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and that the father disposes his estate in the son's contract of marriage, according to communing, and so hath it in his power to exact from his son privately what he pleases, against which the law most justly provides.

"THE LORDS reduced the defender's father's obligation, as in fraud of the contract, and that not only in so far as the same might affect the tenement and acres specially disposed, but also in so far as it might burden the conquest; and found the defender's service, as heir of line, reducible on minority and lesion."

Dalrymple, No 23. p. 28.

1705. February 21.

GRIEVE against JOHN THOMSON.

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In a contract of marriage, a father bound himself to pay a sum to his son and his wife in conjunct fee and liferent; but, prior to the contract, he took a discharge from his son, declaring, that, though his father should be bound in the contract, yet the sum was never to be exacted. The discharge was reduced, as *contra fidem pactorum nuptialium*.

By minute of contract of marriage betwixt John Thomson and Margaret Grieve, John Thomson elder provides 500 merks and certain tenements, and John Thomson younger provides 1000 merks of his own to the future spouse in liferent, and to the children in fee; and, by a contract of marriage posterior, these sums and tenements are provided in the same way.

John Thomson younger disposes all he had to his wife; and, after his death, she charges John Thomson elder to pay the said sum of 500 merks: He suspends, and *alleges*, That his son, who was fiar in the sum, had discharged the same posterior to the minute; and because there was a contract to be extended, the discharge bears, that though his father should afterwards be bound in the contract, yet the sum was never to be exacted.

It was *answered*; The discharge was null, as *contra fidem pactorum nuptialium*, and fraudulent; *2do*, The obligation in the contract was posterior to the discharge, and introduced a new obligation, whatever the discharge might otherwise import.

It was *replied*, The charger hath no interest in the sum, except for her liferent, as to which, he will not obtrude the discharge; but for the fee, her title is only as assignee by her husband, who was the fiar, and might freely discharge the same; and both law and equity do favour the pursuer in exacting the same, because he was drawn to exorbitant terms for his son's satisfaction, whom he saw to be a tender weakly person, not likely to survive the marriage long, as it happened; he got but a small portion, which was to return, failing heirs of the marriage; and she also impetrate from the husband a disposition of all he had, in prejudice of the suspender's numerous family; and the discharge does expressly declare, that the contract to be made shall not be effectual as to that sum.

It was *duplicated*, That the circumstances of the contract and any deed done in the charger's favour, could all be justified, if needful; but the point of law

lies in this, that private deeds, contrary to solemn contracts of marriage, are fraudulent *contra bonos mores*, and ought to receive no encouragement from any judicature; and such discharges are prejudicial to the wife, not only for her liferent interest, but in so far as they cut off the fund of sustaining the married couple, and educating the children; and such unfair dealings could even be quarrelled by the granters of private discharges themselves, as being elicited at a time when children cannot debate nor contend with their parents, and ought not to be imposed upon; and it is reasonable, and necessary, that all such underhand practices should be discouraged; for who can be secure in matching their daughters, if private pactions can evacuate solemn contracts of marriage, upon the faith whereof matches are made, and settlements for maintenance of the married persons and their issue?

“THE LORDS found the discharge null, not only as to the liferent, but the fee, as being *contra pacta dotalia*, and fraudulent; and did not proceed to determine on the other point, *viz.* that the contract was posterior, being willing to discourage all such underhand transactions.”

Fol. Dic. v. 2. p. 21. Dalrymple, No 61. p. 77.

