

ther infeft or not infeft. It appears to me evident, that by the common law an entail is not good against creditors, even where the heir of entail is infeft; because a prohibitory clause does not limit the heir's right of property, but is only a personal prohibition; the contravention of which can go no farther than to subject him to damages, or perhaps to forfeiture. Now, if the possessor's right of property be not limited, every adjudication deduced against the estate for his debt must be effectual. This reasoning is equally applicable to the case of a person who possesses by a disposition without infeftment.

Sch. Dec. No 55. p. 73.

1761. June 24.

ANDREW and JOHN CALENDERS against GEORGE WADDEL of Easter Mothal.

GEORGE WADDEL of Above-the-hill made a settlement of his heritable subjects in favour of several of his relations. In which, amongst others, he disposed "to Robert Waddel his brother, his heirs, and assignees, heritably and irredeemably, with the burden of the legacy under written to the person after-mentioned, all and hail the lands of Mothal, &c.; and the said Robert, or his heirs, by acceptation hereof, is obliged to pay to Margaret Waddel his niece, the liferent of 900 merks, and to divide the said sum of her children equally amongst them in fee." This disposition contained a precept with this clause: "And I require you, that, incontinent thir presents seen, ye pass to the ground, &c. and give heritable state and sasine, &c. under the burden of the legacies above mentioned, to the said Robert Waddel," &c. In virtue of this precept, one infeftment was taken for all the different disponees.

The lands of Mothal were afterwards disposed by Robert Waddel, the original donee, to William Waddel his second son, and by him they were sold to George Waddel the defender.

These two last mentioned dispositions made no mention of the legacy with which the lands were burdened; but, in the assignment to the writs and evidents in the disposition to the defender, the original disposition to Robert and the infeftment following upon it, are specially assigned.

The pursuers, the only surviving children of Margaret Waddel, brought an action of poinding the ground against George Waddel and his tenants, in order to recover payment of a balance of the 900 merks above mentioned, which still remained unpaid.

After the commencement of this process, the pursuers were present at sundry meetings of the Creditors of William Waddel the defender's author, where it was resolved, that William Waddel's lands of Ardriehill should be sold, and that the price should be divided amongst the creditors proportionally, who, upon drawing their shares, should be bound to grant discharges of their res-

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Legacy given in a disposition to lands, by which the donee and his heirs are burdened with payment of it, is a real burden upon the lands.

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pective debts to the said William Waddel. At these meetings, articles of roup were read, containing a clause to the above purpose. To this resolution, the pursuers made no objection, and, in consequence thereof, drew a further payment of L. 21 : 17 : 6. Upon the 23d February 1757, the LORD ORDINARY pronounced the following interlocutor: " Having advised the memorial with the answers, the former minutes of debate, with the certificate by the minister and elders of the parish of Falkirk and justices of the peace, affirming, that Andrew and John Callenders, the pursuers, are the only surviving children of the deceased James Callender and Margaret Waddel his spouse, with the depositions of the two witnesses for proving thereof, and disposition by George Waddel to Robert Waddel his brother, wherein a legacy of 900 merks is settled to the said Margaret Waddel his niece, and her children in fee; finds that the same is made and granted *stirpi* of the body of the same Margaret Waddel, and that there is reasonable evidence, that the pursuers are the only children of the said Margaret Waddel, and issue of her body; especially considering, that the defenders do not pretend to aver or set forth, that there are any other children or issue of the said Margaret; and therefore repels the objection offered to the pursuers' title, and finds that the legacy not being to any particular persons, but to the children of Margaret Waddel's body of the fee of the sum to be liferented by her, the children existing at the determination of the liferent have right to the sums, without making up any title to any brothers or sisters that may have existed before that time, but are dead without issue: And further finds, That the disposition by George Waddel to his brother Robert, burdened not only the said Robert personally, but the right of the lands granted in his favour; more especially, that the precept of sasine, which is part of the disposition, and the warrant of the sasine, mentions, that the infestment is to be granted under the burden of the said legacy, and thereby subjected, not only the said Robert the first disponee, but also William his second son, to whom he disposed the lands with the burden of his debts, and likewise subjected George, the disponee of the said William, the rather, that, in the assignation to the writs and evidents by the said William to George the defender, the disposition wherein the said burden was imposed in favour of the pursuers by George their grand-uncle, as aforesaid, is specially assigned and delivered up; and therefore decerns in the pointing of the ground conform to the conclusion of the libel."

By several after interlocutors, the LORD ORDINARY adhered to the above judgment, with this variation, That the defender got credit for the sum of L. 21 : 17 : 6 Sterling, of which the pursuers had received payment out of the lands of Ardriehill.

