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 poner's wife,
 without his
 knowledge,
 to procure
 her assistance
 in influencing
 her husband
 to settle his
 estate on the
 granter of the
 bond.

ment, Dirleton suspends on double pointing, that he was not only distressed by him, but likewise by Dame Jean Nisbet, as nearest of kin to Sir John, and Sir William Scot of Harden, her husband. And they falling to debate their several interests in this bond, the Lady Harden claimed it, as executor to her father, in so far as this bond came in place of one granted to her father's Lady, in his lifetime, and so accresced to him, being not only presumed to be his, but likewise known to be given as a gratuity to influence the tailzie and succession of his estate from Nisbet of Dean to this William who now enjoys it.—*Answered* for Prestongrange, He opposed the bond in his sister's name; and *esto* it had been *surrogatum*, in place of one granted to her *stante matrimonio*, and before her husband's decease, yet he founded on two dispositions, granted by the said Sir John to this Dirleton, whereby he assigned him to all bonds, debts, and sums of money, any way belonging to him at the time of his decease; but *ita est*, on Harden's supposition, this bond fell to Sir John, and was his at the said time; *ergo*, I must have right to it, because my sister and I have all the right this Dirleton had, and being come in his place, may propone whatever he could say.—*Replied*, It cannot be carried by the first disposition, because that relates only to such bonds as he left contained in a list or inventory of his debts, whereof this was none; and it was as little comprehended in the second disposition, because, though that related to no inventory, yet it bore an obligation on Dirleton to tailzie all the sums disposed in the same way as the lands were tailzied, which restrained him from giving any such bond to the Lady; besides, *nemo fertur ad incognita*; he could never mean this bond which he knew nothing of, but was given as a secret gratification concealed from him. And yet the law, *l. 51. D. de donat. inter vir. et uxor.* makes all such purchases of wives devolve to their husbands, *ad evitandam turpis quæstus suspicionem*.—THE LORDS found this bond comprehended under none of these dispositions, and therefore preferred the Lady Harden, as executor to her father, to the right of this sum. Prestongrange appealed to the Parliament,

Then *alleged*, That in so far as it was onerous, it ought to subsist; and they offered to prove it was not only granted on the account foresaid, but also for her entertainment of the family till the next term, and for the expense of her mournings, &c. of which the Lords were to consider after he had given in his condescendence on the particulars; but the interjecting the foresaid appeal put a stop; though in law such protestations are not to be admitted but against definitive sentences terminating the whole cause.

Fol. Dic. v. 1. p. 340. Fountainball, v. 1. p. 771.

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 Found, that
 the words
 "goods and

1699. December 1. MR WILLIAM HENDERSON against JANET BEER.

By contract of marriage betwixt John Beer and Janet Henderson, the husband is obliged to secure all lands, heritages, annualrents, wadsets, sums of

money, and other goods and gear whatsoever, in favour of his wife in liferent; and, by another clause, it is provided, that the survivor should have the liferent of all free goods and gear whatsoever, and the survivor is obliged to make good and thankful payment of the equal half of all goods and gear whatsoever, to such persons as the first deceaser should leave the same in testament, or latter will, and that at the decease of the longest liver.

The wife dying first, without heirs of the marriage, assigns the benefit of the contract to Mr William Henderson her brother; whereupon there ensues a debate betwixt him, as the wife's assignee, and Janet Beer, the husband's heir and executor, anent the meaning and import of these words, *free goods and gear*, to which he had right from the wife; and the LORDS, 13th December 1698, found, 'That Mr William Henderson, the pursuer, had only right to *species* or *corpora* of moveables, by virtue of the foresaid contract, and had no interest in bonds or obligations due to the defunct thereby.'

Mr William reclaimed by a bill; which being remitted to the Ordinary, and of new debated and reported, several new grounds, not formerly under the Lords consideration, were insisted in, to make appear, that, by the contract, he had right to the equal half of all moveable debts and sums of money; as, *1mo*, By the civil law, *bonorum appellatione veniunt nomina debitorum*; and, by the common acceptation with us, a man's goods comprehend all he hath. *2do*, By our acts of Parliament, bonds, debts, and all moveables, are sometimes comprehended under the word *goods*, act 120th, Parl. 7th, King James V. whereof the Rubrick bears, that the nearest of kin are to have the goods of minors that die intestate; where the word *goods*, signifies all moveables; and the same word *goods* hath the like sense, both in the narrative and statutory part of the act. The like, 26th act, Parl. 1690; and in the 19th act, 2d Parl. Charles II. concerning confirmations and quotes of testament, *goods* and *debts* are used as reciprocal and convertible terms.