* * * Fountainhall reports this case :

1705. February 24.—JOHN THOMSON, merchant in Jedburgh, being to marry Margaret Grieve, in the contract of marriage the said John's father disposes the fee of some houses to him, and likewise becomes obliged to pay 500 merks; and both these are provided to the wife in liferent, and her father engages for 400 merks of tocher. Thomson's father prevails with his son to give him a clandestine discharge of the 500 merks before the marriage, (which subsisted little above a year;) and Thomson being dissatisfied with his father's impetrating that discharge without any payment from him, he assigns the same 500 merks to his wife, and gives her the fee of the houses, there being no children, (for which some called him a true John Thomson's man;) and he dying, his relict pursued Thomson, her father-in-law, for payment of the 500 merks. He founded on his discharge from his son, and *alleged*, That he being of a tender and sickly constitution, his wife's friends had so far imposed on him, as to make him yield to the most extravagant conditions; and he entreating his father to comply with them, offered freely to discharge his father of the 500 merks, if he would but please his wife's friends so far as to put it in the contract. *Alleged*, The taking the discharge was a manifest cheat put upon the wife and her father, who upon the faith of that obligation entered into the contract, which otherwise they would not have done; and being *contra fidem tabularum nuptialium*, it is a paction reprobated in law; and if such fraudulent private transactions were allowed, there were no security by contracts of marriage, which are the most solemn deeds, and ought to be *uberrimae fidei*; for when parties think themselves secure by what provisions they see there, they can

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be all frustrated and evacuated by private discharges, contrary to that fidelity and trust amongst mankind, and the rule of law, that *nemo debet ex proprio dolo lucrari*. *Answered*, The farthest this can be pleaded is, that her husband's discharge cannot prejudice her *quoad* the liferent of the said sum, which is all the interest she has in it; but as to the fee, the discharge must stand good, seeing she can pretend no sort of damage, being not only liferentrix of all her husband's means, but likewise made fiar of his houses, &c. so that *nihil ei deest*. And as to that brocard, *Fidei pactorum dotalium non licet derogare*; *Perezius ad tit C. De pact. convent.* cites no express law for it; but refers to *Annaeus Robertus*, lib. 2. cap. 2.; et *Tuldenus eod. tit. Cod.* founds its authority on the consequence of sundry laws. The first is, *l. 3. D. De extraord. cognit.* which case the doctors extend and apply thus; a bride's father threatens the bridegroom, that he will not suffer his daughter to marry him, unless he remit him a part of the tocher, or the bridegroom's father tells him, I will not consent, unless you discharge me of a part of my obligations, and he does both for fear the marriage go back. The other laws are, *l. 7. D. De pact. dot. et l. 7. C. De jure dot.* from which they infer, when a good-father and a son-in-law make a paction derogatory to the pactions contained in the contract of marriage, which were given *ad sustinenda onera matrimonii, tale pactum sponsæ non consentienti præjudicare non potest*. Some of the LORDS thought the discharge was null, in so far as it prejudged her *jus quesitum*, viz. the liferent of the sum provided to her in the contract; but the generality of the LORDS thought the taking a gratuitous discharge in such a manner was an act against common honesty and morality, and therefore reduced it simply *et in toto*; for if such pactions were any way sustained, then none had security by any provisions made to them in contracts of marriage.

December 1.—IN the case mentioned 24th February 1705, betwixt Margaret Grieve and John Thomson, her father-in-law, the discharge he had taken from his son her husband, being there reduced and annulled, as *contra fidem tabularum nuptialium*, he now founded on another receipt to infer compensation against her, whereby his son, in the journal account-book of the shop, acknowledged the receipt of L. 283 Scots from his father. *Alleged*, It was null, neither bearing writer's name nor witnesses. Next, it was false, seeing his son, when a young boy, being his apprentice, had wrote his name up and down sundry pages of that book in a childish manner, and above one of these scribblings this receipt was filled up, as appeared by ocular inspection. *Answered*, They opposed the receipt, where the subscription appeared evidently to be the son's hand-writ; and that the receipt was superinduced, was *gratis dictum*; and that, in fortification of it, they could prove he had bought his son plenishing to that value, and delivered it to him, and thereon took his receipt for the sum; and that, by the 9th act, Parliament 1669, holograph subscriptions in count-books were probative for twenty years without witnesses. *Replied*, Though the sub-

