

‘THE LORDS refused to accept of a cautioner residing out of the kingdom.’

No 10.

This question was advised upon a report, without any pleading, or any papers given into Court upon it.

For Lord Boyd, *Lockhart*.

J. C.

Fol. Dic. v. 3. p. 231. Fac. Col. No 161. p. 288.

1792. May 18. ANN STEWART *against* SOPHIA HOOME.

DAVID HOOME STEWART of Argaty, by a deed of entail, in 1768, disposed to George Stewart his brother, residing in Annapolis in Maryland, and to a series of substitutes, his lands, under ‘the following conditions, appointed to be ingrossed in the infeftments to follow thereon; viz. That the said George Stewart, and his foresaids, shall be burdened with and obliged to pay the whole just and lawful debts that shall happen to be resting and owing by me at the time of my death, in so far as the same shall not be paid out of my moveable subjects, and also to pay an annuity of L. 25, provided by me to each of Janet and Jean Stewarts, my sisters, during their joint lives after my decease, and L. 35 to the survivor of them, and likewise to pay L. 500 to James Stewart, my younger brother.’

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A person born in America, while that country was subject to Great Britain, and domiciled there, is not to be considered as an alien, but a subject of Great Britain residing in a foreign country.

George Stewart succeeded, and made up titles under this deed. After his death, Ann Stewart, his widow, having claimed from Sophia Hoome, his granddaughter, then in the right of the estate, a terce out of the lands in which he died infest, it was *objected*, That the estate having been settled on her husband and the other heirs, under the burden of the provisions granted, and debts contracted by the entailer, these burdens must have the effect at least of limiting her claim. In support of it she

Pleaded, Where lands are disposed as burdened with debts or particular sums of money, such debts or sums are considered to be real *liens*; but where the donee or heir is only taken bound to pay, they remain personal.

Thus, ‘a purchaser of lands having obliged himself to pay a certain sum to any person his author should please to nominate, this clause, *though in the infeftment*, was found not real to affect singular successors;’ Stair, 25th June 1664, Canham *contra* Adamson, *voce* PERSONAL and REAL. So also, Fountainhall, 19th November 1685, Lord Ballenden, *IBIDEM*. Fountainhall, 14th June 1687. Home, July 1687, Creditors of Marjoribanks, *IBIDEM*. 19th July 1780, Allan *against* Cameron’s Creditors, *IBIDEM*.

Now, by the clause mentioned above, the burdens in question, though *appointed to be ingrossed in the infeftments*, being laid, not on the lands, but on the heirs, are therefore merely personal. As it is clear they could afford no ground of competition with purchasers, or real creditors secured by infeftment, so they can as little affect the claim of terce, which, as it is founded on the husband’s sasine, can only be made to yield to rights preferable to it.

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Answered, It has been frequently decided, that if a disposition of lands be granted under the burden of the payment of the granter's debts, these are constituted real *liens* on the subjects; July 1719, Creditors of Coxston, *voce* PERSONAL and REAL; 18th February 1729, Geddies, *IBIDEM*; 10th January 1738, Creditors of Smith, *IBIDEM*. Also the case of the Creditors of Marjoribanks, quoted on the other side.

As to the rest of the cases appealed to by the opposite party; in those of Canham, and of Ballenden, the conveyances were not granted under that burden, the disponees being only taken personally bound to pay certain sums. And the same observation applies likewise to the case of Cameron's Creditors.

The deed in question having been in like manner granted under the burden of certain debts, for it bears to be executed 'under the provisions and conditions after expressed,' they are rendered real *liens* on the lands, effectual even against the claims of real creditors, much more that of terce, which has been erroneously compared to these.

It resembles more the right of an adjudger or appriser, who, as Mr Erskine says, 'when he uses diligence consults no records, but affects the subjects appraised *tantum et tale* as it was vested in his debtor,' b. 2. tit. 12. § 36; an opinion recognised by the Court in the case of Thomson, 15th November 1786, *voce* PERSONAL and REAL, where it was found, 'That the allegation of fraud was not relevant against heritable securities and infeftments, but that *it was relevant as to creditors-adjudgers*.' Being during the husband's lifetime subject to his power of disposal, it vests in the widow on his death, by the *kenning* or adjudication of the inquest, *tantum et tale* as the right out of which it arises 'was vested in him.'

THE LORD ORDINARY found, 'That whatever annuities or debts upon the lands, of any kind, are mentioned in the deed of entail, as a burden upon the estate entailed, must in so far restrict the claim of terce, which the Lord Ordinary found must be only exigible from heritable subjects in which her husband died infeft, after deducting all burdens above-mentioned.'

THE COURT were clearly of opinion, That by the conception of the deed, the burdens were personal on the heir, and not real on the lands. Some attention was paid to the argument of *tantum et tale*, as in some degree countenanced by an opinion that seemed once to obtain, but which, it was observed, was now corrected by the decision in the case of the Creditors of Kerse, 13th January 1792, *voce* PERSONAL and REAL.

THE LORDS therefore repelled the objection.

The widow being a native and an inhabitant of America, it was further *objected*, That as a subject of the United States, owing no allegiance to Britain, she was to be deemed an alien, and so to be excluded from a claim of terce as much as from a claim of property.

THE LORD ORDINARY found, 'That the claimant having been born in America while that country was subject to Great Britain, is not to be considered as

an alien, but as a subject of Great Britain, residing now in a foreign country ; therefore repels the objection of 'alienage to the claim of terce.' In this judgment the objector acquiesced. See PERSONAL and REAL.

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Lord Ordinary, *Monbodlo.* For the Widow, *Wight.* Alt. *Macleod-Bannatyne.*
Clerk, *Colquhoun.*

S.

Fol. Dic. v. 3. p. 231. Fac. Col. No 210. p. 440.

1792. June 8. JAMES MILLER and his ATTORNIES, against JOHN ALLEN.

MILLER, a subject of the United States, of America, as curator-in-law of his brother, a fatuous person, residing in Scotland, brought an action, by his attornies, against Allen, for monies due to his brother.

Allen did not dispute the justice of the debt ; but *contended*, That the pursuer, being an alien, could not be allowed, as a curator-in-law, to uplift sums of money due by, and belonging to a person residing here.

THE LORDS sustained the defences.

Reporter, *Lord Henderland.* Act. *Cullen.* Alt. *Hay.* Clerk, *Menzies.*
C. *Fol. Dic. v. 3. p. 232. Fac. Col. No 216. p. 455.*

No 12.

An alien cannot sue, in the Courts of this country, as a tutor-at-law or curator for an insane person resident in Scotland.

See FOREIGN.

See APPENDIX.