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for the bills which form the subject of his appeal in the previous case against the appellant; and there is nothing in the specialties which he has attempted to raise that can free him from his liability.

Pleaded for the Respondent.—It is perfectly clear that the appellant can have no claim on the respondent for payment of the bills amounting to £3999, because, at the date on which he discounted, or advanced money on them to Hugh Mathie and Co., being posterior to the middle of February 1803, he knew the respondent was not a partner of Hugh Mathie and Co., and, consequently, could not be liable in obligations or bills granted by that company in matters with which he had no concern.

After hearing counsel, it was

Ordered and adjudged that the appeal be dismissed, and the interlocutors complained of be, and the same are hereby affirmed.

For the Appellant, *Tho. Plumer, M. Nolan.*

For the Respondent, *Wm. Adam, Sir Samuel Romilly, John Clerk.*

NOTE.—Unreported in the Court of Session.

(Fac. Coll. vol. xiii. p. 403, et Mor. App. 1. "Heir and Executor.")

JOHN FRAZER of Farraline, who and his Father, the deceased SIMON FRAZER of Farraline, were the Trustees under the deed of Settlement of MISS FALLS, } *Appellant;*

JOHN SPALDING, Esq., surviving Executor of the Will of the deceased Lieut.-Colonel HUGH FRAZER of Knockie, and JAMES BRISTO FRAZER, Factor *loco absentis*, appointed by the Court of Session over the Estate of his late Father, the deceased JAMES FRAZER of Gorthlic, Esq., another Executor, and Residuary Legatee under the Colonel's Will, . . . } *Respondents.*

House of Lords, 20th July 1812.

HERITABLE DEBT—PAYMENT OF—HEIR OR EXECUTOR—RELIEF—FOREIGN—DOMICILE.—(1.) A testator by his will, executed in London,

conveyed his heritable estate in Scotland to his heir at law. He next conveyed his moveable estate to executors, for the purpose of paying certain legacies, and also his debts, and the residue to his uncle. There were no debts owing by him, except an heritable bond for £2000, over the heritable estate in Scotland. It was contended by the heir at law, that the executors were, by the intention and words of the will, taken bound to pay the heritable debt. In an action of relief, held, that the words of the will, conceived in general terms, did not exempt the heir or disponee in the heritable estate from paying the heritable debt due upon it. (2.) The testator had left Scotland early in life, and was constantly abroad with his regiment on foreign service. He never returned to Scotland, except for a short time with his regiment. He afterwards died in London, where he made his will. Held, That the heritable bond above mentioned, was not a burden on the personal estate, according to the law of England, but was to be judged of according to the law of Scotland, where the heritable estate was, and to be paid by the heir taking the heritable estate on which it was an incumbrance.

Colonel Frazer inherited from his father a small estate called Knockie, yielding then about £30 per annum. His father dying while the Colonel was a boy, he was brought up by his uncle, James Frazer of Gorthlic. Having a fancy for the army, his uncle procured him a commission, and he went to India as a lieutenant in the 72nd Regiment, and afterwards became lieutenant-colonel of the regiment.

At a time when there was a prospect of there being a vacancy in the majority of the regiment, he wrote to his uncle, expressing a desire to purchase it. His uncle procured a loan of £2000 from Miss Falls; and as his own estate was inadequate as a security, Mr. Frazer not only became bound in the bond, conjunctly and severally, but conveyed, in farther security, his own estate of Torbeg, in addition to the Knockie estate. In this way the money was got, and his object accomplished.

Colonel Frazer afterwards acquired a fortune in India of £15,000, chiefly through prize money claims. He came home with his regiment to Great Britain, visited his estate of Knockie, which by this time had improved in value, and he then expended about £2000 on the improvement of the mansion-house and grounds. He died in London in April 1801, having executed there a will, disposing of his heritable and moveable estate. Had no will been made, the appellant's father, Simon Frazer, and, after his death, the appellant, would have succeeded to his heritable estate as heir at law.