scription might be his son's, yet it was clear that it has been wrote by him at random, when a boy, and quite differs from his subscription to his contract of marriage, and other papers signed by him after he came to be a man; and so being null, cannot be adminiculate; and this case falls not under the act of Parliament 1669, for that relates only to counts constituting and acknowledging debts, but this is a receipt and discharge relative to no account. THE LORDS found the receipt founded on in this book not probative, and null; and therefore repelled the compensation, and found the letters orderly proceeded, and decerned him to pay all the expenses of the process, and the said Margaret's damages, as as shall be given up in account, and as she shall verify upon oath; And, in regard of his tampering to vitiate the count-book, they fined him in 500 merks, and sent him to prison, there to lie till he paid the same, and till he applied to the Lords for obtaining his liberation. And accordingly a warrant for his commitment, bearing the cause, was signed *in præsentia*, conform to the late act of Parliament for personal liberty in 1701. Forgery turning so barefaced and bold, the LORDS thought it fit by such examples to discourage it.

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Fountainball, v. 2. p. 272. & 296.

** This case is also reported by Forbes :

1705. December 1.—MARGARET GRIEVE as having right by assignation from the deceast John Thomson her husband to 500 merks, which John Thomson elder obliged himself in their contract of marriage to pay to the cedent and his heirs, charged her father-in-law for payment: Who suspended upon these reasons, *imo*, The cedent had discharged the sum betwixt the minute of the contract of marriage and the extending of the contract itself; *2do*, He offered to prove by the charger's oath, that her husband and she had received household furniture and goods to the value of the sum charged for. THE LORDS repelled the first reason of suspension, and reduced the discharge granted betwixt the minute and contract as *contra fidem tabularum nuptialium, et bonos mores*.

When the charger came to depone upon the second reason of suspension, the suspender past from her oath, and offered to prove the allegiance *scripto*. And to that effect produced an account-book wherein there was a receipt of L. 286 written by the suspender, and subscribed by his son.

Alleged for the charger; That the suspender had, falsely with his own hand, made up and superinduced that receipt to her husband's subscription, who, when apprentice to his father, bad, in a childish way, written his name in several places of that account-book, to try his hand. And, to fortify the suspicion of a fraudulent contrivance, urged the reasons followed: *imo*, The suspender deceitfully elicited the discharge reduced as *contra bonos mores*; and *semel malus, semper præsumitur malus*, especially in this case, where the first deed of fraud was designed to evacuate the same claim; *2do*, It is inconceivable why the suspender referred his allegiance to the charger's oath, when he had so

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clear a discharge ; but it seems he had not then filled up the receipt, or entered so deep upon the contrivance ; *3tio*, There being but eight days intervening betwixt the discharge reduced, and the date of the posterior receipt quarrelled, it is not probable the suspender, who was so desirous to pay nothing, would so suddenly have made payment of the most part ; or that having a receipt upon real performance, he would have suffered his good name to be called in question for the first discharge, without supporting it by the production of the second ; *4to*, The husband's subscription in the book produced, is disconform to his subscription in other writs in his manhood, and therefore has been writ by him when he was a boy ; *5to*, The subscription to the receipt appears to have been a childish scribbling ; for the subscriber's name stands written after the same manner in 20 other parts of the book, which the suspender had industriously blotted out, to conceal the congruity of these subscriptions with that of the receipt. It may also be observed, that to cover the scribbling under the subscription, there were several accounts pinned on. *Lastly*, There is no article of business marked in the said book after the year 1697, except this receipt in the year 1703, and another in 1701.

