*Mr. Warren.*—Would your Lordships give costs to the Appellants. May 27, 1818.

ALIMENT.—JUS NATURÆ.—ENGLISH SETTLEMENT, &c.

*Lord Chancellor.*—I am apprehensive we cannot give costs, where three Judges out of four are with the Respondents.

Judgment accordingly REVERSED.

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## SCOTLAND.

### APPEAL FROM THE COURT OF SESSION.

WADDELL and another—*Appellants*
WADDELL—*Respondent.*

A. by disposition and settlement, gives his moveable property, except the debts due to him, to B. the object of his particular favour; and the residue of the debts due to him, after payment of the debts due from him, to B. in life-rent and to C. in fee: and gives the life-rent in his lands to B. and the fee to C.; declaring that B. by acceptation of the deed, should be bound to pay the whole of his debts; manifestly conceiving that his moveable property would be much more than sufficient for payment of his debts, and intending that B. should have the life-rent in the lands free. The moveable property turns out not to be sufficient to pay the debts, and action brought by the life-rentrix against the fiar for relief and sale of so much of the lands as would pay the balance, &c. and relief decreed below. But the judgment *reversed* in Dom. Proc., the disponer, although he intended that B. should have the life-rent free, having expressly subjected B. alone to the payment of his debts, for which she became liable to the amount at least of the benefit which she derived from the deed. Mar. 9, 1818.

SETTLEMENT.—LIFE RENTER.—DEBTS.

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THIS action was brought by Jean Waddell, sister of the late William Waddell, of Easter Moffatt,

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against the Appellants, his nephews; and the object was to fix upon the Appellants a liability for certain debts of the deceased, which, they contended, rested exclusively on the Pursuer. The question depended on the effect of a disposition and settlement, executed by the late William Waddell, under which the parties on both sides derived valuable interests.

Disposition. May 6, 1803.

By that disposition the disponer gave to his sister Jean, the Pursuer, all his lands and heritages in life rent; also all debts and sums of money heritable, and moveable, that should be due to him at his death, and all corns, cattle, &c. and in general, all his moveable subject. And particularly, and without prejudice to the said generality, he gave under the burdens, &c. under-written, to Jean Waddell, in life-rent, and to the Appellants in fee, all and whole the respective lands and others, &c.—"But declaring "always that the said Jean Waddell shall be bound "and obliged, as by acceptation hereof she binds "and obliges herself, to pay all my just and lawful "debts, with my funeral charges and expences, and "any gifts or legacies I may think proper to leave "by a writing under my hand." And then he appointed Jean Waddell to make payment to his sister Christian Waddell, of a yearly annuity of 20*l.*; and gave 1,000*l.* to his niece Margaret Waddell, and 100*l.* to Agnes Gardner, and 700*l.* to another niece named Margaret Waddell, which sums were to be paid by the Appellants, or those who might succeed to the fee of the lands. And then he assigned and made over to the Appellant George Waddell, in fee, all debts and sums of money that should be due to him at the time of his death, and empowered Jean Wad-

dell to sell whatever part of his moveable property above assigned to her in life-rent, and to George Waddell in fee, she might think proper, and to lend out the money on heritable bonds, payable to herself in life-rent, and to the said George Waddell in fee.

Mr. Waddell died in 1806, three years after the execution of the deed. He had, in his life-time, made considerable advances for the making and repairing the Bath-gate and Airdrie road, between Edinburgh and Glasgow; and had also come under obligations to a considerable amount to lenders of money for the purposes of that road, the expected tolls of which were then imagined to be ample security. The interest of the money advanced by him was regularly paid to the time of his death. Soon after his death it was found that the tolls were totally insufficient to defray the yearly burdens, and hence the trustees not only withheld, in future, any interest from their own body, but made large requisitions on each other for sums to pay up the principal of money borrowed. From this and other causes, the moveable funds, and debts due to Mr. Waddell, fell greatly short of the claims and demands against him: and the Respondent had no means to pay the amount of the *deficit* without encroaching on the annual income which she drew from the lands. The fiars having refused to agree to a sale of so much of the lands as would pay this balance, or advance the money to pay it, the Respondent brought this action against them for relief. The summons narrated the different clauses of the settlement executed by her deceased brother, and proceeded thus:—

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SETTLEMENT. —LIFE RENTER.—DEBTS. Summons.

"That the said William Waddell having died as "aforesaid, on the said first day of June, 1806, it "has turned out that the personal debts due by him "in consequence of cautionary and other obligations, "executed prior to his death, greatly exceed the "whole moveable funds and effects assigned to the "Pursuer:" And it concluded—"that the Defend-"ers should be decerned, and ordained by decreet "foresaid, to free and relieve the Pursuer of the "principal sums of these debts, the Pursuer being "always bound to pay the legal interest from the "period of Mr. Waddell's till her own decease, or "to pay 5,000*l.* less or more, to enable her to get re-"lief for herself."