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In this settlement, he therefore conveyed it, in the following terms:—" I do, by these presents, give, assign, convey, and " dispone my lands and estates of Knockie and Dalchapple, " with their appurtences, and all others my lands and real " estates, of every nature and kind soever, and wheresoever " situated in Scotland, to, and in favour of my cousin, " Simon Frazer of Farraline, and his heirs, assignees; and " I bind and oblige myself and my heirs to make up titles " to such lands and estate; and when so made up, to con- " vey the same, by proper instruments, agreeable to the laws " of Scotland, to them."

He then gave directions to his executors as to his personal estate, and states, " With regard to my personal estate, I " give, grant, devise, and bequeath the same in manner fol- " lowing, viz. In the first place, I order and direct that my " funeral charges and expenses, *together with all my just* " *and lawful debts, be paid by my executors* named, as soon " after my decease as conveniently may be." After bequeathing several legacies, he directed, after his whole debts (the only debt owing was the £2000), and legacies were discharged by the executors, that the residue should be conveyed to his uncle, James Frazer of Gorthlic, one of the respondents.

It occurred to the appellant, that, unless according to the expression of his settlement, " all his debts" was included the £2000, that the conveyance to him of the heritable estate, which was burdened with that £2000, would be literally conveying nothing to his father whatever. Accordingly, as trustees of the Miss Falls, an action was raised by the appellant against the respondents for the payment of the bond.

Besides special defences, this was met by a counter action of declarator and relief, at the respondents' instance, to have it found and declared, that the £2000 bond was a real burden over the lands of Knockie and Dalchapple, for which the heir and disponee succeeding thereto is alone liable, and not the personal estate and effects of the deceased Colonel Frazer, and for relief to that extent.

It was argued by the appellant, that unless the debt of £2000 fell to be paid by the executors exclusively out of the personal estate, the disposition of the lands to the appellant's father would be merely nugatory; that there was every reason to suppose that he meant to give Mr. Frazer of Farraline a succession of some value; but unless the bond was paid out of the personal estate, Mr. Frazer would take nothing, or next to nothing. And, finally, as the Colonel, at

the time of his death, and for a great many years before, was a domiciled Englishman, and his will made in England, and the most part of his estate there, the testament ought to be construed and to be executed according to the law of England, which lays the burden of the payment of heritable bonds and mortgages on the executors and the personal estate. It was answered, that the rule of law was, that the heir takes the heritable property, under the burden of the heritable debts, and the executors the personal property, under burden of the personal debts, unless the deceased declare in his will to the contrary. In the deceased's settlement there is no declaration contrary to the rule of law, whereby the heir is relieved of the heritable debt, and the payment of it is burdened on the executors; that no regard can be paid to the supposed intention of Colonel Frazer, if not expressed in his will. And, lastly, although he did not reside in Scotland for many years previous to his death, with the exception of the short time his regiment was at Perth, yet he ought to be considered as domiciled in Scotland.

The Lord Ordinary pronounced this interlocutor:—"The "Lord Ordinary having heard parties procurators, conjoins "the process of relief, at the instance of John Spalding and "others, the executors of Colonel Hugh Frazer against Si- "mon Frazer of Farraline, with the before mentioned pro- "cess, at Simon and John Frazer's instance, against Colonel "Frazer's executors: Finds the whole defenders conjunctly "and severally liable for payment of the heritable bond "libelled on; but, in respect the settlement by which the "lands of Knockie are disponed to Simon Frazer of Farra- "line, one of the defenders, could only import a right to "those lands, subject to the heritable debt with which they "were burdened, and that the clause, taking the executors "bound to pay the debts, cannot have the effect of altering "the right of relief between *him* and the executors, finds "the executors entitled to relief from Simon Frazer of Far- "raline, Esq., of the heritable bond libelled on, conform to "the conclusions of their action of relief, and decerns "accordingly." Jan. 27, 1804.