3tio, Sometimes the word *gear* is, in law, understood to express all that is moveable, or of a testamentary nature, as in the said 19th act, Parl. 2d, Charles II.; and the instructions to the Commissaries 1666, whereby nothing is to pay quote, but free gear.

4to, Sometimes all moveables are expressed by the words *goods* and *gear* jointly; as act 14th, Parl. 22d, James VI. anent executors, whereby it is statute, that executors nominate should be obliged to account for the defunct's whole goods and gear, reserving a third to the executor.

5to, The style of bonds obliges intromitters with goods and gear, &c. whereby an intromitter with bonds or debts would certainly be liable.

In the former debate, the point chiefly insisted upon, which moved the Lords, was, that the common style of testaments bore two inventories, one of goods and gear, and another of debts; the first, of goods and gear, consists only of such moveables as are *corpora* or *species*, and comprehends no debts; but, upon consideration of the foresaid acts of Parliament, the Lords were satisfied, that

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"gear," in a contract of marriage, extend to bonds bearing interest, and other debts, as well as to *corpora*, or other species of moveables.

No 10. these words *goods* and *gear* are variously understood, sometimes to comprehend *species* of moveables only, as in confirmed testaments, and sometimes to comprehend likewise *nomina debitorum*, and all moveables confirmable; so that it was *quæstio voluntatis*, whether, by the contract of marriage in question, the defunct designed to give his wife the disposal only of moveables, consisting of bodies or species's, or likewise of bonds or debts.

It was *alleged* by the wife's assignee; That the half of all moveables belonged to him in the wife's right; because the first part of the contract provided the wife to the liferent of all heritage and moveables, that the husband had, or should acquire; and by a second clause, it was provided, that the longest liver should liferent all the free goods and gear; and by a third, that the said longest liver should pay the equal half of the free goods and gear whatsoever, to such persons as the first deceasing should leave the same in testament, or latter will; whereby free goods and gear, in the last clause, appointing a division, was to be as largely interpreted, as in the former, providing the liferent to the longest liver, which certainly was not restricted to *corpora* or *species*.

It was *answered*, The contract was extended by a very unskilful person, and the clauses are no ways suitable or congruous to one another; and therefore the words in the clause in question, were to be understood in the most congruous sense, which, *in dubio*, is always more favourable to the husband's heirs than to the wife's, who are strangers; and goods and gear are most properly understood *corpora*, especially in conveyances and transmissions; and, as to the contract, the words *goods* and *gear* cannot be understood in law, as the contract doth express; for the first clause, providing the liferent of heritage and moveables to the wife, and the second, providing the liferent of all free goods and gear to the survivor; the said second clause is either incongruous and inconsistent with the former, or otherways goods and gear must extend even to heritage; and, seeing that interpretation cannot stand, the second can have no rational interpretation, it cannot be made use of to regulate the meaning of the last clause, anent the division of the free goods and gear.

It was *replied*, The contract hath indeed been framed by no expert writer, yet the design of parties is abundantly clear, that the longest liver should liferent all, and, failing bairns, that all should be divided; and, albeit nothing is expressly provided to the wife's heirs, if she had survived, yet the provision, that the longest liver should pay the half to the executor of the first deceasing, imports a division in all cases; and there is not the least evidence of the husband's design to restrict the division intended to species of moveables; but his intention is evident for a division of all.

It is true, the writer appears to be inexperienced, and there is no congruity betwixt the first clause, providing the liferent of lands and heritages to the survivor, and the second, which provides the liferent of goods and gear; because, whatever the party or writer understood, goods and gear, in the interpretation of law, doth not extend to heritage; yet, since there is a probable evidence, that

the liferent was designed to extend even to heritage, by the second clause, and that the division betwixt the husband and wife, in the last part of the contract, was of all free goods and gear whatsoever; these words are to be interpreted in the most ample sense, there being no circumstances to qualify the husband's design to restrict; for, if the words were understood only of species, the wife and her executors would have less by that clause, than by the provision of law, which allows the half not only of species, but of all bygone annual-rents of bonds, and all tickets, and other debts not bearing annualrent, to the nearest of kin of the wife predeceasing.

'THE LORDS found, That the words *goods* and *gear* were not to be understood in the restricted meaning, but that the same did extend, as well to bonds bearing annualrent, and other debts, as to *corpora*, or other species of moveables.'

