

‘ther the places where the stake-nets complained of in the said  
 ‘petition and complaint were put, or any of such places, be or  
 ‘be not within the limits of the said river, frith, or water.’

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LORD GIFFORD.—In this case it does not appear to me that the Court below ever fixed what was the southern boundary of the river or frith of Tay, or the limit betwixt it and the sea or St Andrew’s Bay. If that line or boundary were once fixed, it is my opinion that Mr Dalgliesh, or his tenant, might erect his stake-nets within six inches of that boundary line,—indeed, as close to that line as possible. I do not mean to give any opinion regarding the report of Mr Jardine, who was employed by the Court of Session to report as to the facts; and it appears to me to be of little consequence whether he be correct in principle or not. It is here quite clear, that the Court of Session never fixed a south boundary, and therefore there could be no contempt. Is it possible, if this case were remitted, that any further proceedings could take place under it?

*Mr Keay.*—My Lord, I am afraid not.

*Lord Gifford.*—Then the judgment must be reversed.

SPOTTISWOODE and ROBERTSON—J. CHALMER,—Solicitors.

MAGISTRATES of MONTROSE, and EWEN’S TRUSTEES, Appellants. No. 52.

ELIZABETH EWEN, Respondent.

*Clause—Discharge.*—Clause held (reversing the judgment of the Court of Session) to import a discharge by a daughter of all the rights competent to her as heir of provision under the postnuptial contract of her father and mother.

JOHN EWEN, a person of obscure parentage, commenced business in Aberdeen as a pedlar—then kept a stall, and latterly opened a shop there. In 1766, while his means were believed to be very scanty, he married Janet Middleton. By postnuptial contract of marriage, she conveyed to him her pro indiviso share of certain houses left by her father, and liferented by the mother; a bond for L. 100, also liferented by her mother; and her share of her father’s household furniture, valued at L. 43. 7s. On the other hand, Ewen, ‘in consideration of the said marriage, and of the disposition and assignation before-written conceived in his favour, ‘hereby, for him, his heirs, executors, and successors, and assignees, assigns, conveys, and dispones to and in favour of the said Janet Middleton, his spouse, her heirs and assignees whatsoever, in case she survive him, all and hail his whole goods, ‘gear, merchant-ware, and effects, of whatever kind, quality, or

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 'which shall be pertaining and belonging, and resting and  
 'owing to him at the time of his death, whether heritable or  
 'moveable subjects, with power to her, immediately on his de-  
 'cease, to meddle and intrōmit therewith, and to use and dispose  
 'thereof at pleasure, providing always that there shall be no  
 'children procreate of the marriage and in life at the dissolution  
 'thereof; but declaring, that if there shall happen to be a child  
 'or children procreate of the marriage and in life at the dissolu-  
 'tion thereof, and that the said Janet Middleton shall survive  
 'him, the said John Ewen, as said is, then, and in that case, the  
 'general disposition before-written, conceived in her favour,  
 'shall be, and is hereby restricted to the just and equal half of  
 'the whole household furniture of every kind belonging to him  
 'at the time of his death, and an annuity of thirty pounds sterling  
 'money, which sum, in that event, the said John binds and  
 'obliges himself and his foresaids to pay to the said Janet Mid-  
 'dleton, his spouse, yearly, and each year, at two terms,' &c. be-  
 'ginning the first payment at the first Whitsunday or Martinmas  
 following his decease; and obliging himself and his foresaids that  
 such a capital sum as will yield this annuity shall, immediately  
 on his death, be settled on 'good security, and the rights  
 'thereof taken to the said Janet Middleton in 'liferent, and to  
 'the said child or children equally in fee; and the residue of his  
 'whole subjects, whether heritable or moveable, shall belong to  
 'the said children equally: declaring hereby, that in case the  
 'said child or children shall afterwards die in minority, without  
 'lawful issue of their bodies, and during the lifetime of the said  
 'Janet Middleton, their mother, then the general disposition  
 'before-written, conceived in her favour, shall revive and return  
 'to its full force and effect, and she shall have the entire and free  
 'disposal of the whole effects and subjects, whether heritable or  
 'moveable, thereby conveyed, alike as if there had not been  
 'a child of the marriage in life at the dissolution thereof; and  
 'in like manner, if the said John Ewen shall survive the said  
 'Janet Middleton, his spouse, and there be a child or children  
 'of the marriage in life at the dissolution thereof, he binds and  
 'obliges himself to aliment, maintain, and educate the said child  
 'or children suitable to their station, until they are put in a way  
 'of doing for themselves, and that his subjects, whether herit-  
 'able or moveable, shall belong to them equally at his death.'  
 A few years afterwards Janet Middleton died, leaving one  
 daughter, Elizabeth, the only child of the marriage, and con-

