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" ed ;" and " That the whole sums contained in a decreet of adjudi-
" cation, whether principal, annual rents, or penalties, belonged to
" the heir."

[M. 14,955 et M. 5229.]

MRS. ELIZABETH ROSE of Kilravock, - *Appellant;*

JAMES ROSE, an Infant, and FRANCIS RUSSEL, Advocate, his Guardian, - - } *Respondents.*

House of Lords, 2d April 1787.

SUCCESSION—HEIRS PRIMARILY LIABLE—RELIEF AMONG HEIRS—HEIRS WHATSOEVER, HOW INTERPRETED?—Several estates belonging to the same ancestor, were together conveyed in security of debt by heritable bonds. Part of the estate descended, after his decease, to the heir of line, and another to the heir male. Held, reversing the judgment of the Court of Session, that the heir male has not relief against the heir of line, in so far as the bonds are charged on his estate.

The barony of Kilravock, along with other estates, belonged to the family of Rose, the investitures in which, for the last 500 years, had stood destined to *heirs male*, and had descended from father to son, without interruption, till the death of Hugh Rose in 1600. After this, it had descended in the same manner to the fourth Hugh Rose, the appellant's brother, who died in 1782 without issue, leaving the appellant, his sister and heir of line, the heir male being the respondent, who was a grandson of their granduncle. According to the old investitures, the latter was entitled to succeed as heir male, and claimed the estate accordingly. But, in consequence of an alteration of the investitures during the possession of the latter series of heirs, between 1600 and 1782, chiefly for the special purpose of creating votes, a new order of heirs was introduced. The way this is usually done is, by first separating the property from the superiority. And in doing this, in the present instance, the property and Barony of Kilravock was conveyed by feu charter to a Lewis Rose, whom failing, to return to him, the said Hugh Rose, " *and his heirs and assignees whatsoever.*" In the conveyance of the superiority, the same terms of destination were used, " to four gentlemen named in liferent,

"and to himself *and* his heirs and assignees whatsoever in "fee." Previous to executing these deeds, Hugh Rose, then in possession, obtained a charter from the Crown, conveying these estates to himself and his heirs male, and *assignees whatsoever*, the object of which evidently being, to enable him to grant freehold qualifications. Infeftment was not taken in direct terms of the grant; but, in the above conveyances, it was assigned over in a manner to suit the purpose for which they were granted. When Lewis Rose, in 1775, came to recover the property of the barony of Kilravock to the appellant's brother, the draft had been drawn out so as to stand thus,—to Hugh Rose and his heirs male and assigns whatsoever, and in these terms it was engrossed, when Hugh Rose ordered it to be altered to the following,—"to himself and the heirs male or female of his "body; whom failing, to the other nearest and lawful heirs "male or female, and assigns whatsoever." In a letter to his sister, it further appeared that he wrote her,—"Your Feb. 23, 1776. "apprehensions, should the worst of events possibly happen, "of falling into the hands of collaterals, are perfectly ground-"less, as the only deed yet executed by me, has conveyed it "expressly in your favour."

In an action of reduction brought by the appellant, to reduce her brother's service as heir male of her father in the barony of Kilravock, which stood previously destined to her brother, and his *nearest heirs male or female whatsoever*, and to have it declared that she had right to succeed to the same as *heiress of line*, the Court held, by two interlocutors, that the old investitures to heirs male were vacated by the above deeds, "to heirs and assignees whatsoever,"—that this term was to be interpreted according to its strict and technical meaning, without reference to the former deeds, and this, notwithstanding it was contended, that from the very nature of these deeds, there could not be, and was no intention of changing the destination of the estate, and consequently, the Court held that the barony of Kilravock, both property and superiority, descended to the appellant as heir of line; but that the lands of Easter Geddes, Flemington, and Nairn, descended to the respondent as *heir male.* Mar. 11, 1784. Nov. 26, 1784.

A second question then occurred, as to the debts of the deceased, with which the whole estates were burdened.—There was an heritable bond of £7000 over Kilravock, Easter Geddes, Flemington, and Nairn; another of £5000

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over Kilravock, Easter Geddes, Flemington, but not over Nairn; and £1000 over Kilravock and Easter Geddes, but not over Flemington or Nairn. Counter action was brought by the respondent, in which he contended that the whole debts which affected the estates of Easter Geddes and Flemington, which descended to him as *heir male*, must be paid by the appellant as heir general, or out of the estates which she took in that character. Thus an abstract question of law arose, Whether these parties were obliged, as between themselves, to contribute towards the discharge of the debt proportionally, according to the value of the estates by them severally taken; or if the heir general, or of line, is obliged to pay the whole, in case the estate she takes be sufficient for that purpose, leaving the estate taken by the *heir male* completely free?

Jan. 17, 1786. Of this date, the Court held: "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, that the heir male is by law entitled to a total re- "lief of these debts from the heir of line." And this judg-

Jan. 19, —— ment was, on reclaiming petitions, afterwards adhered to.

