained, unless it be conceived by the civil law in these express terms, *heres meus damnus esto*, or when in our legacies the executors are expressly burdened therewith; and it is ordained not to belong to the universal legatar: Likeas the defunct having left Sir James a legacy of 10,000 merks, and many other legacies, which extended to near the worth of his whole estate, it was not to be imagined that legacy of his could but intend to free him of any particular bonds or tickets, for other considerable debts or accounts, where in Sir James was debtor to him *proprio nomine*.—It was answered for the pursuer, That the said legacies of liberation ought to comprehend Dickson's debt, notwithstanding of these reasons; because, long before the testament, Archibald Hay was distressed and in prison for these debts; so that they could not but fall under his consideration, when he did leave that legacy of liberation; and if he had intended that notwithstanding thereof, Sir James, as being principal debtor, should be obliged to relieve him at Dickson's hands, he would have burdened his legacy of 10,000 merks with that relief; and it cannot be imagined that he intended to leave him nothing but that legacy of liberation, and that it should be altogether elusory without any effect, seeing they cannot condescend that Sir James was debtor to him, *proprio nomine*, by any bond, ticket, or account whatsoever. And as to the argument taken from formalities used by the civil law, in legacies of liberation, they are of no weight here, *ubi constat de voluntate defuncti*, which is always interpreted *ut aliquod operatur*; and if that argument should hold, from formalities contrary to the express will of the defunct, that a legacy could take no effect, neither ought it to be respected that the defunct, Archibald Hay, not having paid the debt, it could not fall under the said liberation of all sums of money due to him; seeing by distress and personal execution by imprisonment, and his special appointment to pay the debt out of his own estate of Stocklie park, Sir James, as principal, was debtor to him in the whole sum.—THE LORDS having much debated amongst themselves upon all that was alleged *pro et contra*, as likewise upon that argument from the *formula legandi*, that it ought to have been in these terms, that he did liberate him of all action of relief which was then only competent, he not having paid the debt; they did, notwithstanding, sustain the reason of reduction founded upon the legacy and codicil, upon these general reasons, that it behoved to operate something; and seeing the defender could not condescend upon any bond or ticket, or any other ground of debt, it ought to comprehend Dickson's debt, which could not but fall under the defunct's consideration, who at that time was prisoner for the same. *2do*, That by the codicil, which was a part of his will and testament, he had made special mention of this debt, and appointed Mr Linthall to be freed thereof, out

of his own proper estate, without declaring that his executors should have any action of relief against Smithfield for retention of his legacy of 10,000 merks, whereby he did constitute himself only debtor to Dickson; and notwithstanding thereof, did liberate Sir James of all sums of money due to him, which being the result of an action of relief, did necessarily include the same, and the whole effect thereof; which reasons did all militate against Haytoun, because he did acknowledge his name was but borrowed to the assignation for the behoof of Mr Andrew Hay his brother, who was the executor, &c. to Archibald Hay, and so liable to satisfy all the legacies; the inventory of the defunct's testament and estate being more than sufficient to do the same.

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Fol. Dic. v. 1. p. 342. Gosford, MS. No 659. p. 387.

1678. January 23. CAMPBELL against NAPIER.

BEATRIX CAMPBELL having charged Napier of Wrights-houses upon an annuity due by him to her, there being several compensations and recompensations alleged, and also a general discharge; this was not found to extend to a sum for which the granter of the discharge was cautioner, and was charged, unless before the general discharge also he had made payment.

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Fol. Dic. v. 1. p. 341. Stair, v. 2. p. 600.

1682. March. OLIPHANT against NEWTON.

A CREDITOR having given a general discharge to his debtor, for whom he was then cautioner, but not distressed, it was contended, That the general discharge did also cut off the relief of the cautioner, seeing the debtor was in effect bankrupt, and had sold his lands to pay his debts, which far exceeded the price; and yet here was no reservation of cautionry in the discharge.

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THE LORDS found the general discharge did not extend to cautionry and relief, whereon the granter was not distressed the time of the discharge.

Fol. Dic. v. 1. p. 342. Harcarse, (DISCHARGES.) No 417. p. 112.

1695. December 12. WOOD against GORDON.

A GENERAL discharge being granted on the back of a bond, not only discharging that sum, but all preceding demands, the LORDS found that such a general clause could not extend to a bond of relief, unless it were proved, that it was *deductum in computo*, and expressly treated and communed upon at the time.

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Fol. Dic. v. 1. p. 342. Fountainball.

* * See this case, No 11. p. 3355.