sequently the heir of provision under the marriage-contract. June 28. 1825.  
In 1787, while about twenty years of age, Elizabeth married James Grahame, about the same age, second son of William Grahame of Morphie. Her father was dissatisfied with the marriage, and James Grahame was represented as being far from an eligible husband. His portion was L. 500. In 1788 James Grahame resolved to go to India to push his fortune, and to leave his wife and an infant child at home. On the night before he set off from Aberdeen, a postnuptial contract was executed by him and his wife, and 'with the special advice and consent of her said father, and the said John Ewen for himself, his own right and interest.' The deed bears, that 'the said James Grahame intending to go abroad, where he may remain for some time in the prosecution of his affairs, he is desirous to make some suitable provision for his said spouse and family, according to his ability; and in like manner, the said John Ewen, out of his own free will, and from the regard he bears to his said son and daughter, the said parties have, with mutual advice and consent, concerted and settled upon the postnuptial contract under-written. Therefore, in pursuance thereof, the said John Ewen hath instantly, at the making hereof, satisfied and paid to the said James Grahame the sum of L. 157. 10s. sterling, as one moiety of L. 315 sterling, which he has agreed to give in name of tocher and dowry with his said daughter, of which moiety the said James Grahame and his spouse hereby grant the receipt, and discharge the said John Ewen, his heirs, executors, and successors thereof, renouncing the exception of not numerated money, and all other exceptions and objections in the contrary;' the remaining moiety of L. 157. 10s. to be paid James Grahame, his heirs, &c. on the first term of Whitsunday or Martinmas following year and day after the decease of John Ewen; 'and which whole sum of L. 315 sterling is hereby declared to be in full satisfaction to the said Mrs Elizabeth Grahame alias Ewen, and her said husband, and they do hereby accept of the same in full contentation to them of all goods, gear, debts, sums of money, and other moveables whatsoever, which they might anyways ask, claim, or crave, by and through the decease of the said Janet Middleton, her mother, by virtue of her contract of marriage with the said John Ewen, her father, or of any clause, article, or condition therein contained, which is hereby discharged to all intents and purposes, as fully and effectually as if the same was particularly engrossed, or by any other manner of way, or

June 28. 1825. ‘ by and through the decease of the said John Ewen, her father,  
 ‘ whenever the same shall happen at the pleasure of God, either as  
 ‘ bairn’s part of gear, dead’s third, portion natural, or on any other  
 ‘ cause or account whatsoever, good-will only excepted.’ Then  
 James Grahame conveys his patrimony of L. 500 to himself and  
 wife in liferent, whom failing, his issue, &c. ; and obliges himself,  
 during his absence, to pay the legal interest to his wife and family  
 as a subsistence. “

On 19th October 1821, two days before his death, John Ewen  
 executed a trust-disposition, whereby he left to his daughter an  
 annuity of L. 40 per annum, to her only son L. 525, a few small  
 legacies to other parties, and conveyed the residue of his fortune  
 to trustees to endow an hospital in Montrose. His property  
 (chiefly moveable) amounted to about L. 16,000.

Thereupon Elizabeth Ewen raised an action of reduction of  
 the postnuptial contract containing the discharge, and of the  
 trust-disposition by John Ewen, and concluding that they should  
 be reduced, and that she might be reponed and restored against  
 them in integrum. This was resisted by the trustees, who alleged,  
 that the sum given by Ewen to his daughter and son-in-law in  
 consideration of the discharge, was fairly calculated, according  
 to the real amount of his pecuniary finances at the date of the  
 deed. On the other hand, it was as broadly alleged, that the  
 amount conveyed was very far from the sum exigible by her, or  
 which she had a fair prospect to receive under her mother’s  
 marriage-contract. It was also averred by her, that when she  
 and her husband acceded to the deed, they were not aware of  
 the value of her interests under it, and that every thing connect-  
 ed with the amount of these interests, or the contents or obliga-  
 tions in her mother’s marriage-contract, were sedulously con-  
 cealed by Ewen.

