

1736. February 3.

KER *against* THOMSON.

No 13.

WHERE a defunct's succession splits, and he comes to be represented by two different heirs of line, which may happen in many cases, the heirs have no total relief one against another, but only in proportion to the subjects they succeeded to: And, therefore, an heir having made up titles to a part of his father's estate, and his sister, after his decease, having made up titles to what remained *in hereditate jacente* of the father, neglecting her brother's succession as overcharged with debt; in a question betwixt her and her brother's creditors, with respect to a bond of provision granted to her by her father, upon which she was a preferable creditor, the LORDS found, that she could not draw the whole out of her brother's estate, but proportionally out of both, as well that part she succeeded to, as the part that her brother succeeded to. See APPENDIX.

*Fol. Dic. v. 1. p. 356.*

1740. July 18.

SIR JOHN HOME of Renton.

No 14.

AN heir having voluntarily paid a moveable debt, which bore no annualrent, and claiming to be relieved *cum omni causa*, it was found, that no annualrents of any sums, voluntarily paid by the heir, other than such as by the constitution of the debt did bear annualrent, were to be stated as a burden upon the executry.

*Fol. Dic. v. 3. p. 255. Kilkerran, (HEIR and EXECUTOR.) No 1. p. 229.*

1745. January 23.

JANET and MARY RUSSELS, and their Husbands, *against* RACHEL RUSSEL, and her Husband.

No 15.

DAVID RUSSEL, surgeon in Kennoway, having no children, settled his small land-estate upon Mr William Dall, the husband of his eldest sister Rachel, in liferent, and on Thomas Dall their son in fee, and the heirs-male of his body, whom failing, &c, with and under the reservations, burdens, conditions and faculties after exprest, viz. reserving his own liferent and power to alter, sell, or burden without consent of the heirs of tailzie; and then followed a clause in the following words: ' And 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 payment of all the just and lawful debts that shall be resting by me the

A disposition of heritage, with burden of debts, does not preclude the heir from being relieved by the executor.

No 15.

‘ time of my death, to whatever person or persons, by bond, bill, contract, decree, or any other manner of way.’

And after a clause, obliging the heirs to carry his name and arms, followed a provision, ‘ That it should not be in the power of the said Thomas Dall, or of any other of the heirs substituted to him, to contract debt, sell, wadset, or dispoise the said lands,’ (with an irritancy in case of contravention) ‘ except in the case aftermentioned, viz. that it shall be in the power of the said Thomas Dall, or of the remanent heirs mentioned in the foresaid substitution, to contract as much debt on the foresaid lands, and to grant security therefor affecting the said lands, as will satisfy and pay the said debts that shall be resting the time of my death, with and under which reservations, provisions, &c. these presents, and the resignation to follow hereon are granted, and shall be accepted by the said hail heirs, &c. and no otherways.’

Upon the death of David Russel, his sister Rachel, and Mr William Dall her husband, having confirmed executors to him *qua* nearest of kin, and amongst other subjects having given up in inventory two bills due to the defunct, and another debt of L. 2000, whereof the term of payment was not yet come, a process was brought against them at the instance of the other two sisters, to account to each of them for a third of the executry, and particularly, to assign and transfer to each of them a third of the moveable debts still outstanding.

*Alleged* for the defenders; That there were more moveable debts than exhausted the executry.

*Replied*; That the defunct had, by the disposition foresaid, laid the burden of all his debts upon his land-estate, whereby his moveables were left free to his executors.

*Duplied*; That as, by the clauses in the disposition, the debts were not made real burdens, these clauses imported no more than an anxiety in the defunct to secure his creditors, but by no means an intention to lay his moveable debts ultimately on his heir, and to bar him from the relief competent to him in law from the moveable estate. And that the circumstances of the case strongly concurred to support this construction; for as the estate did not exceed 1800 merks a-year, and was affected by two liferents, one of the defunct’s mother, the other of his wife, extending together to about 1200 merks, one of which still subsisted; as the moveable debts amounted to 15,000 merks, and the executry to near that sum; it was not to be conceived, that when he tailzied his estate, he at the same time meant to exhaust it by debts, and leave a free subject to go to his executors.

THE LORDS, ‘ 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 moveable estate.’

The circumstances of the estate in this case were a strong indication, that it could not be the intention of the granter to burden the tailzied estate with the debts. But laying aside these circumstances, it was the general opinion, that

the rule is, that a clause in a 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.

No 15.

*Fol. Dic. v. 3. p. 256. Kilkerran, (HEIR AND EXECUTOR.) No 3. p. 230.*

\* \* \* D. Falconer reports the same case :

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, decret, or any other manner of way, and likewise with the payment of the liferent-provisions provided to Rachel Thomson my mother, and to Rachel Wilson my wife ;' with prohibition to sell or contract debt, except that it is in the power of the heirs of tailzie to sell as much as will satisfy the burdens abovementioned : They are also bound to carry his name and arms, and the whole is fenced with an irritancy.

Mr 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, made this defence, that there were more moveable debts than exhausted it. To which it being *replied*, That the defunct had laid the burden of his debts upon his land-estate, 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 moveable estate.

THE LORDS refused a reclaiming bill, and adhered.

*D. Falconer, v. 1. p. 56.*

1747. *January 14. February 17. & July —.*

MARGARET, LILLIAS and HELEN CAMPBELLS *against* CAMPBELL.

ON the 28th May 1733, Archibald Campbell of Shirvan, having then one son and three daughters, executed a settlement of his personal estate, by which he disposed ' to his son Dougal, and the heirs-male of his body, which failing, ' to any person he should appoint, and failing such appointment, to his own nearest lawful heirs-male and assignees ; all and sundry debts heritable or moveable, which should happen to belong to him at the time of his death, ' with what other moveables he should be then possess of ; *proviso*, That the

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A father, in a disposition of his personal estate, burdened the disponee with payment of all his debts heritable and moveable. He executed af-