

1738. July 25.

The CREDITORS ARRESTERS, of DOUGLASS *against* The LEGATEES of DOUGLAS.

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WHERE a grant was made of certain bonds, and of all other subjects belonging to the grantor, and the said grant burdened with certain legacies to the persons therein named, these legacies were found to be preferable debts of the grantee to his own proper Creditors arresting the subjects.

*Fol. Dic. v. 4. p. 68. Kilkerran, (PERSONAL AND REAL.) No 1. p. 383.*

1739. June 20. CREDITORS of BROUGHTON *against* GORDON.

A FATHER having disposed his estate to his eldest son, in his contract of marriage, with the burden of his debts in general, as contained in a list or inventory therein referred to, the general burdening clause was also ingrossed in the procuratory of resignation, and the list registered in the books of Session.

It was notwithstanding, found, that the particular debts not being expressed in the contract, nor the list registered in the register of sasines and reversions, the said clauses in the contract and procuratory of resignation, did not render these debts real burdens upon the lands conveyed by the father to the son.

*Fol. Dic. v. 4. p. 69. Kilkerran, (PERSONAL AND REAL.) No 2. p. 383.*

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A disposition with the burden of debts contained in list, referred to in the disposition, does not make these debts a real burden, unless the list be recorded in the register of sasines.

\*\*\* Lord Kames reports this case :

SIR DAVID MURRAY, in the marriage-contract of his eldest son Alexander, disposed to him the estate of Stanhope, with the following clause in the procuratory of resignation: " And further, it is hereby expressly provided and declared, and shall be provided and declared in the charter and infestments to follow hereon, that these presents are granted in favours of the said Alexander Murray, and the lands, baronies, tenandries, and others therein mentioned, are resigned with express burden of payment to the said Sir David Murray's Creditors, of the hail debts and sums of money due by him to them, and contained in a particular list and inventory of the said debts; as also, with the burden of payment to the said Sir David's children, of the respective provisions and portions granted by the said Sir David to them, all particularly set down in the foresaid list and inventory, subscribed by the said Sir David and Alexander Murrays, of the date of these presents." And this list was recorded in the books of Session.

Sir Alexander the son sold the estate, which produced a multiple-poiding by the purchaser, as debtor for the price, and a competition of Creditors; and Mr Robert Gordon, having right by progress to the provision of one of Sir

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" Found, that the clause in the contract of marriage, burdening the lands, baronies, &c. with the payment of Sir David Murray's debts, contained in a list and inventory thereof, neither expressed in the contract of marriage aforesaid, nor registered in the register of sasines and reversions, does not render the debts in question a real burden upon the lands, conveyed by Sir David Murray to his son Alexander, by the said contract of marriage."

*Rem. Dec. v. 2. No 10. p. 23.*

\* \* \* This case is also reported by C. Home :

In the year 1710, Sir David Murray of Stanhope disposed his estate to his son, Alexander (afterwards Sir Alexander) Murray, in his contract of marriage; which contained, in the procuratory of resignation, the following clause: ' That these presents are granted in favours of the said Alexander Murray, and the lands, &c. therein mentioned, are resigned, with the express burden of payment to the said Sir David's creditors, of the hail debts and sums of money due by him to them, and contained in a particular list and inventory of the said debts; as also, with the burden of payment to the said Sir David's children, of the respective provisions and portions granted by the said Sir David to them; all particularly set down in the foresaid list and inventory, subscribed by,' &c. In virtue of the precept, Alexander was infeft in the 1715, with the burdens and provisions mentioned in the contract, and contained in the list and inventory therein referred to; which list was registered *anno* 1717, in the common register of the Session.

In the year 1719, Alexander disposed the barony of Broughton (part of the said estate) to Mr John Douglas, who having died incumbered, the Earl of March, as apparent heir to him, brought a sale of these lands; in consequence whereof it was sold by public roup before the Lords; and the purchaser having raised a multiplepoinding, with respect to the price, there ensued a competition betwixt Robert Gordon, as assignee to a provision granted by Sir David to Anne his third daughter, contained in the foresaid list, and the Credi-

tors of Mr John Douglas ; wherein this question occurred, How far, in virtue of the foresaid burden in Sir Alexander Murray's contract of marriage, the children's provisions became real, and were thereby effectual against the debts and deeds of Sir Alexander, or those deriving right from him ?

