

SUMMER SESSION, 1887.

COURT OF SESSION.

Thursday, May 12.

FIRST DIVISION.

[Lord M'Laren, Ordinary.]

WILLIAMSON v. BEGG.

Real and Personal—General Disposition—Titles to Land Consolidation (Scotland) Act 1868 (31 and 32 Vict. c. 101), sec. 19, Sched. L—Agent and Client.

In a general *mortis causa* disposition by a person of his whole estate, heritable and movable, under certain burdens, and, *inter alia*, a legacy, there was a declaration that these provisions should form real burdens over the heritable estate conveyed. This declaration was not contained in the dispositive clause, and there was no special description of the lands conveyed. The title of the disponee was completed by means of a notarial instrument which bore to be in the form prescribed by sec. 19, Schedule L, of the Titles to Land Consolidation (Scotland) Act 1868, which contained a reference to said provisions, but did not specify them *ad longum*.

The legatee raised an action of damages against the agent who had prepared the notarial instrument, alleging that in completing the disponee's title he was acting for those interested in the general disposition, and that there had been a failure in professional duty in not making the legacy a real burden on the heritable estate. *Held* that a real burden cannot be created by a general disposition, and action *dismissed* as irrelevant.

Opinions that there was no duty upon the agent to constitute the legacy a real burden, and that he could not competently have done so in the notarial instrument.

John Williamson, clerk in the British Linen Company's Bank, Glasgow, raised this action against Robert Begg, solicitor, Kinross, conclud-

ing for payment of £200, the amount of a legacy which the pursuer alleged he had lost through the negligence or want of professional skill of the defender. The circumstances under which the action was raised were as follows:—James Beveridge, of Balado in Kinross-shire (the grandfather of the pursuer), died in June 1879 leaving a general disposition whereby he assigned and disposed to his eldest son Thomas Beveridge, and his heirs and assignees, his whole means and estate, heritable and movable, which should belong to him at the time of his death, subject to certain provisions and annuities, and, *inter alia*, to a legacy of £200 to the pursuer, payable on his attaining majority, with interest at 5 per cent. from the date at which it should become due until paid. The deed in question was prepared by the defender under Mr Beveridge's directions, and it contained the following clause:—"Declaring that the said provisions hereinbefore contained in favour of . . . and John Williamson shall form real burdens over the heritable estate hereby conveyed." This declaration was not in the dispositive clause. The pursuer, thinking his legacy was well secured, took no steps to obtain payment of it, as it was yielding a good return, and he received 5 per cent. interest at the hands of the defender up to Martinmas 1881. Thereafter the interest was paid by pursuer's directions to his grandmother. Between the years 1879 and 1882 the defender, as agent for Thomas Beveridge, negotiated several loans for him on the security of the estate of Balado, amounting in all to about £3000.

In April 1886 Thomas Beveridge executed a trust-deed in favour of the defender as trustee for his creditors.

The pursuer averred that the title of Thomas Beveridge as general disponee of his father was completed by notarial instrument prepared by the defender, which purported to be in the form of Schedule L of the Titles to Land Consolidation Act 1868; that this instrument, however, merely referred to the provisions in the general disposition instead of specifying them *ad longum*, the result of which was that these provisions had not been constituted real burdens upon the estate of Balado as directed by the testator.

He also averred that the defender when completing Thomas Beveridge's title "was acting, and was bound to act, not merely for him or in his interests, but also for or in the interests of the beneficiaries under the said general disposition and settlement, and it was his duty to see that the said notarial instrument was properly executed, and that in particular all the necessary steps were taken to make the legacy of £200 in favour of the pursuer effectual as a real burden."

He further averred that for ten years before the present dispute "the defender has acted as sole legal adviser of the pursuer, and in that capacity has had numerous business transactions with the pursuer. The pursuer, as the defender was well aware, relied upon the defender doing what was necessary to secure his interests under the said general disposition and settlement, and in particular relied upon his taking such steps as were proper and necessary for securing said legacy. The pursuer was not informed by the defender, and was not in fact aware until recently of the defender's failure to secure said legacy as a real burden upon the estate of Balado."

The defender denied that he at any time acted as pursuer's agent in connection with his grandfather's estate, and that any dealings he had had in connection therewith were as agent for the pursuer's uncle. He further stated that the pursuer was informed of what was taking place in connection with his uncle's affairs, and that he fully approved of all that was being done.