Answered for the suspender ; *1mo*, It cannot be concluded that every thing that is contrary to the law of Scotland, is *contra bonos mores* ; nor can a person, who is no lawyer, be justly charged with malice, for not observing the niceties of the municipal law of his own country ; *2do*, The reason why the suspender did first refer his ground of suspension to the charger's oath, was to vindicate himself from her calumny by her own testimony ; but afterwards being informed she would prevaricate in her deposition, he thought fit to resile, and prove his allegiance *scripto* ; and it is a most artificial and absurd inference, that the suspender referred the cause to the charger's oath before he contrived the receipt, and resiled after contriving ; *3tio*, It is true, the suspender at first thought not himself obliged to pay the sum charged for after the first discharge ; but immediately after the marriage, he was told by intelligent persons upon what head it was quarrelled, and therefore took the now controverted receipt from his son ; *4to*, As the charger's husband was a man of a very unconstant head, so he was a man of a very unconstant hand, and varied his subscription frequently ; and therefore nothing can be drawn from the disconformity of his subscriptions ; *5to*, It is a caluminous gloss to assert that the father scored out the son's name in the book to conceal the congruity of the subscriptions ; since it is a thousand times more probable, that the son was so cautious as to delete his own name for fear of superinduction, and that he would also have delete his subscription to the receipt, had it not been a true deed of such a date ; as to the insinuation that some receipts were pinned upon that founded on in the book, the better to cover the contrivance ; there is no more sense in it than to conclude that where several papers are tacked together, that which falls to be uppermost was so placed to hide the rest ; and no more could the

suspender, if he were not an idiot, fancy, that the pinning of other papers upon the receipt in the book, might hide it, than the first or second leaf of a book could hide the third; *Lastly*, The reason why the suspender did not insert other business in that book, was to conceal from his younger children the transactions betwixt him and his eldest son.

THE LORDS found the receipt in the book founded on null, and not probative, and therefore repelled the reason of suspension; and decerned the suspender to pay all the expenses of the process, and the charger's damages to be given up in an account by her upon oath; and for his tampering to vitiate the account-book, he was fined in 500 merks, and sent to prison till he paid it, and applied to the Lords for his liberation.

Forbes, p. 48.

1709. *January 28.*

WILLIAM M'GUFFOCK of Rusco, and his Lady, *against* DAVID and JAMES BLAIRS, Sons of the second marriage to Hugh M'Guffock, the said William's Father.

HUGH BLAIR, *alias* M'Guffock of Rusco, in his contract of marriage with Mrs Margaret Dumbar, daughter to Sir David Dumbar of Baldoon, his second Lady, provided her to a life rent annuity of L. 1,000 Scots, and the children of the marriage to 50,000 merks. Thereafter in *anno* 1695, in a contract of marriage betwixt William M'Guffock, his eldest son of the first marriage, and Mrs Elizabeth Stuart, daughter to the Laird of Ravenston, he disposed the estate of Rusco in favours of William and the heirs-male of the marriage, with the burden of 45,000 merks of debt, and obliged himself to warrant the lands disposed to be worth 8,000 merks of yearly rent, and burdened his other estate with making the same good and effectual, in case the rent of the lands disposed fell short. Hugh M'Guffock, after his eldest son's contract, before his marriage, entered into a transaction with him; whereby the father gave him some land and moveables not contained in the contract; and the son obliged himself to pay all his father's just and lawful debts, and discharged the obligation to make the lands disposed to him worth 8,000 merks yearly; and the father, with consent of his son the bridegroom, disposed to David and James Blairs, two sons of the second marriage under pupillarity at the time, some lands out of which the father stood obliged to make those disposed to the eldest son worth 8,000 merks of rent. William M'Guffock, now of Rusco, raised reduction of the dispositions to David and James Blairs, as granted *contra fidem tabularum nuptialium*.

Answered for the defenders; They were creditors by their mother's contract of marriage in 50,000 merks, in prejudice of which provision the father could do no voluntary gratuitous deed in favours of his eldest son of the first marriage, but what not only they might quarrel upon the act of Parliament 1621,

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A person disposed an estate to his eldest son, in his son's contract of marriage, warranting it to be worth a certain yearly value, and he burdened another estate with making the same good. Before the marriage, he took a discharge from the son of this obligation. In a reduction of the discharge against the father's other representatives, to whom the separate estate was disposed, the pursuer's estate falling short of the rent at which it was warranted, the Lords reduced the discharge as *contra fidem*.