The Lord Ordinary having reported the case on informa-  
 tions, the Court sustained the reasons of reduction, and re-  
 duced, decerned, and declared conform to the conclusions of  
 the libel. Thereafter (5th December 1823) they adhered, ‘ in  
 ‘ so far as relates to the reduction of the trust-deed executed  
 ‘ by the said John Ewen, as having been granted in fraudem of  
 ‘ his marriage-contract with Janet Middleton; but altered, in so  
 ‘ far as their interlocutor may be construed to extend to the  
 ‘ reduction of the marriage-contract entered into between the  
 ‘ respondent (Elizabeth Ewen) and James Grahame her hus-  
 ‘ band; and find it unnecessary to reduce the said contract, in  
 ‘ respect that the same does not import any discharge of the

‘rights competent to the pursuer, on the death of her father, as June 28. 1825.  
 ‘heir of provision under her father and mother’s contract of  
 ‘marriage, and decerned accordingly.’

Hitherto the defence had been conducted by the trustees; but the Magistrates of Montrose, the proposed administrators of the charitable endowment projected by the trust-deed, came forward, and although their petition was (15th January 1824) refused as incompetent on the merits, they were held to be sisted as defenders to the action in the terms they prayed.\*

The Magistrates and trustees appealed. In the Court of Session several reasons of reduction had been discussed,—on the head of deathbed, and the extent to which the law of deathbed affects moveables,—of fraud, lesion, and culpable concealment,—of defects peculiar to the construction of the trust-deed, &c.; but the ground on which the judgment of the House of Lords proceeded was, the effect of the terms of the postnuptial contract of 1787 upon the postnuptial contract of John Ewen and Janet Middleton in 1766.

*Appellants.*—By the tripartite deed all claims whatever under the marriage-contract of 1766 are discharged. It is clear that was the *enixa voluntas* of parties. The discharge of the moveables is applicable *ad omnia*; and although the generality of ‘all goods, gear,’ &c. be set down at the beginning of the clause applicable to the mother’s death, it must in reading be carried on to the beginning of the clause applicable to the father’s death. The words ‘either as bairn’s part,’ &c. are exigetical, were added *ex abundante*, and cannot controul or destroy the effect of the general and ample discharge imported by the previous expressions. They are merely demonstrative, not taxative. The respondent’s argument depends on not carrying forward the words ‘all goods,’ &c. and rests therefore on a false reading. Besides, the respondent discharged all claims competent ‘by and through the decease of the said Janet Middleton by virtue of her contract of marriage with the said John Ewen.’ But these clearly included her right as heir of provision. The claim to her mother’s share of the goods in communion (supposing her mother had not by implication discharged it) was not a claim arising under the contract of marriage, and therefore could not have been in view in discharging claims under the contract of marriage. Consequently nothing was left to be discharged

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\* 2. Shaw and Dunlop, No. 587.

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but her claims as heir of provision; and this provision under the contract of marriage had taken effect at the date of the tripartite deed. It was therefore the clause in the contract of marriage of 1766, vesting the right to all Ewen's subjects, whether heritable or moveable, to which the words of the discharge plainly apply. Moreover, the expressions used are sufficient to discharge the marriage-contract itself, and 'any clause, article, or condition therein contained.' The appellants have no desire to quarrel with the rule, that where a discharge is granted of certain claims particularly enumerated, the mere addition of general words will not extend the effect of it beyond the particulars, or to other claims not enumerated, for here the discharge has not been constructed in that form.

*Respondent.*—The Court below held, that the tripartite deed need not be reduced, as the discharge contained in it did not apply to the right to succeed as heir of provision under the marriage provision of 1766, and the tripartite deed was therefore no bar to reduce the trust settlement. Now what is the import of the tripartite deed? The respondent had a distinct and separate set of claims. One set of rights arising by and through the decease of her mother, whether created by virtue of the contract 1766 or otherwise; and the second set arising by and through the decease of her father. The rights affecting the father vested in the respondent at her birth, but were not exigible until her mother's death. The first set embraced her mother's share of the goods in communion, which was not renounced in the contract 1766, but was discharged by the tripartite deed; and the other was the respondent's right as heir of provision under the contract of 1766, to which the discharge cannot be applied, because that was not a right by and through the decease of the mother, and could not arise until the father's death; whereas the claim discharged was one (arising by her mother's death) against her father during his lifetime. The addition of the words, 'by virtue of her marriage-contract,' &c. create no sound distinction. Then comes the second set of rights emerging on her father's death. But the words used do not include a discharge of her right as heir of provision; because, 1st, If intended to be discharged, this was the appropriate place for its introduction. But the deed is silent here (as it is throughout) on that important point. And, 2d, The deed does describe the rights to be discharged, and these are all rights competent at common law, but not one of them arising *ex contractu*. The appellants try to carry forward and force in the words