Dec. 8, —— Against the latter interlocutor the appellant appealed, and a cross appeal was also brought against the interlocutors of 11th and 23d March by the respondent.

Pleaded by the Appellant.—1. An heir, whatever be his character, can only take up the estate by succession *tantum et tale* as it was in his ancestor, encumbered with all the debts with which his ancestor had specially charged it, and hence, the general rule of law is, that one who takes an estate by descent, must pay the debts with which that estate is specially burdened, without recourse against those who take other parts of the estate, descending from the same ancestor, under a different title. Thus the heir in heritage must pay all debts heritably secured, without recourse against the executors. Thus, also, if an heritable debt be secured upon one estate only, descending to the heir male, it must be paid by him without recourse upon the heir of line, though the heir of line takes another estate, descending to him as such, from the same ancestor. The principle therefore of discharging proportionally, according to the value of their respective estates burdened, is the only one consistent with justice. 2. As to the property, the interlocutors on this branch of the case ought to be affirmed, because it is quite clear, whatever was the nature of the investiture pre-

viously, that this was changed from a *male fee*, to "*heirs whatsoever*;" and it is no answer to this to say, that the deeds by which this was done, were merely intended to serve a temporary purpose, because after that purpose was served, it was then that the proprietor manifested an intention, and in point of fact did alter his deed after it was engrossed, so as to include "his heirs and assignees whatsoever." This clear intention, on his part, to alter the destination, is further corroborated by the letter written to the appellant.

Pleaded by the Respondents.—1. It is an established rule, that the heir of line must be first discussed, and is liable primarily for the debts of the predecessor. The heir of line is the heir general, and *eadam persona cum defuncto*, and so generally liable for his debts. The heir special, by deed, is accounted a stranger, and, consequently not liable for the debts of the deceased, whatever these be. The heir of line or general must first be discussed, before the heir special or heir male can be called on. It is only when the proper estate of the heir of line fails, that recourse can be had against his estate for the ancestor's debts. And if this right of discussion between heirs is to be regarded at all, it necessarily implies *relief* to this extent. 2. In regard to the barony of Kilravock. The term heirs whatsoever is flexible in its nature. It has no fixed and invariable meaning, but denotes heirs of any kind, consequently, its use here applied perfectly to the state of the ancient investiture, which was conceived to heirs male. By the later use of heirs whatsoever, therefore, it was not intended, and, in point of law, it did not change the destination of heirs male, but embraced such a destination. Besides, these deeds being obviously granted to serve a mere temporary and political purpose, were not, and could not be evidence of a deliberate intention to alter the destination from heirs male to heirs whatsoever.

After hearing counsel, it was

Ordered, that the interlocutors of the 11th of March 1784, in so far as the same sustains the reasons of reduction as to the *property* of the lands and barony of Kilravock, be affirmed, and that the interlocutors of the 26th November 1784, be also affirmed; and that the interlocutors of the 17th and 19th of January, and the interlocutors pronounced on the 8th of December, and signed the 9th December 1786, be reversed. A declaration was made, that the Court of Session was ordered

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to give the necessary directions for carrying the judgment into execution.

For the Appellant, *Alex. Wight, Geo. Ferguson.*
For the Respondents, *Ilay Campbell, R. Dundas.*

NOTE.—In a later case, Molle *v.* Riddle, the same point as occurs in the first branch of this case, was decided 13th December 1811, Fac. Coll.

MATTHEW BOULTON, Esq. and Others, Creditors of SAMUEL GARBET, late of Birmingham, and of Prestonpans, in Scotland, Merchant, a Bankrupt, - } *Appellants;*

MESSRS. MANSFIELD, RAMSAY, & Co. of Edinburgh, Bankers; MESSRS. DOUGLAS, HERON & Co., late Bankers in Ayr; and WALTER HOGG, Trustee for the Creditors of SAMUEL GARBET & Co. of Carron Wharf, - - - - } *Respondents.*

House of Lords, 18th April 1787.

COPARTNERY.—An agreement dissolved a Company, and transferred the retiring partner's interest in stock, &c. of the concern, to the other partners, but provided that he was still to have a share of the profits of the concern. In a question with creditors, held, that the person so retiring was still a partner of the firm, and liable as such.

A copartnership was entered into by Samuel Garbet and Dr. John Roebuck of Birmingham in 1750, for the period of 40 years, and had subsisted, and had been carried on under the firm of "*Roebuck and Garbet,*" until the year 1766. The object of the firm was, the manufacture of aquafortis, and refining gold and silver, chiefly originating with the invention and discoveries of Dr. Roebuck, and which manufacture was carried on in Birmingham. The Company had besides, other works at Prestonpans, in Scotland, principally for making oil of vitriol.

In January 1766, James Farquharson, one of their clerks,