

Nor is it of importance in the present question, that by the law of England, the defender is entitled to the whole real estate; nor that, by the law of Scotland, the descendants of a younger brother would have excluded them from the succession. As of all those who enjoy any part of the predecessor's estate, he alone is entitled to the character of heir-general, every burden which is not of its nature applicable to the estate falling to the particular heirs, must affect him only,

THE LORDS repelled the defences.

Lord Reporter, *Halles*. Act. *Rae*. Alt. *David Armstrong*. Clerk, *Home*.  
C. *Fol. Dic. v. 3. p. 256. Fac. Col. No 67. p. 105.*

1786. January 17. MRS ELIZABETH ROSE *against* JAMES ROSE.

THE estate of Kilravock descended in part to Mrs Rose, the heir of line; and in part likewise to James Rose, the heir-male. Certain debts of the family were contained in heritable securities, affecting indiscriminately both these portions of the estate. In an action, therefore, at the instance of the heir of line, against the heir-male, the question came to be agitated, Whether she ought to be relieved of a part of the debts corresponding to the proportion that the heir-male's succession bore to the whole lands burdened. In defence it was

*Pleaded* for the heir-male; The heir-general, or of line, as the proper and primary representative of the deceased in heritage, is alone liable for his heritable debts; while heirs of tailzie and of provision, who in the first instance are deemed singular successors, are never subjected, except *subsidiarie* on the failure of the former. Nor in any case is a deviation from this rule of law to be admitted, without the most unequivocal expression of will by the predecessor; and then, no doubt, a man may burden with the payment of his debts any of his successors whom he chuses. *Russell contra Russell*, No 15. p. 5211; and *Campbells contra Campbell*, No 16. p. 5213.

Our more ancient lawyers, Hope, for example, and Craig, agree in the doctrine, and the latter quotes a decision\*, by which it was directly found, That the heir of line is bound to relieve even an heir of tailzie from an obligation on the ancestor to convey to another party the very tailzied subjects themselves. *Jus Feud. lib. 2. diæg. 17. § 19.*; *Maj. Pract, voce TAILZIE*. Dirleton and Stewart likewise seem to entertain similar sentiments; *Doubts, voce HEIR OF TAILZIE*.

The opinion of Stair is, That where a burden has been laid on particular lands or rights, *and no other*, in that single case, the heir of the special subjects is obliged to relieve the heir-general, b. 3. tit. 5. § 17.; an opinion which, though perhaps not quite conformable to the above, is equally favourable to

\* See TAILZIE.

No 21,

No 22.

An heir-male found entitled to relief, from the heir of line, of heritable debts secured on the succession of both indiscriminately.—Reversed on appeal.

No 22. the defender's plea; for here no burden is laid on his particular lands, *and no other*, but as making a part of the estate in general along with those which devolve to the heir of line. On this ground, then, which is likewise agreeable to the opinions of Lord Bankton, (b. 3. tit. 5. § 70.) and of Erskine, (b. 3. tit. 8. § 52.) the present argument rests. The utmost effect of such a catholic burden, like that of renouncing the benefit of discussion, is to give creditors immediate access to the heir-male's succession, without first attaching that of the heir of line.

The opposite doctrine is such a novelty, that it cannot be discovered in the records of the Court; nor have the form of process and mode of judicial proof been yet devised, by which that proportion of debt which corresponds to the comparative values of succession, dividing between special and general heirs, may be regulated or ascertained.

*Answered*; When it is admitted, that heirs-male cannot claim relief of debts secured on their lands, if those of the heirs-general be not likewise impignorated, the rule of law concerning the representation of the ancestor being thus departed from, the question at issue is really given up. For if the heir-male alone is liable, and the burden on him is total, when his lands only are affected, why should the burden cease altogether, instead of becoming partial and proportional; when it still lies upon his property, though it extends also to that of the heir-general?

Let one of two debts be supposed to burden the succession of the heir-male, and the other the succession of the heir of line; then, *ex concessis*, the heir-male will be liable for the first, in the same manner as the heir of line is for the second. Now if these two separate debts of the ancestor be thrown into one, so as to affect *pro indiviso* the whole succession, general and special, what conceivable reason is there for exempting on this account the heir-male altogether, and subjecting totally the heir of line? Or if a security granted over the heir-male's succession only, were supposed to be afterwards extended at the desire of the creditor over that of the heir-general, could any rational cause for such a consequence be then assigned?

To say only, that an effect similar to the privilege of creditors against the order of discussion will be thus produced, is no more than a begging of the question. In all the cases alike, a burden is laid on the estate of the heir-male, under which it descends to him. The will of the defunct, it is true, was sufficient to regulate on what portion of his succession the load of his debts should fall; and it is thus that intention is most unerringly expressed. For though a man giving real security to his creditor may be supposed to have for his object the procuring of money rather than the settlement of his succession; yet if in fact he does settle it in a legal manner, as he is not to be presumed ignorant of the law, nor unconscious of his own act, the conclusion must necessarily be, that if his purpose had not been consistent with the deed done by him, he would in express terms have guarded against so obvious a hazard.

The cause was reported by the Lord Ordinary, when the COURT pronounced this interlocutor:—‘ Find, That where the heritable debts are secured upon the estates descendible to the heir of line, and also upon the estates descendible to the heir-male of the late Kilravock, the heir-male is by law entitled to a total relief of these debts from the heir of line.’

This judgment having been brought under the review of the Court, by petition and answers; and the Bench being then much divided, a hearing in presence was appointed; after which

THE LORDS adhered to their former interlocutor. See a case between these parties, *voce* SUCCESSION.

Reporter, *Lord Rockville.* Act. *Wight, G. Fergusson.* Alt. *Lord Advocate, Rolland, Blair.*  
Clerk, *Menzies.*

S. *Fol. Dic. v. 3. p. 256. Fac. Col. No 247. p. 379.*

\* \* This case, along with that relative to the succession of the estate, was appealed:

THE HOUSE of LORDS, 2d April 1787, ‘ ORDERED, That the interlocutor of the 17th of January 1786 be reversed.’

Who is heir, who executor; *See* SUCCESSION.

What subjects go to the heir and what to the executor; *See* HERITABLE MOVEABLE.

What go to heirs and against them; *See* PERSONAL AND TRANSMISSIBLE.

No discussion betwixt heir and executor; *See* DISCUSSION.

*See* No 38. p. 4478.

*See* APPENDIX.