Dec. 11, 1813. This action came first to be tried before Lord Balmuto, Ordinary. Upon hearing counsel on the grounds of the action and defences, his Lordship appointed them to give in memorials to himself; upon advising which, his Lordship pronounced the following judgment:—"Having considered the mutual "memorials for the parties, and whole process, finds "that the deceased William Waddell, of Easter "Moffatt, for the love, favour, and affection which "he bore to Jean Waddell, his sister, by a deed of "settlement disponed and assigned to and in favour "of the said Jean Waddell, in life-rent, and George "and William Waddell, his nephews, in fee, his "personal and heritable estate; but declaring that "the said Jean Waddell, by acceptation thereof, 'is "'bound and obliged to pay all my just and lawful "'debts, funeral expences, and any gifts or legacies "'I may think proper to leave by a writing under "'my hand:' That this declaration is coupled with

" this other clause, ' in order the more easily to Mar. 9, 1818.
" ' carry my intentions with regard to my moveable
" ' property into execution, I hereby empower the SETTLEMENT. —LIFE RENTER.—DEBTS.
" ' said Jean Waddell to sell and dispose of whatever
" ' part of my moveable property above assigned to
" ' her in life-rent, and the said George Waddell,
" ' in fee, she may think proper, and convert the
" ' same into cash; and after payment of my debts,
" ' sick-bed and funeral expences, to lend out the re-
" ' mainder of the money on heritable bonds, taken
" ' payable to herself in life-rent, and the said George
" ' Waddell, in fee;' which unequivocally indicates
" the opinion and belief of the Testator that his per-
" sonal estate was more than sufficient to pay his fu-
" neral expences and all debts that were due by
" him: That in no view could it be the intention
" of the late Mr. Waddell to burden his sister with
" his debts, in the event of their exceeding his move-
" able estate, and deprive her of the favourable si-
" tuation in which he had placed her, by giving her
" the life-rent of his whole property: Finds it is not
" denied that the personal funds have fallen greatly
" short of the debts of the late Mr. Waddell, and
" therefore that the Pursuer is entitled to be relieved
" by the Defenders, fiars of the heritable estates,
" in proportion to the value of these estates, in so far
" as the principal sums due by the late Mr Waddell
" exceed his personal funds and effects; the Pursuer
" being always liable for the interest of such sums,
" from the death of the late Mr. Waddell, until the
" Defenders shall enter into possession, and draw
" the rents of the heritable property; but, before
" further answer, appoints the Pursuer to give in a

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Mar. 9, 1818. "specific condescendence of the debts due to the "deceased Mr. Waddell, and of all other moveables "belonging to him, which she has or might have "intromitted with, and of the amount of the debts "due by him which she has paid or are still resting, "distinguishing the interest from the principal; and "when the said condescendence is lodged, allows "the Defenders to see and answer the same."—Thereafter the Appellants having given in a short representation, the Lord Ordinary thought it best, in order to save time and expense to the parties, to desire informations to be printed, that the case might be de-

June 16, 1814. termined at once by the whole court. Upon advising these informations, the Judges of the first division of the Court of Session pronounced this interlocutor: "Upon the report of Lord Balmuto, and having ad-"vised the informations for the parties, the Lords "find and declare in terms of the Lord Ordinary's "interlocutor of date 11th December, 1813; and re-"mit to the Lord Ordinary to proceed accordingly; "but find the Defenders not liable in the expenses

Dec. 22, 1814. "of process." To this judgment the Lords adhered, by refusing a petition for the Appellants, who thereupon appealed.

The grounds on which the Respondent founded her claim to relief in this case, were stated by the Respondent to be these—1st, That at the period of Mr. Waddell's death there was a very large *deficit* in his moveable funds; and 2dly, that the *Intention* of the granter was clearly expressed in this deed itself, merely to impose the debts on the Respondent, not *qua life-rentrix*, but *qua executrix*, and assignee *of his moveable* funds; and in fact, that the

*technical* import of the clause founded on by the Appellants went no further. The first of these positions the Respondent admitted that she was bound to prove; the latter was a question of construction for the Court. As to the first point the Repondent made out a statement from which it appeared that there was a very considerable *deficit*, and this she had offered to prove in the Court of Session. As to the point of construction, the Respondents contended that the inquiry here, as in all cases of construction of settlements, should be—1st, What was the true and actual intent of the defunct? 2dly, Has the Court of Session as a court of equity, power to give effect to the intention of the granter in the manner claimed by the Respondent according to the established rules of law applicable to the case.

POINT I. Intention of the defunct.

I. In reference to the first of these points, it has been shown that the deed of settlement of Mr. Waddell, in so far as the *Respondent* was interested, consists of two parts: it conveyed, 1st, a life-rent of Mr. Waddell's heritage; and, 2dly, an assignation of his moveables, which were to be applied in the first instance in payment of all the just and lawful debts of the granter. Now, at first sight, the declaration in the deed of settlement, that the Respondent "shall "be bound and obliged, as by acceptation hereof "she binds and obliges herself, *to pay all my just "and lawful debts*," taken as a *single* and *insulated* clause, appears to be unqualified. But fortunately, *without going beyond the deed itself*, there is the most complete evidence that this obligation was merely meant to attach to the assignation of moveables, which occurs in a *preceding* part of the deed.