The pursuer pleaded, *inter alia*—" (1) The defender, as agent for the pursuer, or at least as agent for the beneficiaries under the said settlement, was bound to do what was necessary for the said legacy being properly constituted a real burden. (4) The defender having been guilty of gross neglect, or breach of professional duty, is responsible to the pursuer for the loss he has thereby sustained."

The defender pleaded, *inter alia*—" (3) The defender, having acted in the matters referred to only as agent for the said Thomas Beveridge, was under no obligation in favour of the pursuer, or in favour of the other beneficiaries mentioned in the settlement of the deceased James Beveridge. (5) No loss having been sustained by the pursuer, the summons ought to be dismissed."

On 23d November 1886 the Lord Ordinary (M'LAREN) pronounced this interlocutor—" Finds that under this action pursuer claims damages against the defender for failure in the professional duty alleged to be undertaken by him, to have a legacy due to the pursuer effectually made a real burden on the heritable estate: Finds that the pursuer has not taken legal measures to have it determined in a question with heritable creditors whether the legacy is effectually constituted a real burden: Finds that until the pursuer's right is tested by eviction or decree, he is not entitled to sue for damages on the assumption that loss has been sustained: Therefore dismisses the action, and decerns: Finds the defender entitled to expenses."

"*Note.*—The action is instituted against a law-agent to recover the value of a legacy alleged to be lost by reason of not being effectually made real in the notarial instrument following on the truster's disposition. It is urged that every conveyancer warrants a security so far as it can be made good by the exercise of his professional skill.

"But in the present case the action appears to me to be premature. The loss has not been constituted, and the pursuer has not sustained the eviction of his legacy. He must first ascertain, in a question with the competing creditors, whether their right is preferable to his, and if he fail he will then be in a position to assert his claim against the agent for failure to give him a good security over the testamentary estate. But there are two pleas which I think the pursuer may maintain in a question with the heritable creditors—(1) that he has an effectual real burden under Schedule L; and (2) that the heritable creditors were affected by the notice of the testamentary character and purposes of the deed which appears in the notarial instrument."

The pursuer reclaimed, and argued—The deed contained a clause creating these provisions real burdens. This admittedly had not been done. The donee was not entitled to take the heritable estate, except in terms of the declaration by which the legacy was made a real burden. The defender was the pursuer's agent, and in not making this provision a real burden on the estate, which could have been done as shown by section 19, Schedule L, of the Titles to Land Consolidation (Scotland) Act 1868 (31 and 32 Vict. c. 101), he had been guilty of neglect of professional duty which afforded a sufficient ground for the present action. Further inquiry into the facts should be allowed—*Fleming v. Robertson*, Feb. 19, 1859, 21 D. 548, and H. of L. 4 Macq. 177; *Struthers v. Lang*, Feb. 2, 1826, 4 Sh. 418, H. of L. 2 Wil. & Sh. 563.

Replied for the respondent—No relevant case of damage had been disclosed on record. There was no specific averment of employment, which was the foundation of the present claim. The defender, as agent for the testator, was under no obligation to the beneficiaries to protect their interests. It was impossible that a real burden could be created in a general disposition; the right of the legatee was only a personal obligation to have a real right constituted—*Fleming v. Robertson*, *supra cit.*, 4 Macq. at p. 199; *Goldie v. Goldie's Trustees*, July 8, 1842, 4 D. 1489.

The 19th section of the Lands Clauses Consolidation (Scotland) Act 1868 provides—"When a person shall have granted or shall grant a general disposition of his lands, whether by conveyance *mortis causa* or *inter vivos*, or by a testamentary deed or writing, within the sense and meaning of the 20th and 21st sections of this Act, and whether such general disposition shall extend to the whole lands belonging to the grantor or be limited to particular lands belonging to him, with or without full description of such lands, and whether such general disposition shall contain or shall not contain a procuratory or clause of resignation, or a precept of sasine, or an obligation to infest, or a clause expressing the manner of holding, it shall be competent to the grantee under such general disposition to expedite and record in the appropriate register of sasines a notarial instrument in, or as nearly as may be in, the form of Schedule L hereto annexed."

Schedule L contains the form of notarial instrument in favour of a general donee, or his assignee, &c., in which occurs the following—
" [If the deed be granted under any real burden or

condition, or qualification, add here—but always under the real burdens, &c.]”

At advising—

LORD PRESIDENT—This is an action of damages against a law-agent by one of his clients for alleged failure in professional duty; and the failure is said to consist in this, that the agent neglected to make a certain legacy left to the pursuer under his grandfather's settlement a real burden upon the testator's heritable estate.

