father; and for a proportion of the grassum, paid by the present tenant to the Lady, effeiring to the said years; in full satisfaction of Pumpherstoun's damages, through being dispossessed:

Albeit it was ALLEGED for Pumpherstoun, that the decree of the House of Peers, entitled him not only to the profits the Lady had made by the decreet of the Session, but also to the advantage he might have made, had he been allowed to continue his possession; and therefore she should be liable to him for what profit the land yielded to the tenant put in by her, since that would have fallen to him if he had not been removed:

In respect it was ANSWERED for the Lady, that seeing the decree of the House of Peers orders satisfaction to be given to Pumpherstoun for his loss in general terms, the Lords are left to proceed and determine the same in their judicative capacity, regarding those differences that law makes betwixt possessors *bona fide*, and vitious possessors or intruders: and the Lady having set the lands to the present incumbent to the best advantage she could, *bona fide*, from a belief of her having right so to do, and by all the authority our law could give her; she can be obliged to restore no more than what she made thereby.

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1713. *January* 28. BEATRIX LINKLATTER, Relict of Captain JOHN BOSWAL, Skipper in Kirkaldy, *against* JOHN and ISOBEL BOSWALS, his children and Representatives.

BEATRIX LINKLATTER having, in her contract of marriage with Captain Boswal, disponed her whole means and estate to him and her in conjunct-fee and liferent, and the bairns of the marriage in fee; and in case of her surviving him without children of the marriage, she being empowered to dispose upon the equal half thereof: she pursued John and Isobel Boswals, as heir and executor to the Captain, to implement the contract, the marriage having dissolved without children. The defenders gave in a list of deductions and grounds of compensation. viz. 1. The expense of leading an adjudication in the pursuer's name, on a bond due by Weems of Fingask to her, and infeftment thereon; as being a necessary disbursement for securing a subject, wherein she has a joint interest by the clause of return. 2. The expense of rouping the pursuer's furniture and plenishing, which deduceth naturally, as the expenses of shearing corn, or confirming, and the like.

ALLEGED for the pursuer,—The defunct having right, by the asssignation in the contract, to the bond and the plenishing, his representatives cannot charge the relict with the expenses of rouping the one, or leading an adjudication for security of the other; because *negotium suum gessit.* 2. Though the relict had been debtor in a share of these expenses, yet since by law a husband is bound to pay his wife's moveable debts, his representatives could crave no deduction from her, upon the account of paying a debt which law transferred on him by the marriage.

ANSWERED for the defender,—Albeit the husband, as *dominus*, might have alienated to third parties, yet the wife had a provisional interest in the subject, in the event of not being alienated, and her survivance: which having happened, ought to be considered as *ab initio;* and no doubt the husband bestowed the expenses for the good of all concerned. For though the pursuer of an improbation can claim no share of his expenses, from a party reaping some consequential advantage accidentally arising thereby, who has no other conjunction of interest with him: yet husband and wife being *socii*, and having an united interest as to the subject, though the former were not founded in the direct action *negotiorum gestorum*, he is founded *in actione utili*, and in the action *pro socio*.

The Lords found, That the defenders must have allowance of the half of the necessary expenses for securing Fingask's money; as also the half of the necessary expenses wared out by the Captain, in rouping the pursuer's plenishing: she having an interest in the half of these subjects.

The defender craved deduction also of L3000 or L4000 of debt, owing by the pursuer before the marriage, and paid by the Captain: for in liquidating the value and extent of what came by her, the debt due by her at the time should be discounted; seeing nobody is worth more than what they have, *deductis debitis*.