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It was intended solely as a burden on *that* part of the conveyance; for towards the end of the deed of settlement, the testator, after assigning over to the Appellant George Waddell, *in fee*, all debts and sums of money, both heritable and moveable, that should be owing to him at the time of his death, proceeds thus: "and in order the more easily to "carry my intentions *with regard to my moveable* "*property* into execution, I hereby empower the "said Jean Waddell to sell and dispose of whatever "*part* of my moveable property above assigned to "her in life-rent, and the said George Waddell in "fee, she may think proper, and convert the same "into cash; *and after paying off my debts*, sick-bed "and funeral expenses, to lend out the *remainder* "*of the money* on heritable bonds, taken payable to "herself in life-rent, secluding the *jus mariti* of any "husband she may marry, and to the said George "Waddell in fee." Here, then, is the clearest evidence of the ground upon which alone the defunct took the Respondent bound to pay his debts. He appointed the debts to be paid out of the moveables. He declared so expressly in the deed. If that fund fails therefore, the means are taken away *in respect of which alone*, the testator laid the burden of debts on the Respondent. And here it is humbly submitted as a general rule of law and of construction, that every presumption must lie against the allegation that a granter intended to impose a heavy burden of debts upon a mere *life-rent*. The debts of a man are in general due to the creditors *instantly* upon his death; but a mere life-renter has neither money nor credit to raise a fund for the

payment of large debts. Every man must be presumed to know that a life-renter has none. And therefore, though a burden upon a life-renter is possible, and must receive effect when a testator intends it, yet a court is entitled to examine the evidence rigidly, and to look narrowly to every part of a deed of settlement, to ascertain the full extent of the burden that the defunct really intended the life-renter to bear. In this particular case Mr. Waddell knew well that his sister had not a shilling in the world but what she could obtain from him. It is granted that a man may impose his whole debts on a *life-renter* on the supposition that they are insignificant; and though they unexpectedly prove so heavy, a court cannot give the life-renter relief. That is freely conceded. But the present case is entirely different, when the life-renter is also made executor, and the debts are imposed, *not* in respect of the *life-rent*,—but in respect of the *executry funds*. The fact that the Respondent was to enjoy her *life-rent* free, seems as distinctly announced as any one provision of the deed. For the defunct, in another clause towards the conclusion of the deed (quoted in the Respondent's narrative), when excluding the *jus mariti* of any husband that the Respondent might marry, expressly declares his meaning in bestowing the life-rent on the Respondent. He says it is given "in respect that "the lands and others above-mentioned are con-"veyed to the said Jean Waddell *in life-rent*, "merely *for the regard and affection I have and* "*bear to her*;" therefore it is provided and declared that the *jus mariti* of any husband that she

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may marry is excluded. The above clause, in the Respondent's humble apprehension, deserves to be particularly marked. The testator does not say, as his nephews now attempt to plead, that the life-rent was conveyed to the Respondent in any view "*for* "*the payment of his debts.*" This is not even stated as *one* of the objects of *this* part of the conveyance. But a different reason for the conveyance is assigned altogether; and the Respondent's life-rent is in particular stated to be given to her solely for the love and favour that the granter bore to her. Thus, if the Respondent has been successful in showing that the obligation on her to pay the debts, was merely imposed on her *in respect of the assignation to the moveables*, there are a multitude of authorities to show that the Respondent cannot be liable beyond the value of these moveables. This has been long fixed. Accordingly, upon a very deliberate argument before the whole court, in order to settle this point, in the case of Smith against Marshall, it was found by the court, that a clause declaring that a son should be personally liable for the disponer's debts, imported no more than that he should be liable for the disponer's debts, *in valorem* of the heritage and moveables intromitted with by him. And the same decision has since been repeated again and again, in cases too numerous to be specified. The Appellants cannot controvert this doctrine; but they allege that there was *more* here than a mere conveyance of moveables; they plead that there is a gift of a valuable *life-rent*, and they contend that the life-rent as well as the moveables must be *exhausted* before the Respond-

Kilk. June 6, 1745; Mercer v. Scotland.

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ent can obtain any relief in this case. This renders it necessary to enter into some explanation of the law of Scotland, applicable to the obligation in question. When a party by a Scotch settlement gives a general disposition, or executes a conveyance of part of his estate by a *mortis causâ* deed in favour of another, and declares that the disponee "shall be bound and obliged to pay all his just and "lawful *debts*," it is a question of circumstances, to be collected from the scope and tenor of the *whole* deed, whether the testator meant these debts *ultimately* to be borne by the disponee? In many cases this may be his meaning, but in other cases it would be unjust thus to interpret such a clause, which is often inserted for the following reason. By the law of Scotland the whole heirs of a deceased person, both in his *real* and *personal* estates, are liable to *creditors* for his debts; and this on account of what is called their *representation* of the defunct. Hence they may in general be all sued by any of the creditors of the defunct; but when a particular party holding a certain fund, such as an *executor* or *assignee* to moveables, is burdened with the payment of debts, that shows the *party primarily* liable, and renders it incumbent on the creditors to sue the party so pointed out in the first instance, *till the funds in his hands be exhausted*; but it does not necessarily follow that the debts are ultimately to be borne by the disponee, or that his relief from the other heirs is to be excluded. That is to be collected from the whole clauses of any particular deed, or from the whole settlements of the testator taken together. This doctrine is illus-

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Kilk. No. 3. p. 230.

trated by a variety of cases which have occurred in Scotland. In particular there are two cases in Lord Kilkerran's Reports to the following effect: David Russel, surgeon in Kennoway, entailed his estate upon Thomas Dall, son to Mr. William Dall, minister of the Gospel at Barry, and Rachel Russel, his eldest sister, by a deed containing this clause: "*I hereby* "*expressly burden this right and disposition*, not "only with the payment of my funeral charges, but "also with the payment of my three sisters-german "their portions yet resting by me to them; *and* "*with the payment of all the just and lawful debts* "*that shall be resting by me at the time of my* "*death*, to whatsoever person or persons, by bond, "bill, contract, decreet, or any other manner of "way; and likewise with the payment of the "life-rent provisions provided to Rachel Thomson "my mother, and to Rachel Wilson my wife," with prohibition to sell or contract debt, except that it was in the power of the heirs of tailzie to sell as much as would satisfy the burdens above mentioned.