Pleaded for the defender in a reclaiming petition, The pursuers were not the only children of Margaret Waddel existing at the date of the first disposition by George Waddel, or even at the time of his decease, when the disposition took effect; and the pursuers having received already more than their propor-

tion of the 900 merks, they are not entitled to the residue, until they are served heirs to the other children. The *jus accrescendi* is utterly inconsistent with the principles of the law of Scotland; and as the legacy vested in the whole children existing when the same became due, it is impossible that the fee can be taken out of them otherwise than by a service.

2do, The legacy left to the pursuers was not a real burden upon the lands, but was only personal against the donee; and consequently cannot affect the pursuer, who was a singular successor in the lands. For, from the words of the disposition, it appears, that Robert, and not the lands, are burdened, and he only, by acceptance of the lands, is obliged to pay. Nor do the words of the sasine, with and under the particular burdens and legacies in manner mentioned in the said disposition, and after the form and tenor thereof in all points, alter the case: These words do plainly neither make the matter better nor worse; and if it was only a personal burden in the disposition, it is made no better by the sasine. Besides, to have made this legacy a real burden, it ought to have been particularly mentioned in the sasine itself; for such general reference as this cannot by law create a real burden upon the lands, so as to affect singular successors; *vide supra, h. t.*

3tio, The pursuers, by being present at the meeting of William Waddel's creditors, and having acquiesced in the articles of roup of his lands, and accepted of their share of the price in terms of these articles, are barred from any further claim, as the articles expressly bear, That the creditors, upon receiving their proportions, should discharge their debts.

Answered for the pursuers, That the *first* plea maintained by the defender can have no other meaning than to put the pursuers to the needless expense of a general service, with a view to deter them, by the apprehension of that expense, from insisting further in this cause. But there does not appear to be any necessity for a service in this case; for it is clear, that the pursuers are the only surviving children of Margaret Waddel, and the only persons who have now right to the fee of the legacy; and from the conception of the clause in the disposition in which the legacy is left, the testator appears to have meant, that it should go to those children of Margaret who should be alive at her death, that is, as the expiry of the liferent, when the fee became payable.

Answered to the *second* defence, That as far as any disposition can be effectual towards constituting a real burden, so far is the respondent's legacy made real by the disposition of George Waddel. He appears evidently to have meant to make it a real burden upon the lands conveyed to Robert; and the words he has used are sufficiently strong and expressive of that intention. In the precept too, sasine is directed to be given under the burden of the legacies above mentioned; and the sasine itself is still more explicit, for it not only contains a narrative of the most material clauses in the disposition, but particularly with regard to the lands of Mothal; it bears them to have been disposed to

No 76. the said Robert Waddel, with and under the legacy also within specified. From all which it is clear, that this legacy is a real burden upon the lands.

Answered to the *third* defence, It is altogether irrelevant; for it is not so much as asserted, that the pursuers verbally even agreed to grant a discharge of their debt to William Waddel, or that they subscribed the articles of roup, in which that conditional obligation is said to have been contained; and surely their taciturnity upon that occasion cannot be binding upon them, as it is established law, that when a debt is constituted by writing, the extinction of it can only be proved, either by the oath of the creditor, or by a written discharge.

THE LORDS found the legacy of 900 merks a real burden upon the lands of Mothal and others: Found, That the pursuers, as the two surviving children, have right to two thirds of the said legacy; but found, that they cannot insist for the share of their deceased brother, without making up titles to him. Upon a reclaiming petition, the LORDS adhered. *

Act. William Baillie.

Alt. Wal. Stewart.

J. M.

Fol. Dic. v. 4. p. 69. Fac. Col. No 43. p. 93.

No 77.

A disposition though burdened with the whole debts of the disponent, not mentioning the names of particular creditors or the sums, did not create a real burden on the land, as to these.

1765. February 21.

STENHOUSE against INNES and BLACK.

JOHN STENHOUSE disposed his lands of Southfod to his eldest son John Stenhouse, with the burden of all his debts, and referring to an heritable bond granted by the son to him, of the same date, which mentioned the names of the creditors, but not the sums due to them.

John Stenhouse younger, having granted two heritable bonds over the lands to Isobel Innes and William Black, a competition arose between them and John Stenhouse elder.

John Stenhouse having claimed a preference for relief of his debts, in virtue of the disposition and heritable bond, the other two creditors *objected*, that the amount of the debts did not appear upon record, and that it was now fixed that general burdens are ineffectual against creditors and singular successors.

Answered for Mr Stenhouse; It is not necessary that the amount of the burden should appear upon record; it is enough that the record shew there is a burden, and direct the creditor or purchaser how to discover the amount of it: Hence it has been found, that a general reference in the sasine to the disposition where the extent of the burden is mentioned, is sufficient; Creditors of Smith, 26th July 1737.—*infra*, b. t.; Callenders *contra* Waddel of Eastermothal, 1761, No 76. p. 10261. Here the sasine upon the disposition refers to the heritable bond; and as that contains the creditors' names and de-

* In the Faculty Collection, the judgment is erroneously stated. The above are exactly the terms of it.