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. *Fountainhall v.* 2. *p.* 119.

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A man provided his son of a first marriage to some lands, and took a discharge from him. He afterwards disponed 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 dispones 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 intromissions 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. 2*do*, 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 intromissions 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*, 1*mo*, An act was not *res judicata*, and had not the privilege thereof. 2*do*, Competent and omitted takes not place in acts; but defences either consisting

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in jure, or instantly verified, are receivable any time before sentence, especially where it is omitted through mistake; and *ita est*, this allegeance on *bona fides* is *in jure*. THE LORDS found the homologation of the act did not exclude him from recurring to this defence. Then the pursuer *contended*, There was no pretence to *bona fides* here; for, 1*mo*, The discharge could afford none, seeing the Lords had found it cannot comprehend heritage; the holograph disposition can afford as little; for it is notour in law, such a writ is reputed on death-bed, and null *quoad* the heir; and as *ignorantia juris neminem excusat*, so *scire*, *et scire debere*, *æquiparantur in jure*; and it was so found in a stronger case than this, 16th November 1633, Grant *contra* Grant, No 24. p. 1743, where a disposition granted by a husband to his wife was not found a title to give her the bygone fruits, because the marriage dissolved within year and day, and she was bound to know that her title is null. *See* Stair's Inst. lib. 2. tit. 10. § 23. And Grotius, *de jure belli et pacis*, *lib.* 2. *tit.* 10. determines, from the nature of things, that he who possesses what belongs to another, not only is bound to restore the thing itself, but likewise the fruits proceeding from it; *nam quod ex re mea fit*, *meum est*. And Menochius, *de arbitrariis judicum quæst. cas.* 225. gives the cases introducing *malam fidem*, which all quadrate here; his title being naught, invalid, and ill, except for security of the sums it is burdened with, which are now far more than paid. *Answered* for the defender, That even a gratuitous disposition will be a sufficient title to lucrate the bygone fruits; then much more should an onerous one, though not adequate, have that effect; and a disposition on death-bed is not *ipso jure* null, much less is a holograph one such, which is only *fictione juris* presumed and construed to be *in lecto*; and such a disposition with seven years possession would give the benefit of a possessory judgement; and though the discharge does not reach heritage, yet it adminiculates and fortifies his dubious title; and the decision in Durie, *anno* 1633, seems hard, and all the circumstances are not marked; yet in that case, deeds within the year, the marriage dissolving, are *ipso jure* null. THE LORDS sustained the discharge and disposition as sufficient to infer his *bona fides quoad* bygones before their interlocutor, but that the debts mentioned in his disposition behoved to be paid *primo loco* out of his intromissions, and they ascribed and imputed to the extinguishing thereof; seeing he could not be in *bona fide* to misken those debts he was burdened *per expressum* with; but if there was a surplus excrescent intromission with the rents above these, he was not countable for the same. *See* PROOF.

Fol. Dic. v. 1. *p.* 344. *Fountainhall*, *v.* 2. *p.* 169.