

1706. July 24. WEMYSS and WHITE *against* MURRAY.

No 21.

A WOMAN having made a disposition *omnium bonorum* to her husband, and at her death left her wearing clothes to her aunt, who took decret against the husband for the same, and thereafter granted a discharge to him, narrating the decret, and containing a general clause of all she could ask or crave from him; the LORDS found, that the discharge concerned the decret only, and did not cut off the granter from a claim of an annuity contained in an obligation granted to her by the defunct, antecedent to the marriage.

Fal. Dic. v. 1. p. 342. Forbes.

* * See this case, No 42. p. 912.

1716. July 26. AGNES DUNDAS *against* CHRISTIAN DUNDAS.

No 22.

THE deceased George Dundas being obliged, by contract of marriage, to dispone to the said Agnes, his second wife, among other things, certain parts of the water-passage upon Forth, with the emoluments thereof in liferent, she pursues Christian Dundas her step-daughter, as representing her father, for implement; and Christian having founded her defence on a general discharge, where, after narrating that she had received payment from the said Christian of the mournings, funerals, alimending the family till the next term, &c. and specially of the bygone annualrents of a sum provided to the said step-mother in-liferent, there is subjoined the common clause of a general discharge, excepting only the said yearly annualrent in time coming.

It was *replied* for the pursuer; That a general clause in a discharge, subjoined to an enumeration of particulars, could not be extended to discharge things of greater import than those expressed, especially an obligation to dispone a real right, as was found Dalgarno *against* Tolquhoun, No 10. p. 5030.

Duplied for the defender; That undoubtedly such a general clause, subjoined to a receipt of particulars, may be extended to discharge particulars of much greater import than those enumerated, when both are of one kind, as was found Lawson *against* Ardkinglass, No 2. p. 5023.; and Chapel *against* Guydet, No 6. p. 5027.; and that they are of the same nature here, appears from this, that though the liferent of the water-passage is to be completed by infestment, yet it being but a liferent right, as well as the other liferent of a sum, whereof the bygones are expressly discharged, they are of the same nature; so that the present case differeth from that of Dalgarno, since there, there was only narrated a compting in relation to one subject, viz. victual intromitted with by the receiver of the general discharge; whereas here there are many particulars premised, and one of them a liferent-right granted to the pursuer, &c.

In a contract of marriage, the husband became bound to infest his wife in a water-passage upon Forth, with the emoluments, &c. as a part of her jointure. After his death, she pursued his heir for implement. The Lords sustained his defence on a general discharge granted by the relict, unless she would prove by the defender's oath, that, at granting the discharge, it was understood that the water-passage should be reserved.

No 22.

Tripled for the pursuer; That the obligation can never be taken away by the generality, seeing at that time there was no communing with respect thereto; as was found in a like case, Blair against Blair, No 13. p. 940. ; and Campbell against Napier, No 13. p. 5035. ; which therefore burdens the defender to prove, which is also conform to the civil law, l. 2. tit. 15. § 5. ff. de transact. where, though it is said that *stipulatio Aquiliana* did cut off all former obligations, yet that it did not take away these ‘De quibus non est cogitatum, in suo statu retinentur. Liberalitatem enim captiosam interpretatio prudentium fregit;’ and in l. 2. t. 15. § 9. in fine ff. eod. ‘His tantum transactio obest de quibus actum probatur; nam ea, quorum actiones competere ei postea compertum est, iniquum est perini pacto; id de quo cogitatum non docetur;’ and thus it is also by l. 47. § 1. ff. de pact. et l. 31. c. de transact.

Quadrupled for the defender; That its not being communed on was not relevant, seeing, in a general discharge, it is not necessary to say, that every particular matter was specially communed upon, but it is sufficient to say, that the intention of parties was to discharge all claims, which being instructed both by the narrative and subsumption of the discharge, all must be comprehended, unless the pursuers would offer to prove that the water-passage was reserved; and, as to the decision cited, it was noways applicable; for there the case was about a general discharge, where the same did comprehend a bond, which the discharger had assigned to a third party long before, which the Lords presumed it did not, viz. That the granter did intend to involve himself in breach of warrandice of the assignation.

“ THE LORDS sustained the general discharge to liberate the defender from payment of the emoluments of the water-passage on Forth, not only from by-gones, but also in time coming, unless the pursuer should offer to prove by the defender’s oath, that it was communed upon, the time of the granting the general discharge, that these emoluments should be reserved, notwithstanding of the general discharge.”

Act. Sir Walter Pringle et Irvine.

Alt. Morison.

Clerk, Sir James Justice.

Fol. Dic. v. 1. p 343. Bruce, v. 2. No 27. p. 35.