Fol. Dic. v. 1. p. 339. Dalrymple, No 20. p. 23.

. Fountainhall reports the same case :

1698. December 13.—PHILIPHAUGH reported Mr William Henderson, *bibliothecarius* of the College of Edinburgh, against Janet Beer and James Forrest her husband.—By contract of marriage between John Beer, father to the said Janet, and Janet Anderson sister to the said Mr William, all lands, heritages, &c. he should have at his decease, are provided to them in conjunct-fee, and to the bairns of the marriage in fee. Then follows this clause, In case there be no children, then the survivor shall pay to the heirs, executors, and assignees of the first deceiver, the equal half of the whole goods and gear they shall have at the time of the dissolution of the marriage. The wife dies first, and assigns her brother Mr William to the contract, and he pursues John Beer's daughter of the first marriage, being his heir, for making furthcoming to him the half of the whole estate, both heritable and moveable, of her father's.—*Alleged*, She opposes the clause, which is only a provision to the half of the goods and gear, which, in no grammar or propriety of language, can extend to any heritable subject, nor yet to sums and debts, but only to corns, cattle, and household plenishing, consisting *in corporibus et speciebus*, and no other.—*Answered* for Mr William, It must be reputed but all one clause; and so lands and heritages being expressed in the first branch of it, they must be holden as repeated in the whole; and it is plain this has been the meaning of parties, for they had no heritage at the time, and so thought his whole estate was sufficiently comprehended under the general words of goods and gear.—*Replied*, The argument concludes more strongly being retorted. Heritage is mentioned in the first clause, and not in the second; *ergo* it has been industriously omitted; and *esto* it had been the design of parties, which cannot be now proved after their deaths, yet the words must be the rule of judging now; and it were strange to draw heritable rights under the denomination of goods and gear; and this was already decided, Young

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contra Youngs, No 8. p. 3054. where goods and gear was not found to extend to heritage; and Dirleton, in his Doubts and Questions, *voce* INHIBITION, says, Bonds come not under the general of goods and gear, which import a *corpus et quantitas*; whereas bonds or *nomina debitorum* are *entia rationis*. Yet I find in the Roman law, l. 21. and 49. *D. de verb. significat. sub nomine bonorum*, obligations sometimes fall. See Wecembachius and other commentators there, who exclude *feudalia a bonorum appellatione*.—THE LORDS were unanimous that this clause would not reach heritage; and as to moveable bonds bearing annualrent (which are heritable *quoad fiscum et relictam*, and fall not *sub communiione bonorum*) the plurality found this clause of goods and gear could not so much as extend to them; and therefore assoilzied from Mr William's process *quoad* these particulars.

1699. November 29.—THE action, mentioned 13th December 1698, pursued by Mr William Henderson against Beer and Forrester, was reported again, and reconsidered, and the former interlocutor altered, which found that 'goods and gear' extended only to *corpora et quantitates*, but noways to bonds, tickets, or sums of money, which are *entia juris*, rather than *corpora*; for the LORDS considered, that though the sense in which *bona* was taken in the Roman law, to signify a man's whole estate, *uti de bonis legassit*, or *bonorum possessio secundum vel contra tabulas*, is not admitted now by any judicatory in Europe, as being too large and comprehensive, yet 'goods and gear' were *verba polysema* with us, and had two various significations; one vulgar, and restricted to signify only household plenishing, cattle, &c. the other legal and more extensive, whereby, in our acts of Parliament, it is used to comprehend all that falls under testament or confirmation, such as moveable bonds, though bearing annualrent, tickets, debts, accounts, &c. as appears by the 120th act, 1540, and act 14th, 1617, and the instructions given to the Commissaries in 1666, &c.; and therefore the LORDS, by a plurality of 7 against 5, did find these words in this contract of marriage now pleaded upon behoved, by the contexture of the clauses, and the conjectured will of the parties, to comprehend all moveable bonds, tickets, accounts, and whatever else was testable. Some of the LORDS moved it could go no farther than to what falls *sub communiione bonorum* betwixt man and wife, which would have excluded bonds bearing annualrent, these being heritable *quoad fiscum et relictam*, but it carried *ut supra*; though severals urged, that 'goods and gear,' both in propriety of language and our law, was always reputed as an opposite species to *nomina debitorum*, and contradistinct therefrom.

Fountainball, v. 2. p. 24. & 70.