ANSWERED for the pursuer,—Though the Captain had paid debts for her, she must enjoy the liferent and fee provided to her by her husband in the contract of marriage, without any deduction: because, law obliging him to pay his wife's debt, he can claim no compensation upon that account. Did a husband provide his wife, who brought him no tocher, to a life-rent of 10,000 merks, and empower her to dispose of 1000 thereof, if she survived him, would his paying several moveable debts for his wife be a ground to diminish her life-rent or faculty provided to her? Which is exactly parallel to the present case: the extent of her life-rent being the full value of what was assigned; and her fee, the half, in the same way as if she had estimated her means in the contract. And the husband's paying her debts could afford no ground of compensation, where there is no *concursus debiti et crediti*, the wife being never debtor to him, who paid only that debt which the marriage made his own; nor yet could it afford a ground of deduction or restitution, contrary to the plain meaning of the contract. Again, by the Scots law there is a communion of moveables between man and wife, whereof the husband during the marriage has an unaccountable administration: and after dissolution thereof, each get their share according to law, without respect to whose debt, or how much was paid during the marriage. Now, the pursuer having only her husband's personal obligement to employ on annual-rent the value of the whole means assigned by her to him, and a reserved power to dispose of the half of the stock; this faculty can no more be effected with debts he paid for her, than bonds granted to her, or legacies left her, could be so affected.

REPLIED for the defender,—The question is not, how the means in communion shall be divided after dissolution of the marriage: but whether or not the wife, disponing her means *per aversionem* to her husband, and taking him bound to provide her to a life-rent of the whole, and reserving power to herself to dispose of the half thereof in case of her survivance, in liquidating the extent and value or her means in order to settle her liferent and fee; the debts owing by her at the time of the contract, and afterwards paid by him, should be deducted:

because the value and extent of an *universitas bonorum* disponed can only be understood *deductis debitis.* This case is nowise parallel to a husband's giving his wife a bond or legacy with a faculty to burden his heritage: for there the husband dispones or legates his own; whereas here a wife pactions the return of her own means or value thereof, which must be understood with deduction of debts.

The Lords found, That the debts due by the pursuer, the time she entered into the contract of marriage with the defender's father, are to be deduced off the whole head of the means she brought to her husband; and that the defenders are obliged to restore to her only the half of the free gear. *Page* 651.

1713. *February* 5. ROBERT BALFOUR, Son to JOHN BALFOUR, Skipper in Kirkaldie, *against* HENRY GREIG.

ANGUS LINKLATTER, in a contract of marriage betwixt Catharine Linklatter, one of his four daughters, and John Balfour, her second husband, having, for himself, and as burden-taker for his said daughter, obliged himself to make her a bairn in his house, and that she should share equally with his other daughters of his lands and heritages, reserving power to himself to use and dispose as he thought fit; and the said Catharine having obliged herself to provide her share of her father's estate to herself, and the said John Balfour, and the longest liver in liferent, and to heirs of the marriage in fee: The father died without making any settlement, and Catharine his daughter, who survived him, neglected to enter heir-portioner with her three sisters. After her death, Henry Greig, her son of the first marriage, procured himself, as come in place of his mother, to be cognosced and infeft in a tenement in Kirkaldie, as one of the four heirs-portioners of Angus Linklatter, the grandfather. Whereupon Robert Balfour, Catharine's heir of the second marriage, pursued Henry Greig, as heir to his grandfather, to denude of that fourth part of the land wherein he was infeft.

The Lords found that Henry Greig, as heir to Angus Linklatter the grandfather, must fulfil his obligement to the pursuer, heir of the provision of the second marriage, and denude of a fourth part of the grandfather's land, unless he instruct where the pursuer is to get the rest made up by the other heirs-portioners, having more than their own shares.

Albeit it was ALLEGED for the defender, 1. The grandfather's obligement to make his daughter a bairn in the house, and that she should share equally with his other children in his lands, did not oblige him to dispone his lands to his daughters: but imported only, that he was to do nothing to hinder them to share equally. And he having left them to succeed according to law, had performed all that was incumbent on him: especially considering that the reserved power to use and dispose, enabled him to dispone to a stranger, notwithstanding the provision. It was John Balfour, the pursuer's father, that should have served his wife heir to her father: and seeing *per eum stetit,* that it was not done, no burden-taker for her could be liable. It can never be imagined that