

neral discharges are never extended to particulars of greater value in specie than those exprest; and, therefore, bonds, debts, and obligations being exprest, it could never be extended to the warrandice of heritable rights, nor to the obligations to dispone heritable rights, such as the obligations in this contract; and the exception is only of bonds for sums of money, which is a different species from dispositions of lands, and of greater importance; and though this discharge would be sufficient to take away a bond of money of the greatest sum, being in specie exprest, yet it cannot extend to an obligation to dispone lands, or any obligation of warrandice, though the particular interest were of less moment, yet the species of land or warrandice are of greater import.

No 10.

THE LORDS found, that this general discharge did not extend to this obligation, 'to dispone lands, or to procure dispositions thereof;' but found Tolquhoun liable to pay annualrent so long as he was not legally put from his possession.

Stair, v. 2. p. 802.

1716. June 27. CHARLES MITCHELL against SINCLAIR of Quendall.

SINCLAIR of Quendall being debtor to William Donaldson skipper in Dundee, after horning registrate, he adjudges his lands, and assigns the debt and diligence to Charles Mitchell; but, the assignation not being intimated, Quendall and Donaldson, (betwixt whom there were several other dealings,) posterior thereto, count and clear, and grant a mutual general discharge to each other, of all that either of them could ask by bond, tickets, decreets, bills, count-books, &c. for any cause whatsoever preceding the date of the discharge, and contains an obligation upon either party to deliver up such obligatory bonds, tacks, &c. as either of them had. Thereafter, in an action of mails and duties at Charles Mitchell's instance, compearance is made for Quendall, who alleged no process on the said adjudication, in respect of the cedent's foresaid discharge, which, though posterior to the pursuer's assignation, yet was prior to any intimation thereof to Quendall the debtor, who was at that time *in optima fide* to pay Donaldson, and receive his discharge, which must be good against the pursuer, who is his assignee.

No 11.

Found that a general discharge of all debts and decreets, did not extend to a decreet of adjudication, where there was no instruction or document, that the debt contained in the adjudication was communed upon, or accounted for at granting the general discharge.

Replied for the pursuer; That the discharge being only general upon the narrative of fitting and closing accounts, &c. can never be extended to the adjudication; because, 1st, The discharge relates only to moveable debts, personal obligations, and decreets, as by the said narrative appears; whereas the adjudication is a real right, and of a quite different nature; and, as such rights are not usually extinguished by general discharges no ways referring thereto, so it is not to be presumed that Quendall would rest satisfied with such a general discharge, without mentioning this debt for which he stood registered at the horn, and his lands adjudged, which the Lords found, *Dalgarno* against the Laird of Tolquhoun, No 10. p. 5030. 2^{do}, A general discharge is never presumed to

No 11. comprehend more than the granter had right to at the time of granting, which was also found, Blair against Blair, No 63. p. 940. Now, William Donaldson having assigned this adjudication long before the discharge, he had no right thereto, and so is not understood to have discharged the same.

Duplied for the defender; *imo*, That, in the decision Blair, the discharge bears no onerous cause, and that there had been a former assignation, whereof the intimation was extant; and that the decision Dalgarno did not meet the present case, since there, there was a debt discharged, and a general clause discharging all other debts, which is not understood to extend to debts of another kind, than that which is specially expressed; but the discharge here is general of all debts and decreets, without mentioning any particular: *2^o*, That all writs tending to liberation ought to be largely interpreted, and that the discharge of all decreets must be as effectual as the decret of adjudication had been discharged, since the pursuer could not condescend upon any other decret that his cedent had.

Triplied for the pursuer, That the decision Blair is founded expressly upon the prior assignation granted before the general discharge, as appears from the the words of the interlocutor; and, by the foresaid other decision in Tolquhoun's case, it appears, that the discharge was not for a particular sum, with a general clause subjoined, but that the discharge was absolutely general, with an exception of a particular obligation, which might appear to confirm the same in cases not excepted: *Lastly*, That the present debate was not simply, Whether the debtor could take, or the cedent grant a discharge of this debt whereof he stood entirely denuded? But it was also *facti et voluntatis*, namely, Whether the cedent, by granting the general discharge, did design to acquit the receiver of this particular debt? And, from the reasonings in the decisions above mentioned, there appears plainly this solid rule, That a party who offers to take away a particular debt by a general discharge, must prove that the particular debt was communed on, and treated of, especially where there is a probable ground or cause why the granter of the discharge might be ignorant that it was in his power to discharge this particular debt at the time, as certainly Donaldson was, who looked on himself as denuded thereof in favours of Mr Mitchell: This rule is likewise clearly laid down in *l. 4. 5. ff. de transact.*; and the reasons are very convincing; because, as the law does secure debtors making payment *bona fide*, so it is careful to preserve creditors from being imposed upon by frauds and fallacies, which use to lurk in general words.

'THE LORDS found, that there being no instruction nor document that the debt assigned was communed upon, or counted for at the granting of the general discharge; the said discharge did not extend to the debt assigned in prejudice of the assignee.'

Act. Jo. M'Leod.

Alt. Binning.

Clerk, Gibson.

Fol. Dic. v. 1. p. 341. Bruce, v. 2. No 5. p. 8.