

Ordered and adjudged that the interlocutors be reversed.

1797.

And it is farther ordered and adjudged, that the said cause be remitted back to the Court of Session in Scotland to rank the appellants, pursuant to their claim, to the amount of £25,081. 4s. 10d., and to proceed farther in the cause according to justice.

EARL OF FIFE
v.
MACKENZIE,
&c.

For Appellants, *Sir J. Scott, J. Anstruther.*

For Respondent, *J. Mitford, W. Grant.*

[M. 2325.]

JAMES EARL OF FIFE, *Appellant;*
MRS. MACKENZIE and ELIZABETH FRAZER, *Respondents.*

(*Et e contra.*)

House of Lords, 6th March 1797.

CLAUSE—EXECUTRY—RENTS—DESTINATION.—A clause conveying all moveable *goods, gear, and effects*, belonging to the party at death, held not to carry debts and sums of money, bank notes, &c., but only *ipsa corpora*.

In 1768 Mr. Udny, who possessed considerable landed estate, married Mrs. Margaret Duff, a widow, and took the name of Mr. Udny Duff. A few months afterwards a *post-nuptial* contract was entered into between them, whereby Mr. Udny Duff, on his part, “ assigns and dispones to and “ in favour of the said Mrs. Margaret Duff, in case she shall “ happen to survive him, and to *her heirs, executors, and assignees*, the whole moveable goods, gear, and effects, “ which shall belong to him at the time of his death, including heirship moveables, household furniture, outright and “ insight plenishing, silver plate, jewels, and linen, and in “ general, all moveable goods and effects of whatever kind “ and denomination, that shall belong to him at the time of “ his death, and that free of all debts and deductions whatever.” He also charged his estate with an annuity to her of £300 in case she survived him ; in consideration of which, and on her part, Mrs. Duff became bound “ to convey to “ her husband, his heirs and assigns, her whole heritable “ and moveable estate which presently do belong to her, or “ which may fall, accresce, or belong to her at any time “ hereafter during the subsistence of the marriage, and par-

1797.

 EARL OF FIFE
 v.
 MACKENZIE,
 &c.

“particularly.” Here followed an enumeration of several heritable bonds and other real estates, and amongst others, the *lands and estate of Forresterhill*. She further, as to her moveable estate, “assigns and disposes to and in favour of the said Alex. Udny, Esq. her husband, *his heirs and assignees*, the whole “moveable goods, gear, and effects which shall belong to “her at the time of her death, including heirship moveables, “household furniture, out-sight and in-sight plenishing, silver “plate, jewels, and linens, and in general all moveable “goods and effects of whatever kind or denomination which “shall belong to her at the time of her death.”

April 25, 1797. The day after the contract Mrs. Duff executed a deed to vest her husband in the different subjects she had become bound by the contract to convey; and four days thereafter

April 29, — Mr. Udny Duff executed a deed, bearing to be for the love, favour, and affection he bore to his wife, did “assign, “transfer and disposes, to and in favour of the said Mrs. “Margaret Udny Duff, my spouse, her heirs and assigns, in “case she shall happen to survive me, and not otherwise, “the subjects underwritten, viz.” Here the subjects which Mrs. Duff had in the above marriage contract conveyed to him were enumerated, including the lands of Forresterhill. In this deed there was this clause of warrandice, “And “which dispositions, assignments, and translations, I bind “and oblige me and my foresaids to warrant to the said Mrs. “Margaret Udny Duff, and her above written, from all “facts and deeds done, or to be done, by me in prejudice “hereof allenarly.”

Sept. 1789. Mr. Duff sometime thereafter sold part of the lands of Forresterhill for £5208, with Mrs. Duff's concurrence. The price was laid out on bonds payable to himself, without any mention of his wife. He died intestate in 1789, being survived by his wife without issue, and leaving personal estate, (exclusive of household furniture or moveables corporeal), to the amount of £15000.

The two neices of the deceased, the respondents, without any opposition from Mrs. Duff, confirmed as being next of kin of their deceased uncle, by which they took possession of all debts and sums of money pertaining and due him by bonds, bills, promissory notes, leaving the widow to take under the contract *ipsa corpora* of all moveables.

It appeared that, in executing the contract, the original draft of that deed contained a conveyance to his wife of his own moveable estate, in case she survived him, in broader

terms: thus,—“all debts and sums of money which shall
“belong to him at the time of his death, together with,”
&c., but these words were deleted in Mr. Udney Duff’s own
handwriting, and thus struck out of the clause regarding
the moveable estate.

1797.

EARL OF FIFE
v.
MACKENZIE,
&c.

Jan. 1793.