William Dall and Rachel Russel his wife, upon David Russel's death, were confirmed executors *qua* nearest of kin to him; and being pursued by the *other two sisters and their husbands* to account for the executry, in which, if unencumbered, these sisters had an equal interest, the Defenders made this defence, that there were more moveable debts than exhausted it. To which it was *replied*, that the defunct had laid the *burden* of his debts upon his *land estate*, which of course must be liable. But the Lord Ordinary, 22d December, 1744, "in "respect it was not denied by the Pursuers that the

" moveable debts due by the defunct did exceed the " moveable estate belonging to him, repelled the " claim made by the Pursuers for the said move- " able estate." And the Lords refused a reclaiming bill, and *adhered.* Upon this case Lord Kilkerran remarks, that " the circumstances of the estate were " a strong indication that it could not be the in- " tention of the granter to burden the tailzied estate " with the debts. But, laying aside these circum- " stances, it was the general opinion that the rule is, " that a clause in the disposition of a land estate, " burdening the disponee with payment of the " granter's debts, does not exclude the disponee " from relief of the moveable debts from the exe- " cutry." This decision establishes the principle, that the court, in every case in which a disponee is burdened with debts, is entitled and bound to look beyond the isolated words of the clause, to the *intention* of the granter, and to give the disponee *relief* accordingly. The burden is imposed upon a particular party, in the first instance, for the purpose of a more speedy and convenient settlement with the creditors at large; but in no case is it held that this burden excludes the *relief* competent to the disponee from the other heirs of a defunct, *if a deficiency unexpectedly occurs in the fund provided for the payment of the debts.* This doctrine is clearly laid down by Lord Kilkerran in the case which immediately follows the one last quoted. His Lordship reports the case of Margaret, &c. Campbells against Dugald Campbell, which was shortly this: " A father, in a disposition of his personal " estate, burdened the disponee with payment of all

Kilk. No. 4. p. 231.

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" his debts heritable and moveable." He executed afterwards an entail of his lands and estate, in which he burdened the institute and substitute with payment of all his debts heritable and moveable, empowering the heirs of entail to *sell* as much of the lands as would pay the debts. Though this deed was *subsequent in date* to the assignation of moveables, the Court found that the disponee of the lands was not bound ultimately to sustain the debts, but that these fell to be borne by the successor, who was by law liable for such debts, viz. by the assignee of the moveables. Lord Kilkerran, after detailing the history and decision of the preceding case, explains very clearly the law applicable to such questions. " In no case," says his Lordship, " are men so apt to be of different opinions as in " those that are called *questiones voluntatis*, nor in " the nature of things can they be brought within " one rule. Meantime, as this particular *questio* " *voluntatis*, whether one heir or another is in- " tended to be ultimately liable in the debts, has " generally its rise only from the conception of the " burdening clause, so much may be thought to be " established by the decision in this case, and that " of Russel and Dall, *that no clause, however* " *anxiously burdening the heir or disponee, is to be* " *construed to exclude from the relief competent to* " *him by the operation of the law, unless either* " *the clause be such as makes the debts real bur-* " *dens, or that by apt words such relief is ex-* " *cluded. This judgment was, upon an appeal, af-* " *firmed.*" The Respondent might quote a variety of other decisions to the same effect. For instance,

"An heir was found entitled to *relief of an an-* Mar. 9, 1818.
"*nuity and a legacy from the executor, although*
"*the estate had been disponed under the burden of* SETTLEMENT.—LIFE RENTER.—DEBTS.
"*debts and legacies.*" But she will not load this with a further enumeration of precedents. She will therefore conclude with the following, which is extremely parallel in its most material circumstances with the present case. David Annandale, merchant in Edinburgh, settled the life-rent of a house on Christian Keay, his wife, in the event of her surviving him, and also executed in her favour a disposition of his moveables, expressly burdened with payment of all his debts. Keay intromitted universally with his moveables, and paid his debts so far as these would go; but the debts exceeded the funds. Keay the widow was afterwards married to Peter Brown, and they paid to Priscilla Handieside the sum of 50*l.* sterling, which the deceased David Annandale owed her by bond. Instead of taking the receipt for that sum, they made Handieside grant an assignation of it to a trustee for their use. In consequence of this assignation, the trustee adjudged the fee of the house above-mentioned, which had now devolved on William Annandale, heir at law. After the death of Keay, William Annandale, brother and heir of David Annandale, raised a *reduction* of the assignation, and of the adjudication which followed upon it; and the similarity, in several points of that case, to the present, deserves to be noted. There was, in Annandale's case, both a conveyance of a life-rent and an assignation of moveables *to the same party*, burdened with debts. The moveables proved insufficient; and in that case the court found that

Fac. Coll. June 20, 1572.

