

No 24.

a bond that he was not entitled to take payment of, especially when he could not know but it might be intimated; *2do*, The general discharge does not import payment of the bond, without which the debtor must be liable to the assignee, though the bond *de facto* were assigned. See APPENDIX.

*Fol. Dic. v. 1. p. 343.*

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SECT. VII.

If presumed to comprehend debts in which the granter is a substitute only.

1633. February 14.

HALIBURTON *against* HUNTER.

No 25.

Found that a discharge granted of a special sum contracted for tocher to the granter's sister, though containing a general clause discharging him of "all sums whatsoever which she might ask or crave of him, wherein he was obliged to her, either in her own name, or in any other person's name, for her behoof," did not extend to a sum, which by a clause in the said contract, belonged to her, as surviving another sister, whose tocher was therein declared to accresce to her, it not being expressly discharged.

By contract betwixt Mr William Hunter on the one part, and Janet Finlason, his mother, on the other part, the said Mr William is obliged to pay to Margaret Hunter his sister, the sum of 3000 merks, and to the rest of his sisters mentioned in the said contract, to ilk one of them a particular sum, at a term appointed for that effect; and, in case of any of their deceases before the term, the sum contracted to her who so died, to accresce to the rest of the sisters surviving, equally amongst them, and that in satisfaction of all sums which they might crave by decease of umquhile David Hunter their father, or which they might crave from the said Mr William, as heir or executor to him. The said Margaret Hunter being married to Alexander Haliburton, pursues the said Mr William for that part of the sum which was contracted, to be paid by Mr William to Barbara Hunter, who was deceased before the term of payment, and which thereby accresces to the sisters survivors, according to that proportion thereof which falls to her and her said husband. And the said Mr William *alleging*, That the said Margaret and her said spouse had no action therefor, in respect that they had, by their discharge, granted the receipt of the sum wherein Mr William obliged himself to the said Margaret for her tocher; in the which discharge, they had not only exonered him of that sum, but likewise had discharged him of all sums whatsoever, which they might seek of the said Mr William, wherein he was obliged to the said Margaret, either in her own name, or in any other person's name to her behoof; which he *alleged* ought to comprehend and extend to this sum, now acclaimed; seeing it was claimed as pertaining to her by her sister's decease; and that he was obliged to pay it to the rest of the sisters surviving, she being one of the survivors, and craved *eo nomine*, which was alike as if her name had been specially expressed;

for it is so craved, as being obliged to be paid to her behoof; the LORDS found, That this discharge, which was specially granted, of a special sum contracted for tocher to the said Margaret, with the general clause foresaid therein contained, did not extend to this sum now acclaimed, seeing the same was not specially discharged, as it ought to have been, if the discharge should extend thereto; for that sum was a debt, also principally owing as the tocher; and the tocher being only received and paid, and the general clause not extending to any sums which might fall to her by her sister's decease, nor no such thing treated on, nor mentioned among them the time of the discharge, it could not extend *ad non cogitata neque tractata*, except the conception thereof had been made more ample, to have comprehended the same; seeing the said general clause might subsist, and the said clause obligatory also remain in its own strength, in respect the said generality might be interpreted to extend to all other things, which the pursuer might seek from the defender by her father's decease, or from him as his heir or executor, or wherein he was particularly obliged to herself, and not to that which fell to her by accident of her sister's decease; for, if it could receive that extension, then, of the like reason, if any, or all the rest of the sisters should die hereafter, the pursuer would by the same discharge be excluded from all claim of her part of their portions; which were hard to extend it to casualties, not then in *rerum natura*, but which were uncertain, except the discharge had been specially conceived for all things, which might thereafter befall to her.

No 25.

Act. Russel.

Alt. ———.

Clerk, Hay.

Fol. Dic. v. I. p. 343. Durie, p. 673.

1670. January 27.

INNES against INNES.

In the action upon the bond of provision made by Patrick Innes to Robert his son, 24th July 1669, *voce* PROVISION TO HEIRS AND CHILDREN; wherein there was a substitution, that failing of him and the heirs of his own body, the same should fall to Janet and Margaret Inneses, the LORDS having found, That albeit Janet deceased before Robert, that her heirs should have right; it was of new *alleged*, That the heirs of Janet could have no right as being heirs to her; because she dying before Robert, had no right in her person, and consequently her heirs could have no right, nor be infeft in the annualrent granted by the Earl of Errol who was debtor, who could not pay that sum but by a valid renunciation of a person that could be infeft. THE LORDS found that the allegiance was not competent *hoc loco*; but reserved the same to be considered when the Earl of Errol should be decerned to pay the money contained in the real infeftment; yet, the question being rightly considered, it seems there will be a difficulty, seeing Janet was never infeft herself; and a general service, although it gave right to the substitution, which

No 26.

A general discharge of all bonds of provision, was found not to include a provision by substitution, of which there was only an apparency, *et de quo non fuit cogitatum.*