Mrs. Duff thereafter died, leaving her whole personal
estate and effects to her near kinsman the Earl of Fife, and
appointing him her sole executor; and conceiving that
she had a right, after her husband’s death, to the whole per-
sonal estate of which he had died possessed, including
money, arrears of rent, &c., and not to the *ipsa corpora* of
such moveables as household furniture, &c., he brought the
present action against the two neices, who had taken pos-
session of the money, for repayment of the same. He
brought a separate action for the purchase money of those
parts of the lands of Forresterhill which Mr. Udney Duff had
improperly sold and appropriated to his own use, in breach
of the marriage settlement. On the other hand, a counter
action was brought by the respondents against Lord Fife, as
representative of Mrs. Udney Duff, praying, 1st, for an account
of the arrears of rent uplifted during the subsistence of her
marriage with Mr. Udney, collected by her under a factory;
2d, That the appellant should restore the rents of Mrs.
Udney’s estate for the half of crop 1789, and the arrears of
rent due at Mr. Udney’s death. 3d, That the appellant
should deliver to the respondents, as next of kin of Mrs.
Udney, the whole effects that belonged to Mrs. Udney at the
time of her death.

There were thus three points for disposal.

1st. Whether by the clause in the marriage contract, the
husband had conveyed to Mrs. Udney Duff *his whole personal
estate*, or only the *ipsa corpora* of moveables, as distinguish-
able from debts and sums of money.

2d. Whether the respondents, Mr. Udney’s representatives,
are liable to account to the appellant for the price of Mrs.
Duff’s lands of Forresterhill, sold by Mr. Udney Duff as a sur-
rogatum for these?

3d. Whether the respondents (Mr. Udney’s representa-
tives), are entitled to the *corpora* of the moveables which
belonged to Mrs. Udney Duff at her death, these by the con-
tract being conveyed to “her husband, *his heirs and assig-
nees*,” or whether the Earl of Fife, as executor under Mrs.
Udney Duff’s will, executed after the death of her husband,
was so entitled to these.

1797.

EARL OF FIFE

v.

MACKENZIE,
&c.

May 14, 1795.

The Court pronounced this interlocutor: “ Find that the conveyance in the contract of marriage by Alexander Udny Duff, in favour of Mrs. Udny Duff, in the event of her surviving him, extends only to the *ipsa corpora* of moveables, and does not include debts or sums of money: Find that the clause in the said contract, giving to Alexander Udny Duff, his *heirs and assignees*, the moveable effects that should belong to Mrs. Udny Duff at the time of her death, does not entitle the heirs or executors of Mr. Udny Duff to make any claim to these effects, in competition with the Earl of Fife, the general disponee of Mrs. Udny Duff, or with Robert Duff of Fetteresso, who has entered a claim to some of them as a special legatee: Find, that the executors of Alexander Udny Duff has right to the arrears of rent due upon Mrs. Udny Duff’s estate at the time of his death; and also to one half of the rents payable for crop 1789; repel the mutual claims made by the parties upon each other for the rents of Mrs. Udny Duff’s estate uplifted by her or her husband, during the subsistence of the marriage: Find that the executors of Alexander Udny Duff, are not accountable to the Earl of Fife for the price of the lands of Forresterhill, sold during the subsistence of the marriage, and remit to the Lord Ordinary to proceed accordingly.”* On reclaiming petition the Court adhered.

* Opinions of the Judges:—

LORD PRESIDENT CAMPBELL.—“ This is a question of succession between the heirs of the husband and wife, under postnuptial settlements. 1st Point.—The words moveable goods, gear, and effects, may be variously construed, according to circumstances. In the present case, all the circumstances show that they must be taken in a limited sense, and so Mrs. Duff herself understood the matter. 2d Point.—The clause to which this refers seems to have been put into the contract without any particular instructions, as a counterpart of the other, though it was unnecessary if it meant *in the event of his surviving*, this having been done already by the preceding clause; and if it meant otherwise, it was merely testamentary, and not of the nature of a provision, so that she could alter it at pleasure *quoad* his heirs. Indeed it ought to be considered as lapsed altogether by his predecease, like a legacy left in the same terms. 3d Point.—Any arrears of rent unlifted by her at her husband’s death must belong to his executors. 4th Point.—The executors

Against these interlocutors the present appeal was brought by Lord Fife, and cross appeal by the respondents.

1797.

Pleaded for the Appellant.—It is quite irrelevant to inquire into the intention of parties in executing a deed, and to gather that intention from collateral circumstances, or from separate evidence, because whatever may have been the intention, when the words used are clear and unambiguous, the rule is, as Lord Stair says. “*In claris, non est locus conjecturis*, and judges may not arbitrarily interpret writs or give them a sense inconsistent with the clear words.” The terms used are clear, and have a precise legal signification, which cannot and ought not to be explained away. Mr. Udny assigns *the whole moveable goods, gear, and effects*, which should belong to him at the time of his death. It is indisputable that moveable effects is a term synonymous with personal estate, and comprehends debts due to the assigner, as much as *corpora mobilia*. But the clause explains further that it not only includes heirship moveables, household furniture, but also in general “*all moveable goods and effects of whatever kind or denomination.*” Unless it can be maintained, that debts and sums of money are not moveable, it is difficult to see how they are not comprehended under the above words of destination as fully as if they were specially named. 2. And as to Mrs. Udny Duff’s lands of Forresterhill, it was clear that it was a part of the original contract, that these lands were to be reconveyed to her, and though this was done by a separate deed, bearing to be for love, favour, and affection, yet that the obligation under the marriage-settlement was not the less binding, which was fenced by absolute warranty; and, 3. As to the claim made by the respondents, as Mr. Udny Duff’s representatives, for the *ipsa corpora* of the moveables belonging to Mrs. Udny Duff at her death, in terms of the marriage-contract, they had no right to these,