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the debts were *no* burden on the *life-rent*, but that the life-renter was *entitled to relief* from the heir's estate. The *Pursuer*, in the case of Annandale, *pleaded*, that as, Keay by her acceptance of the disposition made in her favour by her husband, Annandale, became burdened with the payment of all his debts, she and Brown, her second husband, must be understood to have paid Handieside's debt in compliance with this obligation; and that the debt, being thus extinguished, could not afterwards be revived in the person of Brown, (who derived right from Keay) so as to affect the heritage of Annandale. Answered for the Defender Brown: although the action had been brought against Keay herself, she would not have been burdened, in consequence of the disposition by her first husband, beyond the amount of the subjects with which she intromitted, as was found in the case of *Thomson v. Creditors of Thin*, 28th December, 1675, observed by Stair. The Lords repelled the reasons of reduction, and found that *the Defender was entitled to take an assignation to the bond in his own or in a trustee's name*, so as to affect the *fee* belonging to the *heir*. The application of these precedents to the present case requires no commentary. They all demonstrate, 1st, the *purpose* for which such clauses as that founded on by the Appellants are generally inserted in Scotch settlements;—and 2dly, that provisions thus expressed do not *necessarily* import a final burden on the disponee without relief, but must be interpreted in connexion with the other provisions in a party's settlements, to ascertain the real *intention* of the granter, by which alone the rights

and obligations of all his heirs are ultimately regulated. These views of the law will, it is humbly supposed, establish without difficulty the soundness of the judgments under review. There is, no doubt, one clause in the settlement of the late Mr. Waddell, which, if taken apart and perused *singly*, might be held to impose a burden on the Respondent; but when the whole deed is examined, it is found, that it consists of several distinct conveyances; and the testator unequivocally inserted a declaration in the very *same* deed which is now the subject of construction, as to the fund to which he meant the burden to apply, and of course out of which alone the debts were to be paid: When that fund therefore turns out deficient, it is in vain to construe with literal strictness the words of one *isolated* clause in the deed against the sense of the whole provisions of it taken together. Had the Respondent merely been an assignee of moveables, or an executor, it could not be pleaded by the Appellants that she was personally liable for the debts beyond the value of these moveables, even if the clause had been expressed in the very terms of the present; but they cannot get more *advantage* in the present case, unless they could make out that the granter of the deed really intended the debts to be paid out of the *annual income* derived by the Respondent from the property, as well as out of the moveable property assigned to the Respondent. But it is humbly submitted, that the whole structure of the deed, and in fact that express clauses in it (unnecessary to be repeated) decisively obviate any such plea. But if the Respondent has not been

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mistaken in the views which she has submitted as to the nature of the settlement in this case, and as to the true *meaning* of the granter, it is humbly presumed, that the Court below were well justified, on the grounds and authorities in law before stated, in giving effect to that intention, as they did in the interlocutors appealed from.

With respect to the fact of a *deficit*, and argument, that the abridgment of the Respondent's life-rent interest was directly contrary to the intention of the disponer, the Appellants answered—

The Appellants conceive it perfectly unnecessary to examine the accuracy of the contrast, as represented by the Respondent, between Mr. Waddell's funds, as estimated by himself, at the date of the disposition, and their real disposeable amount at his death, as the whole argument founded upon it seems to them utterly inapplicable to the present question. The question is, whether or not the obligation to pay the testators whole debts is imposed upon the Respondent by his settlement; and it is clear, that the decision of that question could not be in the slightest degree affected by the establishment of the Respondent's proposition, that the testator considered the moveables, without the life-rent of the heritage, sufficient to discharge that obligation. Does it not happen every day, that a bequest is abridged, or perhaps rendered entirely unavailing by the alteration of the testator's affairs taking place between the date of the bequest and his death, and was it ever held that a court in construing the contending claims of legatees, in such cases, is entitled to disregard the intention really expressed by the

testator, and to give effect to the intentions which it is supposed he would have expressed if he had foreseen the situation of his affairs at the period of his death; yet it is only on this supposition that the argument of the Respondent can bear on the subject of dispute. Although Mr. Waddell did place at the disposal of the Respondent a fund, which he *supposed more than* equal to the payment of the debts and the protection of the life-rent, yet, if his supposition turned out at his death to be incorrect, and if the acceptation of the deed, and consequently *of any part* of its benefits, binds the Respondent to pay the debts; every thing which she takes by the deed must be subject to that obligation, and a court cannot "protect" the life-rent without substituting for the settlement made by Mr. Waddell a new settlement, upon presumptions of his intention, suited to the situation in which he left his affairs. It is hardly necessary to state, that such an interference is contrary to every legal principle, and that the only sound presumption to be drawn from a testator allowing his will to remain unaltered in the change of his affairs, is, that he saw and approved of the effect which that change had on his testamentary arrangements.

The Appellants are just as much entitled to the benefit of these presumed intentions as the Respondent. The Respondent maintains, and the Lord Ordinary seems to hold, that because the clause directing the disposal of the moveables, *after payment* of the debts, shows his conviction of the sufficiency of the moveables for that purpose, it is to be inferred, that it was his intention to confer the

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unimpaired enjoyment of the life-rent of the heritage on the Respondent. But it appears to the Appellants, that the clause in question only provides for contingency, without arguing any conviction, on the part of the testator, that the contingency was to be realized. And even allowing it that effect, why is that conviction to operate in favour of the life-renter, rather than the fiars? If the testator's belief of the sufficiency of the moveable funds is proof of his intention, that the life-renter should have the life-rent free, is it not equally decisive of his view of securing to the fiars the full enjoyment of the fee? Is it not just as likely that if he had been aware of the deficiency of the moveables, he would have curtailed the life-rent, for the advantage of the fiars, as that he would have burdened the fiars for the benefit of the life-renter? This argument then, even if admissible, would be perfectly inconclusive. It leaves the question just where it was. That question must be determined not by the extraneous circumstances of the difference between the real and estimated amount of the testator's moveable succession, but solely and exclusively by the terms of the deed itself, which burdens the "acceptation of the *deed*, and, consequently, the "acceptation of the life-rent of the heritage, as well as the moveables, of every thing, in short, which the deed confers, with the payment of the whole of the testator's debts. The obligation is, in fact, an obligation laid personally on the Respondent, if she shall take benefit by the deed at all: and if the objection is expressed with sufficient precision, it is in vain to argue that the life-rent, one of the subjects con-

veyed, is protected from the obligation, because the testator may be presumed to have supposed that the moveables, the other subject placed at the Respondent's disposal, was adequate to its performance.