The deed of conveyance was a general disposition, and contained no special description of the lands. It was just an ordinary disposition of the whole means and estate of the testator, heritable and moveable, which should belong to him at the time of his death, and it contained various provisions in favour of his widow and younger son, and these were followed by the legacy which has given rise to the present action.

The effect of the deed as regards these provisions was to make them personal obligations on the general donee, but the pursuer relies specially upon this—“Declaring that the said provisions hereinbefore contained in favour of the said Mrs Agnes Beveridge, and Alexander Beveridge, and John Williamson, shall form real burdens over the heritable estate hereby conveyed.”

Now, if the effect of that clause was to make these provisions real burdens on the testator's estate, then it would have been necessary that they should have been feudalised when the title of the general donee was made up. Even if this had been done, however, it would not, I think, have been of any avail, because it is impossible that a real burden can be created by a general disposition. In order that a real burden may be effectually created there must not only be a precise statement of the amount of the burden, but also of the lands over which it is secured. It may be further observed that no clause such as is contained in this general disposition could create a real burden because it could not be followed by infestment. Upon that ground it is unnecessary to consider further this part of the case.

But it was next argued by the pursuer that there was a failure of duty on the part of the defender in not making this legacy of £200 a real burden in the notarial instrument. But could this have been done? The statute of 1868, and especially sec. 19, Schedule L, was referred to to show that real burdens could be created in this manner as suggested by the pursuer, but it does not seem to me that the statute advances matters much. If a real burden has been competently created, then of course it must be inserted in the notarial instrument; but if no such burden has been effectually created, then it appears to me that this portion of the statute does not apply. It was further argued that this statute contemplates real burdens being created by means of a general disposition, and in support of this contention reference was made to section 19 of the statute, which provides—[*His Lordship here read section 19 as quoted above*]. I do not see how the provisions of this section aid the pursuer's argument, nor does it appear to me that he can derive any benefit from the language of Schedule L.

The possibility of effectually creating a real

burden apart from the provisions of Schedule L is a different matter. It is not alleged that the defender undertook to create this legacy a real burden on the testator's estate. The pursuer's case rather is, that it was in the power of the defender as the family agent to have made this legacy effectual in his favour by creating it a real security, and that by not doing so he failed in his professional duty to the pursuer. It appears to me, however, that the defender could not competently have done what the pursuer blames him for omitting to do, and therefore I cannot see how he is now to be held responsible for not doing it.

I think that it is a pity that there should be any further litigation upon so small a matter; so, while considering the action irrelevant, I have stated the grounds of my opinion rather than adopt the somewhat narrow ground of judgment of the Lord Ordinary.

LORD MURE—I am of the same opinion, and prefer to place my judgment upon the broad grounds stated by your Lordship.

Under the rules of law in existence in 1868 this legacy of £200 would not, in the circumstances of the present case, have been viewed as a real burden, and I can see nothing in the provisions of that Act which has the effect of relaxing or qualifying the rules then in force.

That being clear, the only question which remains is, whether the defender, as family agent, was under any obligation to the pursuer to have constituted this legacy of £200 a real burden upon the estate of the testator? and upon that point I am clearly of the opinion expressed by your Lordship.

LORD SHAND—This action is brought by the pursuer against the defender for failure in professional duty, and it takes the form of an action of damages. The pursuer claims that he was entitled to have had this legacy of £200 constituted a real burden on his grandfather's estate, and he also alleges that the defender undertook to have this done. This is not a case of trust in which directions are given to the trustees, nor is it a case in which the intention of the testator has to be considered. It is a simple conveyance by the testator of his whole estate to a donee who is directed in return to make payment of certain legacies. Such a general disposition does not create a real burden as no infestment could proceed upon it. The donee makes up his title under the general disposition, and clearly there is no obligation upon him to create a real burden for this amount. No doubt the testator considered that he had created the provisions real burdens over the heritable estate which he had conveyed, but he has not succeeded in doing so. Upon that ground I think the defender ought to be absolved.

LORD ADAM—I concur.

The Court recalled the interlocutor of the Lord Ordinary, sustained the first and fifth pleas-in-law for the defender, and dismissed the action.

Counsel for Pursuer—Young—Liddall, Agent—F. J. Robertson, W.S.

Counsel for Defender—Pearson—Guthrie, Agents—Henderson & Clark, W.S.