introductory to the discharge of the claims at the mother's death. June 28. 1825.  
 That is obviously against every rule of fair interpretation, and, in a question of a child's rights, never can be admitted. But then an appeal is made to the closing expression, 'or any other clause,' &c. These general words, however, must be explained and limited by the previous particulars. That is a rule of law too firmly fixed to be now shaken. If there were any other common law right but those enumerated, the appellants might perhaps, under the general clauses, be protected as to that right; but by the form of expression adopted in the tripartite deed, such a right as that of heir of provision is as much excluded as if excluded totidem verbis. The argument founded on the words 'any clause, article, and condition' of the marriage-contract 1766, as if operating by themselves, has no support in reason or grammar. In short, had parties intended to discharge the right of provision, apt and proper words would have been introduced for that purpose. And that it was not intended, at least by the respondent, is made manifest by the whole circumstances attending the concoction of the tripartite deed, and the situation and age of herself and husband. If so, the respondent's rights under her father and mother's marriage-contract 1766 stand good, and cannot be defeated by a gratuitous deathbed deed, amounting unquestionably to an alienation in fraudem of that contract.

The House of Lords found, 'that the marriage-contract entered into between the respondent and James Grahame her husband, imports a discharge of all the rights competent to the pursuer as heir of provision under her father's and mother's contract of marriage: And it is therefore ordered and adjudged, that the interlocutors complained of, so far as they are inconsistent with this finding, be reversed: And it is further ordered, that the cause be remitted back to the Court of Session, to proceed further therein as shall be consistent with this judgment, and as shall be just.'

LORD GIFFORD.—My Lords, The only other case to which I shall now call your Lordships' attention, is one which was heard last week, the case of the trust-disponees of the late John Ewen, merchant in Aberdeen, and Mrs Elizabeth Ewen or Grahame.

My Lords,—The question in this cause, and the only question brought before your Lordships' House, is upon the construction of a supposed acquittance or discharge in the marriage-contract of Mrs Grahame,—that is the only question that now strictly can be determined by your Lordships.

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My Lords,—It appears that a person of the name of Ewen, who was originally an obscure person, stated in the papers to have been an itinerant pedlar, married, in the year 1766, a person of the name of Janet Middleton; and upon that occasion, or soon after the marriage, a post-nuptial contract was executed between the parties. It was entered into by Mrs Ewen, with the consent of her mother; and by it she, in consideration of the marriage formerly solemnized, and now subsisting between her and her husband, conveyed to him, in the first place, her pro indiviso share of the property of the houses left by her father, and which were enjoyed by her mother in liferent; she also conveyed a bond for L. 100, granted by a methodist society in Aberdeen, under the burden also of her mother's liferent; and she and her mother conveyed to Mr Ewen his wife's share of the household furniture belonging to her father. In consideration of these covenants, Mr Ewen assigned and conveyed his whole property and effects to his wife, and the children that might be born of the marriage, according to the several events of a dissolution of the marriage, by the predecease of the husband or wife respectively, and with or without issue. This clause of the deed is expressed in the following terms:—‘ And on the  
‘ other part, the said John Ewen, in consideration of the said marriage,  
‘ and of the disposition and assignation before-written, conceived in  
‘ his favours, hereby, for him, his heirs, executors, and successors, and  
‘ assignees, assigns, conveys, and disposes to and in favours of the said  
‘ Janet Middleton, his spouse, her heirs and assignees whatsoever, in  
‘ case she survive him, all and hail his whole goods, gear, merchant-  
‘ ware, and effects, of whatever kind, quality, or denomination, with  
‘ all and sundry debts and sums of money which shall be pertaining  
‘ and belonging to, and resting and owing to him at the time of his  
‘ death, whether heritable or moveable subjects, with power to her,  
‘ immediately on his decease, to meddle and intromit therewith, and to  
‘ use and dispose thereof at pleasure; providing always, that there shall  
‘ be no children procreate of the marriage, and in life at the dissolu-  
‘ tion thereof: but declaring always, as it is hereby specially provided  
‘ and declared, that if there shall happen to be a child or children  
‘ procreate of the marriage, and in life at the dissolution thereof, and  
‘ that the said Janet Middleton shall survive him the said John Ewen  
‘ as said is, then, and in that case, the general disposition before-  
‘ written, conceived in her favour, shall be, and is hereby restricted to  
‘ the just and equal half of the whole household furniture, of every  
‘ kind, belonging to him at the time of his death, and an annuity of  
‘ L. 30 sterling, and which sum is to be paid at certain times of the  
‘ year: And in case the said John Ewen should survive the said Janet  
‘ Middleton, and there be a child or children of the marriage in life  
‘ at the dissolution thereof, he binds and obliges himself to maintain  
‘ and educate said child or children suitable to their station, until they  
‘ are put in a way of doing for themselves; and that his subjects, whe-  
‘ ther heritable or moveable, shall belong to them equally at his death.’