In answer to the argument, that the obligation to pay the debts was meant to attach solely to the assignation of the moveables, the Appellants referred to the clause, by which it was declared, that *by acceptation hereof* (of the deed), the Respondent became bound to pay the debts, and to the whole of the disposition. And as to the adjudged cases quoted to show that the obligation to pay debts did not always preclude the claim of relief, the Appellants answered—Here there is no attempt to stretch the liability of the Respondent beyond that limit, because the benefits conferred on the Respondent, by the deed in question, including the life-rent, are confessedly far more than equivalent to the debts which she is bound to pay. It is necessary for her to make out, therefore, that even although the subjects conveyed are sufficient to pay the debt, the obligation to pay does not bar her claim of relief; and in support of this position, she refers to certain decisions, in particular to the cases of *Russell v. Russell*, and *Campbell v. Campbell*, Kilkerran, p. 230. 231. In the first case it was found, that where an entailer had burdened the lands entailed, with the payment of his debts, his moveable effects, which were not disposed of, remained properly liable, and that the disponee had a claim of relief against the executor.

In the case of *Campbell v. Campbell*, a person first executed a settlement of his moveable property under the burden of the payment of his debts, and

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afterwards executed an entail of his lands under the same burden. Here the obligation to pay the debts was imposed both on heir and executor, but it was found to operate exclusively against the executor, in the question which occurred, regarding their respective responsibility. The point fixed by these decisions may be expressed in the words of Lord Kilkerran's Report of the first case, "That a clause "in the disposition of a land estate, burdening the "disponee with the payment of the granter's debts, "does not exclude the disponee from relief of the "moveable debts from the executry"—and the ground of the rule is expressed in the argument of one of the parties in *Campbell v. Campbell,* reported by the same Judge, "Where a person settles his estate, "not by way of succession, but by disposition, *inter* "*vivos,* reserving a life-rent and power over the es- "tate to himself, the disponee takes not as heir, and "especially if he be not *alioqui successurus,* the "creditors cannot recover their payment but by the "circuit of a reduction upon the act of parliament "1621; and therefore it is the universal practice, "where one settles his estate upon a series of heirs, "to burden the disponee and the heirs succeeding to "him, with the payment of the debts; and the in- "tention of such burdening clause is understood "only in favour of the creditors, to give them the "like access against the disponee, as if he had taken "the estate by service; but by no means to deprive "him of the like relief that would have been compe- "tent from the moveable estate, had he taken the "estate by service."

It must be perfectly evident that the principle of

these judgments is quite inapplicable to the question under discussion. They no doubt show, that where a person, in a disposition of a particular land estate, inserts the obligation to pay his debts, that obligation does not bar the disponee's relief from the executry, because the obligation is understood in law to be merely inserted for the benefit of creditors, and not as defining the respective responsibility of disponee and executor. Here, however, there is no question between disponee and executor, but between disponees, under one general settlement of the disponee's whole property, by which he divides that property into certain shares, and imposes upon each sharer certain specified burdens, as the conditions upon which these various persons are to take benefit by the deed. Upon the two Appellants he lays the obligation of paying particular legacies, and upon the Respondent that of paying his whole debts; obligations which each are, by the "acceptation" of the deed taken, bound to perform. In such a case it seems utterly absurd to infer, from the relief competent between disponee and executor, that a similar relief is available to the Respondent against her co-disponees. That inference is excluded by the circumstance of the obligation forming part of a general settlement, where the disponer had particularly in view the benefits which he was conferring, and the burdens which he was imposing on each of the various disponees. The obligation to pay the debts in this case could not have been inserted merely for the benefit of creditors. Being imposed exclusively upon the Respondent, the life-rentrix, while the fiars, the persons whom of course, in con-

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templating the rights of creditors it was most natural to subject, are left entirely free: it is obvious that the obligation was imposed for the sole purpose of defining the particular burden which the testator declared she should bear in consideration of the benefit conferred by the deed. Indeed it seems impossible to frame any more unequivocal partition of the separate burdens to which each disponee under a deed is to be subjected, than the form adopted here by the disponer. No doubt, if the subjects bestowed on the Respondent had been insufficient to discharge the obligation imposed upon her, relief from the Appellants would have followed as a matter of course; but while a life-rent of the value of 800*l.* or 900*l.* a year, remains untouched, she must remain the proper debtor, without relief, in that obligation which forms the express condition of her acceptance of the deed.