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*Argued* for Robert Gordon ; It is plain, from the conception of the clause, the provision to which he has right is really conceived ; it is inserted in the procuratory of resignation, and the lands are declared expressly to be resigned with the burden of the debts and children's provisions, conform to the inventory subscribed by Sir David and his son ; neither could any infeftment proceed, without reference to that list, or a purchase be regularly made, without the purchaser's getting up the list of debts with the progress ; so that he could not pretend ignorance of the extent of the burden therein contained. It is true, that general burdens, though never so really conceived, will not be sustained in prejudice of the disponent's creditors ; but special ones, imposed by the disponent upon the subject, are real, and give as effectual a preference to the persons interested therein, as if they had been infeft before the disponent's right ; and here there is, in effect, a special burden, by the reference to the subscribed inventory, which was registered two years before Mr Douglas's purchase.

On the other hand, it was *pleaded* for the Earl of March, and the Creditors of Mr John Douglas ; That they being singular successors, were not concerned to debate what effect the clauses in the contract, and arguments thereupon, might have against their author, Sir Alexander Murray, and his heirs, but that these could not affect them, because, *imo*, By the tenor of the contract, the lands are disposed to Alexander, with the burden of these debts and provisions ; and he, by his acceptation thereof, is bound to relieve his father of the same, which is only personal on the disponent, whose faith the disponent trusted without reserving any real right in the lands ; *2do*, These debts and provisions are not at all specified in the foresaid contract, nor in the separate precept of sasine, granted in favour of Sir Alexander, nor in any infeftment, or others that followed thereupon ; but are only referred to as contained in a list, which is not at all repeated in any of the deeds aforesaid. A purchaser, or any transactor with the proprietor of a real estate, who is infeft therein, is not obliged to go further than the public records, to know the burdens that affect the said estate ; and, therefore, is not concerned with any reference not contained in the deed itself, nor duly recorded ; if it were otherwise, it would often happen, that the writs referred to could not be got, and then the reference in the recorded deed could signify nothing ; whereby the register would be imperfect, and lead one into a snare, or to insufficient knowledge of what it should sufficiently inform him of ; but, when one is not obliged to notice any thing but what is in the proper register, then it is his own fault if he suffer ; nor can it vary the argument, that the inventory is recorded, since it is only in the common register of the Session, but not in the register of sasines ; where,

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nevertheless, it must have been recorded, if to be sustained as a real burden on the lands whereon that sasine was taken; for it is only the register which people do, or are bound to search for that purpose, and with which the common register has nothing to do.

THE LORDS found the clause in the contract of marriage, burdening the lands, baronies, tenandries, and others, and the resignation therein mentioned, with the payment of Sir David Murray's debts, contained in a particular list and inventory thereof, neither expressed in the contract of marriage aforesaid, nor registered in the register of sasines and reversions, does not render the debts in question a real burden upon the lands conveyed by Sir David Murray to his son, Alexander, by the said contract of marriage.

*G. Home, No 120. p. 191.*

1748. June 3.

BEATSONS *against* BEATSON.

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A PERSON made a settlement of his estate upon his second son and his heirs, burdening him with provisions to his younger brothers and sisters. The eldest son had left the country, on account of the Rebellion 1715; but the father, by a special clause in the disposition of the estate, allowed it to be redeemable by certain persons for a rose-noble; and, in a separate deed, he named his eldest son, and two others for his behoof, to be the persons entitled to redeem it. The father died; the eldest son returned to the country; but without redeeming; took possession of the estate, in right of his apparenry. The second son having ceded the possession, and accounted to him for the rents, got from him a disposition to a separate tenement. The eldest brother died without heirs, the second brother having predeceased him; upon which the estate was taken up by a son of the latter. The other brothers and sisters of the young man's father pursued their nephew for the provisions which were devised to them by the original settlement. The defender *pleaded*, That his father, indeed, might have been liable to make good these provisions, but that he did not succeed in the right of his father, being heir to his uncle, the elder brother, who was not liable for these provisions.—THE LORDS found, that these provisions were a burden upon the succession.

*Fol. Dic. v. 4. p. 68. Falconer.*

\*\*\* This case is No 63. p. 2327. *voce* CLAUSE.