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So that your Lordships perceive, by this marriage settlement, the whole of the property of the husband was settled on the children of that marriage, either upon the death of the husband, if he survived the wife, or if the wife survived the husband, subject to a certain annuity payable to her.

My Lords,—It appears that there was only one child born of that marriage—a daughter, who is the respondent in this appeal. She married a person of the name of Grahame; and that marriage, it is said, took effect without the consent of her father;—whether it did or not, it appears, after the marriage, a settlement was made, and upon one of the clauses of that settlement the question in this cause turns. The deed was a tripartite contract between Mrs Grahame, first, with her husband's consent; secondly, her husband; and, thirdly, her father. I should have stated, that the mother of Mrs Grahame was dead, and that she was the only child. The deed recites, 'That  
' the parties, considering that Mr Grahame and his wife were law-  
' fully married to each other upon a certain day in November  
' 1787, and have lived together since that time as married per-  
' sons, and that now a son is born lawfully procreated of the said  
' marriage; and also considering that there was no contract of mar-  
' riage entered into between them prior to the celebration of the mar-  
' riage, and the said James Grahame intending soon to go abroad,  
' where he may remain for some time in the prosecution of his  
' affairs, he is desirous to make some suitable provision for his said  
' spouse and family, according to his ability: And in like manner, the  
' said John Ewen, out of his own free will, and from the regard he  
' bears to his son and daughter, the said parties have, with mutual ad-  
' vice and consent, concerted and settled upon the postnuptial contract  
' under-written: Therefore, in pursuance thereof, the said John Ewen  
' hath instantly, at the making hereof, satisfied and paid to the said  
' James Grahame the sum of L. 157. 10s. sterling, as one moiety of  
' L. 315 sterling which he has agreed to give in name of tocher or  
' dowry with his said daughter, of which moiety the said James  
' Grahame and his spouse hereby grant the receipt, and discharge the  
' said John Ewen, his heirs and executors thereof, renouncing all ex-  
' ceptions and objections: and John Ewen binds and obliges himself  
' and his foresaids, to satisfy and pay to James Grahame, his heirs or  
' executors, the remaining moiety at the first term of Whitsunday or  
' Martinmas next immediately following year and day after the decease  
' of the said John Ewen, with a fifth part more of liquidate penalty in  
' case of failure, and the annual rent of the said moiety during the not-  
' payment after the term of payment thereof above-written; and which  
' whole sum of L. 315 sterling is hereby declared to be in full satis-  
' faction to the said Mrs Elizabeth Grahame, alias Ewen, and her said  
' husband, and they do hereby accept of the same in full contentation:  
' to them of all goods, gear, debts, sums of money, and other move-  
' ables whatsoever, which they might any ways ask, claim or crave, by

June 28. 1825. ‘ and through the decease of the said Janet Middleton, her mother,  
 ‘ by virtue of her contract of marriage with the said John Ewen her  
 ‘ father, or of any clause, article, or condition therein contained, which  
 ‘ is hereby discharged to all intents and purposes, as fully and effectually  
 ‘ as if the same was particularly engrossed, or by any other manner  
 ‘ of way, or by and through the decease of the said John Ewen,  
 ‘ her father, whenever the same shall happen at the pleasure of God;  
 ‘ either as bairn’s part of gear, dead’s third, portion natural, or on any  
 ‘ other cause or account whatsoever, good-will only excepted.’