Another decision referred to with much confidence on the part of the Respondent is still less applicable to the point now in dispute. "David "Annandale, merchant in Edinburgh, settled the "life-rent of a house upon Christian Keay, his wife, "in the event of her surviving him, *and also exe-* "*cuted in her favour a disposition of his moveables,* "*expressly burdened with payment of all his debts.* "After his death, Keay intromitted universally with "his moveables, yet so that after payment of the "privileged debts due by the deceased, her super "intromissions appeared not to have exceeded 2*l.* "sterling." Keay married a second time, and she and her husband paid a debt of the deceased, to the amount of 50*l.* but took an assignation of it to a

trustee for their own use, on which the trustee adjudged the house. After the death of Keay, the heir of David Annandale brought a reduction of the assignation, and the adjudication against Brown the second husband, on the ground that Keay, by her acceptance of the disposition *of the moveables*, was burdened with all the debts, and therefore that she and her husband must be understood to have paid the debt under that obligation. In this action the Defender was assoilzied. The decision is quoted on the part of the Respondent, as showing that where a person held a life-rent of a certain heritable subject, and a disposition of moveables burthened expressly with the disponer's debts, she was not precluded from her relief against the fee of the heritage, in so far as the moveables were insufficient for their liquidation. But the resemblance of that case to the present is completely removed, by considering its circumstances. There it appears from the report, that the life-rent of the house was not burdened with the debts at all; nay, it seems clear from the expressions used in the narrative, that the disposition of the moveables was a totally separate deed. The situation of Keay, therefore, was that of a person having the unburdened life-rent of a house, and a disposition of moveables, subjected to the payment of the disponer's debts. There could be little doubt therefore, that upon the ordinary principle of law, she, upon paying a debt beyond the amount of the moveables, had a claim of relief against the heritage, though life-rented by herself. That decision would be perfectly applicable here, if the Respondent's conveyance of the lands of Easter Moffat, and

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others, were unburthened with any obligation to pay the disponer's debts; and if that obligation were only imposed in a conveyance of moveables, which turned out inadequate to the performance. But here the situation of the Respondent is widely different. The obligation is attached to her right of life-rent, as well as every thing else which she takes by the deed. Indeed the obligation is immediately subjoined to the conveyance of the life-rent of the lands; and, therefore, upon the ordinary rules of construction, is more exclusively incumbent upon her in the character of life-renter than any other. The value of the life-rent is beyond all denial, of incomparably greater amount than the balance of debt said to be still due; nay, the sums which she has already drawn from it since Mr. Waddell's death are sufficient to discharge the double of that balance; and in these circumstances, the Appellants humbly submit that her claim of relief cannot be sustained against them upon whom no such burthen is thrown by the deed, without frustrating the obvious and clearly expressed intentions of the testator.

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*Lord Eldon*, (C.) In this case the question arises upon the effect of a deed of settlement, in which there are several clauses material to be attended to with reference to the case of *Keay*. Mr. Waddell made this settlement under an apprehension that if he gave the Respondent, his sister, all his moveables absolutely; and gave her the debts due to himself, at the time of his decease, to be converted into cash, and applied in payment of the debts due from himself, she would derive a benefit from that arrange-

ment; and he calculated that, after payment of his debts out of that fund, there would be a residue to be settled in the manner mentioned in the deed. That he had so calculated the extent of his fortune cannot be doubted. But there are thousands of cases where, when one happens so to miscalculate, the actual arrangement is such as he did not know would be the effect of the will. If he had had nothing but lands, and had given them to A. B. for life, remainder to C. D. in fee, then certainly the fee would be liable for the debts, the life-renter keeping down the interest. But the question is, what is the effect of the disposition altogether.

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This lady was the principal object of his affection; and the disposition commences with the following narrative: "Know all men by these pre- "sents, that I, William Waddell, Esq. of Easter "Moffat, heritable proprietor of the lands and others "after mentioned, for the love, favour, and affec- "tion that I have and bear to Jean Waddell (my "youngest sister), George Waddell, of Ballochnie, "and William Waddell, his brother (my nephews), "and for other good causes and considerations, me "hereunto moving, have disponed, assigned, con- "veyed and made over, as I do by these presents, "but with and under the burdens, provisions, con- "ditions, power, and faculty under written, give, "grant, assign, and dispone from me my heirs and "successors, to and in favour of the said Jean Wad- "dell, in life-rent, all lands and heritages presently "belonging or which shall belong to me at the time "of my death, with the whole writs and evidents "thereof, conceived in favour of me or my predeces-

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" sors, and authors; as also all debts and sums of " money, heritable and moveable, any ways ad- " debted, resting, or that shall be owing to me at " the time of my death."

And I apprehend the effect of that, coupled with a clause in the concluding part of the deed, was to give a life-rent only in these debts to Jean Waddell. And then he says: " And further, give, grant, " assign, and dispone to and in favour of the said " Jean Waddell, her heirs, executors, successors, " and assignees, all the corns, cattle, horse, nolt, " sheep, &c. and in general, any other moveable " subject pertaining or belonging to me, wherever " the same may be." The distinction then being that of his moveable property, all the debts and sums of money due to him were given to her in life-rent, and the rest absolutely.

Then he proceeds, " And particularly without " prejudice to the said generality, I hereby, with " and under the burdens, provisions, condition, " power, and faculty under written, give, grant, " and dispone from me and my foresaids, to and in " favour of the said Jean Waddell in life-rent, and " the said George Waddell and his heirs in fee, all " and whole the respective lands and others after " mentioned, viz." (Then follows a full description of the subjects destined to the Appellant, George Waddell.) " And further, I hereby give, grant, " and dispone from me and my foresaids, to and " in favour of the said Jean Waddell, in life-rent, " and the said William Waddell, and his heirs in " fee, all and whole the Forty Shilling Land of " Easter Moffat, &c." (Then follows a particular

description of the lands disponed in fee to the other Appellant, William Waddell.) And then he goes on :—

"*But declaring always that the said Jean* "*Waddell shall be bound and obliged,* AS, BY AC- "CEPTATION HEREOF, *she binds and obliges herself* "*to pay all my just and lawful debts,* with my "funeral charges and expences, and any gifts or "legacies I may think proper to leave by a writing "under my hand."

