

1749.

 CAMPBELLS
v.
 CAMPBELL.

the contract of 1668, yet, that personal contract cannot affect the right of a purchaser, not having notice of it, who claims under a deed executed by a subsequent heir of entail, while he was in the undisputed possession of the estate, under a title then unimpeached; and which appeared, from all the entries upon record, to be liable to no objection.

Judgment,
 30 May 1749.

After hearing counsel. “ It is ordered and adjudged, &c. that the interlocutor complained of be affirmed.”

For Appellants, *W. Murray, A. Lockhart, C. Maitland.*

For Respondent, *A. Hume Campbell, C. Erskine.*

MARGARET CAMPBELL and HUSBAND
 and OTHERS (daughters of Archibald Campbell of Shirvane,) } *Appellants.*
 ALEX. CAMPBELL of Shirvane, } *Respondent.*

1st June 1749.

HEIR and EXECUTOR.—Where the real and personal estate are conveyed to different heirs in virtue of different deeds, each containing a general clause, obliging the persons favoured, to pay all the granter's debts—Held, that such clauses do not alter the ordinary rules of liability between heir and executor.

[*Elchies, Voce Tailzie No. 31. Kilk. p. 231. Falc. Mor. 5213.*]

No. 83.

ARCHIBALD CAMPBELL of Shirvane, granted a conveyance (28 May 1733) of his executory and

personal estate in favour of his eldest lawful son Dougal, and the heirs-male of his body ; whom failing, to such person as he himself should appoint by writing under his hand ; whom failing, “ to his own nearest heir-male ;” and the heirs so succeeding were taken bound to pay “ the respective portions and provisions provided, or to be provided, by him, to his other children, and also to satisfy and pay his just and lawful debts and legacies, and the expences of his funeral, &c.

1745.

 CAMPBELLS
 v.
 CAMPBELL.

A few days thereafter, (8 June,) he likewise executed an entail of his estate of Shirvané in favour of himself, and of the same son Dougal, and the heirs of his body—(with other substitutions)—whom failing, in favour of Alexander Campbell, (the respondent,) his eldest natural son. In this deed likewise, it was declared that the heirs so succeeding, “ Shall be holden and obliged to pay the portions and provisions of my other children, &c. and that the lands shall not only be burdened with the payment thereof, &c. but with the payment of all debts that shall be due by me at the time of my decease, &c. all which,” &c. the said heirs “ shall be holden by acceptation of this right to perform and fulfil, albeit the said bonds and obligations be only personal, and no infestment has followed thereon.”

Archibald died in 1737, and his son Dougal having died soon after, without issue, the succession to the estate of Shirvane opened to the respondent, and the personal estate accrued to Dougal Campbell of Kilmartin, as the next heir-male of Archibald.

Thereafter Kilmartin, in implement of a transaction with the daughters of Archibald, (the ap-

1749.

CAMPBELLSv.
CAMPBELL.

pellants,) disposed to them his whole right to the personal estate. They then paid some of the debts due by their father, and afterwards, in the character of executors of their father, and as assignees of Kilmartin, they brought an action of relief against the respondent, in which they insisted that, in virtue of the clause in the settlement of Shirvane, they are entitled to reimbursement of what they had already paid, and to relief from any other demands which might be made against them by the other creditors of their father.

The defence was chiefly rested upon the previous disposition of the personal estate, whereby that was also burdened with the payment of the debts.

The Lord Ordinary (Kilkerran) sustained the defences, and decerned, (27 Nov. 1744,) but afterwards took the case to report to the Court on informations.

Their Lordships, by their interlocutor, (14 June 1747) found, “that relief of the debts of the tailzier is competent to the pursuers, in the right of Campbell of Kilmartin, against the defender, the heir of tailzie in the land estate.” But upon advising a petition and answers, (17 Feb. 1747) they altered the interlocutor, and “found that relief of the debts of the tailzier is not competent to the pursuers in the right of Campbell of Kilmartin against the defender, the heir of tailzie in the land estate,”—and (12 June) adhered.

Entered,
11 Jan. 1748.

The appeal was brought from these interlocutors of 17 Feb. and 12 June 1747.

Pleaded for the Appellants:—The testator had full power to dispose of his real and personal estate to such persons, and under such conditions as he

thought proper. He could not defeat the right of his creditors, but he might subject either his real or his personal estate in the payment of his debts. Which of those he has subjected must depend upon his acts. And by the last deed executed by him, whereby he excluded his heir-male, he conveyed his real estate, upon the express condition that the heirs under that deed should pay all his debts. To contend that the personal estate, which was given to the heir-male, is in these circumstances liable to pay the debts, and not the real, is to maintain that the heirs nominated in the deed of tailzie are entitled to take the estate under the settlement, and to reject the conditions upon which it was given. Besides the intention of the testator to subject the heirs in the real estate to the payment of his debts, is clearly demonstrated by the declaration that they shall be so liable, “albeit the said “bonds and obligements be only personal, and no “infestment has followed thereon;” and this was a reasonable satisfaction to the heirs of his family whom he was disinheriting, in order to provide for his illegitimate offspring.

Pleaded for the Respondent:—The debts in question are such as by their own nature, and by the common and statute law of Scotland, ought to be paid out of the executry or personal estate of the original debtor, who, by the clause obliging the heirs in his tailzied estate to pay all his debts, intended merely to provide an express security for his creditors, or to furnish them with a more prompt and easy remedy to recover payment of their debts, but not to alter the ordinary rules of liability between the heir and executor. That the bare charging the heir in a real estate with

1749.

 CAMPBELL
 v.
 CAMPBELL.

1749.

 CAMPBELLS
 v.
 CAMPBELL.

the disponent's debts, and empowering him to sell land for payment thereof, are not sufficient to discharge the personal estate, or to bar the heir's relief out of the executry of the personal debts, which stand so charged upon him, was decided by the Court in Jan. 1745.*

Besides, in the present case, there was an express settlement made by the testator of his personal estate, whereby part of his property was also expressly burdened with the payment of his whole debts, and thus both estates being *in pari casu* in respect to the burdens with which they were charged, the question concerning the relief stood in the same situation as if neither the one nor the other had contained any such declaration, namely, that the moveable estate should be ultimately charged with the payment of the moveable, and the real estate with the heritable debts, if there were any.

Judgment,
 1 June 1749.

After hearing counsel, "It is ordered and adjudged, &c. that the interlocutors complained of be affirmed."

For Appellants, *A. Hume Campbell, C. Erskine.*
 For Respondent, *W. Grant, W. Murray, Will. Robertson.*

Elchies states erroneously that the judgment was reversed.

* Russel v. Russel. Mor. 5211.