My Lords,—It appears that Mr Ewen, the father, survived this marriage-contract a great many years; and it should seem that, in the latter part of his life, he became very opulent, and was possessed of many thousand pounds. It appears, that upon his death-bed he made a deed of settlement, the provisions of which it is unnecessary for me to state to your Lordships, except that he thereby provided for the payment of an annuity of L. 40 per annum, for the life of his daughter; and after leaving various other legacies and charitable bequests, he employed the remainder of his property in endowing an hospital in Montrose.

My Lords,—After his death, Mrs Grahame instituted an action of reduction against the trust-disponees of this disposition, which, I have stated to your Lordships, was executed shortly before the death of Mr Ewen; and by her summons she seeks for the reduction of the trust settlement, and also of her own marriage-contract—she states the marriage-contract of her mother, and that she was the only child of that marriage—she seeks to have her own marriage-contract reduced, upon the ground ‘ that it was obtained from her upon false  
 ‘ pretences, and by gross fraud and circumvention on the part of  
 ‘ her father; and particularly, by falsely representing, as proved by  
 ‘ the foresaid postnuptial contract of marriage, that he entered into  
 ‘ the said postnuptial contract out of his own free will, and from the  
 ‘ regard he bore to his said son and daughter, and that he had ad-  
 ‘ vanced the sum of L. 157. 10s. as a moiety of L. 315, which he had  
 ‘ agreed to give in the name of tocher or dowry; under which false  
 ‘ and fraudulent device he elicited and impetrated, from the pursuer, a  
 ‘ discharge to himself of all goods, debts, sums of money,’ and so on;  
 ‘ and which discharge, (she says), was so falsely and fraudulently ob-  
 ‘ tained by the pursuer, her legal guardian, sine redditis rationibus,  
 ‘ and more particularly in and through the gross fraud and circum-  
 ‘ vention of the said John Ewen, seeing, at the time of the obtaining  
 ‘ of the said discharge, he was in possession of property belonging  
 ‘ to the pursuer in right of her deceased mother Janet Middleton.’  
 Then she says, that the discharge was obtained on false pretences, and without any just or onerous cause, and to the pursuer’s great hurt; and, moreover, that the discharge was obtained by John Ewen while he had in his possession the contract of marriage. Then she states what that contract was, the result of that contract being,

‘ that the property of the said John Ewen and Janet Middleton was June 28. 1825.  
 ‘ thereby settled on the children of the marriage, and any discharge  
 ‘ obtained by the said John Ewen, whereby the foresaid contract was  
 ‘ to be voided, was ultra vires of the said John Ewen, independent of  
 ‘ the fraud and circumvention condescended on; therefore, and for  
 ‘ other reasons,’ she seeks for the reduction of that instrument.  
 Then having reduced that settlement, if she succeeds, she seeks  
 also for a reduction of the trust-disposition, upon the ground that  
 it was in fraud of the marriage-contract, and executed upon deathbed.  
 I call your Lordships’ attention to this, to shew your Lordships that  
 it was thought material by Mrs Ewen, that the marriage-contract  
 executed by her should be reduced, to let her into a title to reduce  
 the trust-disposition.

‘ It appears, when the case came before the Court in January 1823,  
 they pronounced an interlocutor, by which ‘ they sustain the reasons  
 ‘ of reduction, and reduce, decern, and declare conform to the conclu-  
 ‘ sions of the libel ;’—so that they originally reduced both the deeds,  
 both the trust-disposition and the marriage-contract. However, on it  
 coming on again on a reclaiming petition, the Court pronounced this  
 interlocutor :—‘ Having resumed consideration of this petition, with the  
 ‘ additional petition given in for the petitioners, and advised the same  
 ‘ with the answers to both petitions, they adhere to their interlocutor  
 ‘ reclaimed against, and refuse the desire of the said petition, in so far  
 ‘ as relates to the reduction of the trust-deed executed by the said  
 ‘ John Ewen, as having been granted in fraudem of his marriage-  
 ‘ contract with Janet Middleton; but alter the interlocutor reclaimed  
 ‘ against, in so far as it may be construed to extend to the reduction  
 ‘ of the marriage-contract entered into between the respondent and  
 ‘ James Grahame, her husband; and find it unnecessary to reduce the  
 ‘ said contract, in respect that the same does not import any discharge  
 ‘ of the rights competent to the pursuer on the death of her father, as  
 ‘ heir of provision under her father and mother’s contract of marriage;  
 ‘ and decern and declare accordingly, but find no expenses due.’ So  
 that your Lordships will perceive, that by this last interlocutor they  
 recall the decision they had pronounced, by which they had reduced  
 the marriage-contract; they think it unnecessary to proceed with that  
 part of the action, because, upon looking at that marriage-contract,  
 they think that the discharge which it contained did not import any  
 discharge of the rights of the pursuer, upon the death of her father, as  
 heir of provision; so that the single question brought before your Lord-  
 ships, and which has been discussed at your Lordships’ Bar, is, whether  
 or not the Court of Session have come to a right conclusion, in judging  
 that that contract did not operate to discharge the rights of Mrs  
 Grahame upon the face of it, without considering whether it was a fair  
 transaction—without considering whether the deed could be reduced  
 upon the grounds stated in the summons—without considering whether  
 fraud was practised or not; but whether, assuming it was a fair trans-