Thus then the deed, after describing the lands, and disponing the fee to his nephews, takes up the subject of his debts, which he lays upon her only. Now if there had been nothing more in the deed, it would be quite impossible to say that she was not liable for the whole of the debts, and that if he miscalculated, she would not be so far disappointed of what he meant to give her; as there is not a word to show that he had it in contemplation that the lands should be liable to pay any of the debts. Then he proceeds, "and I appoint the said "Jean Waddell, to make payment to Christian "Waddell, my sister, spouse of James Muir of "Gilgarth, during the said Christian Waddell's life, "a yearly annuity of 20*l.* sterling *per annum,* and "that at two terms in the year, Whitsunday and "Martinmas, by equal portions, beginning the "first term's payment thereof at the first term of "Whitsunday or Martinmas after my death, and so "on termly thereafter during her life-time. That stands on the same ground as the bequest to the Respondent, and is open to the same answer. If he miscalculated, and the life-rent failed, so would

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the annuity for the same reason. And then the disposition goes on—" and in the event of the said " Jean Waddell's predeceasing the said Christian " Waddell, then I hereby appoint the said William " Waddell, or those who may succeed to the fee of " the lands above disponed to him, to make pay- " ment to the said Christian Waddell of her said " annuity." And then he gives considerable lega- cies, " As also I leave the sum of 1,000*l.* sterling " to Margaret Waddell, my niece, daughter of " Patrick Waddell of Bogo, and 100*l.* sterling to " Agnes Gardner, daughter of John Gardner of " Broom Park; which sums of 1,000*l.* and 100*l. are* " *hereby declared the said William Waddele, or those* " *who may succeed to* THE FEE *of the lands, and* " *others above disponed to him, shall be bound and* " *obliged,* as by acceptation hereof they bind and " oblige themselves, to make payment to the said " Margaret Waddell, and Agnes Gardner, at the " first term of Whitsunday or Martinmas, after the " death of the said Jean Waddell, with the legal " interest thereof, from the term of payment during " the not payment of the same.

" And further, I leave the sum of 700*l.* sterling " to Margaret Waddell, my niece, daughter of the " deceased George Waddell, of Ballochnie; *which* " *sum of* 700*l, sterling, the said George Waddell,* " *her brother, or those who may succeed to* THE FEE " *of the lands above disponed to him, shall be bound* " *and obliged, as, by acceptation hereof,* they bind " and oblige themselves, to make payment to the " said Margaret Waddell, at the first term of Whit- " sunday or Martinmas after the death of the said

" Jean Waddell, with the legal interest thereof, " from the term of payment, during the not pay- " ment of the same." So that he first makes a gift to Jean, then to William and George; and then lays the burthen of the payment of his debts on Jean alone; and then he takes up the remainder of his purpose, and subjects the fee to legacies not to be paid till the death of Jean. There is another clause which, it is contended, shows his anxiety to provide for Jean; but the answer to that is, that she could not take the benefits of this disposition, but subject to the payment of the debts. On this clause considerable stress has been laid, and it certainly shows that he must have thought that the whole of his moveable property, including the debts due to him, would be more than sufficient to pay his debts due from him.

" And further, I hereby assign, and make over to " the said George Waddell in fee, all debts and sums " of money heritable and moveable, any ways ad- " debted, resting, or that shall be owing to me at the " time of my death. And in order the more easily to " carry my intentions with regard to my moveable " property into execution, I hereby empower the " said Jean Waddell, to sell and dispose of what- " ever part of my moveable property, above as- " signed to her in life-rent, and the said George " Waddell in fee, she may think proper, and con- " vert the same into cash, and after paying off my " debts, sick-bed, and funeral expenses, to lend out " the remainder of the money on heritable bonds, " taken payable to herself in life-rent, secluding the " *jus mariti* of any person she may marry, and the

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"said George Waddell in fee." This manifestly shows the intent that the debts should be paid out of the moveable property; and also that he thought that it would be more than sufficient for that purpose; otherwise it would have been unnecessary to have given the residue to one in life-rent, with remainder to another in fee.

But after all, where the personal property is made liable to the payment of debts, and the residue is given to one, and the lands to another, and there is no residue, the objects of testators are defeated every day. He seems to have thought that there would be enough to pay his debts. But suppose 10,000*l.* due to him, and 5,000*l.* to pay, and that the 10,000*l.* or 5,000*l.* of it, had been lost by insolvency or otherwise, the object of his bounty would be defeated. Then the utmost that can be said is, that he called upon her to take, but subject to a burthen, what, he conceived, would be a benefit. But he mistakes: and so mistaking and miscalculating, his object has miscarried. I therefore think that the opinion of the two Judges, against that of the three, is the better opinion; and that this judgment should be reversed, and the Defenders assoilzied, without prejudice to any claim which she may have against the Appellants, in case the interest she has under the deed should fall short of the burthens imposed upon her.

(*Sir Samuel Romilly*, in answer to a question from the Lord Chancellor, stated that they did not mean then to press the point of her being personally liable after her interest should be exhausted.)

Judgment REVERSED, without prejudice to any claim against the Defenders, in case the interest she derived under the disposition stated should fall short of the debts paid, or to be paid, by the Pursuer.

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