

1711. June 19.

BEATRIX LINKLATTER, Relict of CAPTAIN BOSWELL, Skipper in Kirkaldy
against JOHN BOSWELL, Skipper there.

BEATRIX LINKLATTER having, in her contract of marriage with Captain Boswell, disposed to him, his heirs and assignees, her whole goods and gear, moveable and immoveable, debts and sums of money, and two tenements lying in Kirkaldy, with this provision and reserved faculty, 'That in case of her surviving him without children of the marriage, she should have full power to dispose upon the half of the goods, gear, sums of money, and others contracted on her part;'—she pursued John Boswell, as representing the Captain his father, to have it found and declared, that she had power to dispose of the tenements foresaid, as well as of the moveables disposed by her to her husband.

Alleged for the defender, *1mo*, The general words in the clause of disposal, and others contracted on her part, cannot be extended either to others of a greater value than the particulars mentioned, or to lands and houses which are of a different kind from the particulars expressed in the clause, 19th November 1680, Dalgarno against Tolquhoun, *voce* GENERAL DISCHARGES and RENUNCIATIONS. *2do*, The meaning of parties is to be drawn from the strain of the writ; so that the pursuer, having disposed her houses by one clause, and her goods, gear, and sums of money by another, and the clause containing the faculty beginning with the same words, *goods and gear*, &c. as the dispositive clause of the moveables, it can be extended only to moveables. *3tio*, A faculty or power to dispose of lands is not ordinary, and therefore not to be presumed.

Replied for the pursuer, *1mo*, If these words, and others contracted on her part, did not comprehend all heritable right disposed by her to her husband, they had been superfluous; for all that was moveable came under the foregoing terms of *goods and gear, and sums of money*. Besides, seeing *nemo præsumitur donare*, especially to make an excessive gift; and a general clause, subjoined to several particulars in a discharge, can be extended only to others of the same nature or value, because a discharge, except in so far as an onerous cause appears, *sapit naturam donationis*; therefore the pursuer's gratuitous conveyance of her whole estate, heritable and moveable, to her husband, reserving to herself but a faculty, in an uncertain event of her surviving him without children, to dispose of the half thereof, must be taken in the most ample and favourable sense the words can bear, and be understood to comprehend the half of all the particulars disposed, whether heritable or moveable. Again, the goods, gear, and sums of money disposed, were of greater value than the lands, and so may naturally, without any extensive interpretation, fall under the general of *others whatsoever contracted on her part*. *2do*, It is frivolous to pretend that the faculty should be extended only to moveables, because it begins with the words,

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A woman in her contract of marriage, disposed to her husband, his heirs and assignees, her whole goods and gear, moveable and immoveable, debts and sums of money, and two tenements, with this provision, That in case of her surviving him without children of the marriage, she should have full power to dispose upon the half of the goods, gear, sums of money, and others contracted on her part. The Lords found this clause did import, that in the event foresaid, a half of the heritable, as well as moveable subjects disposed, should return to her

No 11. *goods and gear, &c.* in the same manner as the clause disposing the moveables. And, *3tio*, It is most ordinary to grant faculties and powers to dispose of lands and other heritable rights.

THE LORDS found, That the clause providing that the pursuer should have power to dispose of the half of the goods, gear, sums of money, and others contracted on her part, doth import a return of the half of the heritable subjects disposed by her to her husband, as well as moveables; and therefore found and declared, that she hath right to the half of the houses disposed by her in her contract of marriage.

Fol. Dic. v. 1. p. 339. Forbes, p. 507.

No 12. 1728. *November 28.* TRAIL of Sabae *against* MOODIE of Melsetter.

A WIDOW, infest in a liferent locality, sold the same, 'together with all right, title, interest whatever, that she could any way ask, claim, or pretend in and to the foresaid local lands.' This was not found to comprehend a claim of recompence she had against her husband's Heirs by her consenting to the preference of a creditor who drew the rents of her local lands for several years. See APPENDIX.

Fol. Dic. v. 1. p. 339.

No 13. 1736. *January 6.* MOCHRIE *against* LIN.

AN assignation *mortis causa*, executed in *liege poustie*, containing an exact list of all the moveable bonds and bills, with a general clause adjected of 'goods and gear, debts and sums of money, gold, silver, coined and uncoined, and others whatsoever,' was not found to comprehend an heritable bond due to the defunct, but the same was found to belong to the heir. See APPENDIX.

Fol. Dic. v. 1. p. 340.

No 14. 1760. *December 11.* WADES *against* HEIR of Marshal WADE.

A PERSON, by a disposition executed in England, after the Scots form, conveyed to his natural children 'all and whatsoever debts and sums of money, real and personal, resting or due to him by any person or persons in Scotland, by bond, bill, account, or any other manner of way.' It was questioned between the natural children and the heir at law, whether this disposition was effectual to convey a right to the accumulate sums in certain adjudications at the disponent's instance against the York-Buildings Company.—THE LORDS found, That the disposition conveyed all debts, whether secured by adjudication, charter and infestment or not.

Fol. Dic. v. 3. p. 249. Fac. Col.

* * * See this case, No 20. p. 221.