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action, whether the discharge it contained was a discharge of every thing she could demand under the marriage-contract of her mother.

My Lords,—Whatever inclination one might feel in favour of this lady, under the circumstances of this case, finding that her father has left her only a small portion of his large possessions, having left the rest to charitable purposes—whatever inclination the House might feel to coincide, as far as it could, with the construction which has been put by the Court of Session upon this settlement, yet, acting judicially, I think we are bound, and that every Judge is bound, to discard from his mind all the circumstances which might lead him away from the real question in the cause, namely, what is, upon the face of this instrument, the fair construction of the language that has been used by the parties.

At the time this instrument was executed, it appears that this gentleman, Mr Ewen, was not in very wealthy circumstances; and it is not at all improbable, that the sum he appropriated to them might be a very large portion of his property. She had married, and he agrees to give her L. 315, one-half of it to be paid down immediately, and the rest a year after his decease. I do not stay to comment upon the particular expressions of the former parts of the settlement, because at last we come to the question, of what the lady has done in the last clause of the settlement. My Lords, her mother was dead, and it is said that, strictly speaking, upon the death of her mother no right vested in her, but it was only upon the death of her father she was entitled to any claim at all. My Lords, by the death of her mother, her rights were so far ascertained, that she was the only child of the marriage, and it was impossible for the father to deprive her of any property he might be possessed of at the time of his death. She accepts it ‘in full contentation of all goods, gear, debts, sums of money, and other moveables whatsoever, which she might any ways ask, claim, or crave, by and through the decease of the said Janet Middleton, her mother, by virtue of her contract of marriage with the said John Ewen, her father, or of any clause, article, or condition therein contained, which is hereby discharged to all intents and purposes, as fully and effectually as if the same was particularly engrossed, or by any other manner of way, or by and through the decease of the said John Ewen, her father, whenever the same shall happen at the pleasure of God.’ Now, I really think, that a lawyer, looking at this instrument, would say, it is clear she intended to discharge every claim she had under her marriage-contract. But it is said, that although at the first view that might appear to be the construction of it, yet the words, ‘by and through the decease of the said Janet Middleton, her mother,’ are restricted to what she had a right to upon the death of her mother; and it is said she might have released and foregone that which her mother was entitled to. But it is quite obvious to me, that the words are sufficient to discharge every right she had under this marriage settlement, or at common law, upon her father’s death. My Lords, I agree, though I do not go to the extent urged by one of