EARL OF FIFE
v.
MACKENZIE,
&c.

can never have any claim to what was uplifted by Udny himself; and as to what she may have uplifted and applied to her own uses, it does not appear that there was any such thing done, or if done, it was with her husband’s consent. 5th Point.—The sale of this estate after these settlements, and taking the bonds payable to himself and his own heirs, was a virtual revocation.”

LORD JUSTICE CLERK.—“A general clause is not to be extended to particulars of greater value than those enumerated.”

LORD SWINTON.—“Of the same opinion.”

President Campbell’s Session Papers, vol. lxxvii.

1797.

EARL OF FIFE
v.
MACKENZIE,
&c.

as after her husband's death she was absolute owner, and might dispose of them either gratuitously or otherwise as she pleased. Whereas, if the respondents' claims were sustained, then Mrs. Udney Duff's right over these would be reduced to a mere liferent, which is totally inconsistent with the terms of the grant to her and her heirs, executors and assigns.

Pleaded for the Respondents.—1. The clause in the marriage-contract in question only gave to Mrs. Udney Duff the *ipsa corpora* of the moveables. The debts due to him, the bonds, bills, bank-notes, money, &c., were not carried to his wife by the clause, and consequently left to be taken up by the respondents as his next of kin. If it had been intended to convey such estate, it was necessary for the maker to use such words as the following: "All debts and sums of money which shall belong to me at the time of my death, whether due to me by bond, bill, or in any other manner, together with the whole moveable goods, gear, &c." The words *goods, gear, and effects*, are undoubtedly clear and unambiguous; but in practice have only a limited signification, and do not extend to sums of money, or *nomina debitorum*. 2. In regard to the lands of Forresterhill, it was clear, after Mrs. Udney Duff reconveyed these to her husband by the postnuptial contract, he was absolute fiar, and this even though three days thereafter he conveyed these lands back again to his wife for love, favour, and affection. But even supposing his right was more limited in its character, there was nothing to prevent Mrs. Udney Duff to sell these lands, with concurrence of her husband, so as to entitle him to do with the proceeds as he pleased. There is no evidence that the original conveyance by the wife to her husband was conditional, only upon his reconveying back the same to her. Nor was the reconveyance *pars ejusdem negotii* with the contract of marriage; and therefore the respondents were not entitled to account for the price of these lands. 3. In reference to the *ipsa corpora* of the moveables belonging to Mrs. Udney Duff at her death, it is clear these were conveyed by her to her husband, *his heirs* and *assignees*, by the marriage-contract in every event, and without the condition of her husband surviving her. And it therefore follows, that these pass to the respondents as *his heirs*; it not being in the power of Mrs. Udney Duff, after such a conveyance, to defeat the destination in her marriage-contract, by a gratuitous and voluntary deed in favour of the appellant, Lord Fife.

After hearing counsel, it was
 Ordered and adjudged that the interlocutors complained
 of be affirmed.

1797.

LIDDERDALE
 v.
 DOBIE.

For Appellant.—*W. Grant, Thomas M'Donald.*

For Respondents.—*Sir J. Scott, Wm. Tait.*

WM. ROBERTSON LIDDERDALE, Esq., . . . *Appellant;*
 MUNGO DOBIE, Writer and Messenger, . . . *Respondent.*

(*Et e contra.*)

House of Lords, 10th March 1797.

DAMAGES FOR ILLEGAL AND OPPRESSIVE PROCEEDINGS.—Circumstances in which a party who had filed an indictment of perjury in England against a party in Scotland, and afterwards obtained sentence of outlawry against him, was held liable in £300 damages, and £740 of expenses, and £200 for costs of appeal.

This was an action of damages raised by the respondent, residing in Dumfries, for certain oppressive and illegal proceedings adopted by the appellant, arising out of the purchase of the lands of Castlemilk town, made by him in 1777.

For one half the year the appellant resided in Dumfriesshire, the other half in London.

Part of the price of the lands had been paid by him to the seller's creditors, for whom the respondent acted as factor or trustee.

It was stated, that when only the balance of £767 remained unpaid, that the respondent came to London and made affidavit that the appellant was indebted to the respondent in the sum of £1030, upon a decree of the Lords of Session. Upon which a bill being filed, the appellant was arrested and held to bail for that sum for a week, until bail was found accordingly. The appellant defended this action, and in consequence of the respondent not being able to prove or produce the decree mentioned in the declaration, he was non-suited.

The appellant having then preferred an indictment for July 19, 1786. perjury in England against the respondent, the grand jury found the bill, and a warrant, signed by Lord Mansfield, was issued to apprehend the said Mungo Dobie.