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the learned Judges, my Lord Gillies, who, feeling what he considered to be the hardship of the case, in a father giving away his property from an only child, says, ' he is not prepared to say, that considerations ' in equity should not entitle their Lordships to dispense with the ' strict rules of construction applicable to such deeds.' I should say, it is not for a Court of equity to dispense with the rules of equity, as applied to the construction of deeds, because nothing would be more dangerous than to apply feelings of commiseration or compassion to the construction of written instruments, by which the parties agree at the time to be bound. Lord Gillies states, that his whole fortune, at the time of his daughter's marriage, consisted of L. 400—it certainly amounted to nothing like what he acquired afterwards during the remainder of his long life : she accepts L. 300 from him at that time, and she releases him in as large words as she could use, from all her rights under him ; and it was fairly argued, that it amounted to a relinquishment, on her part, of what she was entitled to at common law. But then, as to the words of the settlement, ' in full contentation to them ' of all goods, sums of money, &c. which they might any ways ask or ' claim by and through the decease of her mother : ' Under the decease of her mother she was not entitled to any thing ; but it settled the right she would have at the death of her father ; and if I was not acting in the character of a Judge—if I was not advising your Lordships as a Judge, I should feel every inclination to get rid of what is the fair legal construction of this instrument : but it does not appear to me, that I can, sitting as a Judge, judicially construing this instrument, say, that it does not import and convey a discharge of all the rights she should derive from her father. The consequence would be, that if your Lordships should concur with me in reversing these interlocutors, that will not settle the question, because the question still remains, whether the deed can be reduced upon the other grounds :—The Court at first pronounced an absolute reduction of the marriage-contract ;—they afterwards recall it, and say it is unnecessary to reduce that, because, under their view of it, the discharge did not amount to a discharge of what she was entitled to under her father's marriage settlement, and therefore did not stand in the way of the trust-disposition. But I apprehend, upon that ground, what Lord Gillies says is correct, that there was a complete discharge ; but if it should appear the deed was unfair, they ought to reduce it. I apprehend that question is still open. At first the Court decided the question in favour of the respondent ; but I apprehend, by recalling it, they have left that still open. I apprehend that what your Lordships would have to do in this case would be, to pronounce a finding, that this deed, upon the face of it, does import a discharge ; and, upon that finding, remit it to the Court of Session to proceed further in the action of reduction as they think just. The case may then proceed upon those allegations in the summons, as to the fraud, and so forth, practised upon this lady, and she will still have an opportunity of making out, if she can, that it was so improperly obtained ;—and

June 28. 1825. although it does bear upon the face of it a discharge of the marriage settlement, still, if it was obtained from her by fraud, it ought to be set aside. But I must confess, that I can offer to your Lordships no other advice upon the present question, but that the interlocutor should be reversed; because I think, for the reasons I have given, that the deed is a discharge of the rights under her mother's marriage-contract. The judgment of your Lordships will be, to reverse the finding, and remit the case back to the Court of Session, to proceed further upon it as they may think advisable.

*Appellants' Authority.*—Todd, Dec. 12. 1770.

*Respondent's Authorities.*—1. Stair, 18. 2.; 3. Ersk. 4. 9.; Swan, June 17. 1620, (5038.); Weems, July 24. 1706, (912.); Gordon, Dec. 25. 1702, (5050.); Monro, Dec. 16. 1712, (5052.); Anderson, Nov. 22. 1743, (5054.); Hepburn, June 24. 1785, (5056.); Fife, Nov. 29. 1751; Nisbett, Jan. 18. 1726, (8181.); Sinclair, July 29. 1768, (8188.); Irvine, Dec. 15. 1744, (2304.); Maxwell, Feb. 1722, (3194.)

DUTHIE—SPOTTISWOODE and ROBERTSON,—Solicitors.

No. 53.

JAMES DUNCAN, Appellant.

HIS MAJESTY'S ADVOCATE, Respondent.

*Jurisdiction—Fraudulent Bankruptcy—Stat. 1701, c. 6.—Wrongous Imprisonment.*—Held, (affirming the judgment of the Court of Session), 1. That under the Act 1696, c. 6. the Court of Session has jurisdiction, exclusive of the Court of Justiciary, as to fraudulent bankruptcy; 2. That although a party was imprisoned on a charge of fraud and fraudulent bankruptcy by a warrant of the Court of Justiciary, yet that letters of intimation under the Act 1701, c. 6. from that Court were unavailing to the effect of getting liberation from imprisonment under a charge of fraudulent bankruptcy; and, 3. Question raised as to whether the Act 1701, c. 6. applied to proceedings before the Court of Session, and the finding of that Court in the negative superseded.

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1ST DIVISION.

ON the 12th of August 1822 the Lord Advocate presented a petition to the High Court of Justiciary against James Duncan, grocer and spirit-dealer in Leith, praying for warrant to incarcerate him in the tolbooth of Edinburgh, 'as guilty of fraud and fraudulent bankruptcy, till liberated in due course of law;' and warrant was upon the same day granted accordingly, in virtue of which he was imprisoned in the jail of Edinburgh. On the 14th Duncan applied to the Court of Justiciary for letters of intimation, in terms of the statute 1701, cap. 6. which were issued and served on the Lord Advocate on the 16th. On the 12th of October the Lord Advocate presented a petition and