On reclaiming petitions to the Court, the Court adhered.* Nov. 15, 1804. July 5, 1805.

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* The Court of Session were of opinion, "that, without a special clause in the deed to that effect, the legal rules of accounting between heir and executor could not be altered."—Vide Fac. Coll.

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Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—1. Colonel Frazer, in his settlement, directed his executors to pay his just and lawful debts, which direction necessarily implies that the burden of these debts should ultimately fall on the personal estate. 2. Colonel Frazer left his residuary legatee his whole estate, exclusive of the lands of Knockie and Dalchapple, after payment of various legacies, of the expenses of his funeral, and of his just and lawful debts: therefore, the residuary legatee is entitled to demand the residue only, after payment of those expenses, legacies, and debts, and he has no right, under the will, to insist that the disponee of Knockie and Dalchapple shall relieve him of these debts. The cases, Lady Cunningham *v.* Lady Cardross, (Mor. 12493); and Denham *v.* Denham, 8th March 1765, (M. 5224), support these propositions. 3. It is a mere *questio voluntatis*, whether Colonel Frazer's heir, or his executors, are burdened with his debts; but the circumstances in which Colonel Frazer was placed, the state of his fortune, and the general scope of his settlement, all concur with the clear unequivocal form of expression which he has used, to show that he intended his executors should be ultimately liable. 4. The will was made and executed in England, where Colonel Frazer was also then domiciled, by the law of which country the heir has a right in equity to have his ancestor's debt paid out of his personal estate. If, therefore, the executors had been sued upon the bond in England, they could not have recovered as against the heir, if the real estate had been situated in England, even though there had been no such direction as that given by the will, which thus derives additional support from the laws of the country where it was executed, and the testator was domiciled. 5. Granting that the executors are entitled to relief from the heir, the action at the instance of Miss Falls' trustees ought not to have been conjoined with the action of relief at the instance of Colonel Frazer's executors, and the appellant ought not to have been found liable in payment of the heritable bond.

Pleaded for the Respondents.—1. If it were made a matter of proof, it would be easy to establish, if that were necessary to the issue of this cause, that Colonel Frazer meant that the heritable debt should not be a charge on the personal estate, but had determined that it should remain a burden on the lands. If it were competent to resort

to the evidence of Mr. Spottiswoode, and to Mr. Frazer, the gentlemen who drew out the settlement, it would be proved that these gentlemen made him aware that, as a matter of course, Simon Frazer would take the estate burdened with the heritable debt, unless, by an express clause, the estate was exempted from that burden. 2. Clauses in settlements burdening grantees with the payment of the testator's debts, in general terms, are construed as being merely for the benefit of the testator's creditors, and have no effect whatever in questions of relief between heir and executor, or between the different heirs or disponees, each of whom is primarily liable for the debts that are the proper burdens upon the estate, which he takes under the settlement, and which the law considers as his proper debts. Though a testator has it in his power, by proper clauses in his settlements, to burden any particular disponee or grantee with the whole of his debts, so as to lay him under an obligation to relieve the other disponees or grantees of such debts; yet, in the present case, the testator has put no such clauses into his settlements, and has indicated no intention that his successors in the moveable estate should relieve his heir or disponee in the heritable estate. And the general clause founded on indicates no such intention, and can have no such effect. The disponee in the heritable estate must therefore pay the debt, with which that estate stands burdened, upon the principle *res transit cum onere*. This has been settled by several decisions, which have received the final judgment of the House of Lords, viz. Rose *v.* Rose, 17th January 1786, (Mor 5229, House of Lords, 2nd April 1787; ante vol. iii. p. 66); Drummond *v.* Drummond, 17th May 1798, (Mor. 4478, House of Lords, 20th February 1799; ante vol. iv. p. 66.) 3. The question here being one in regard to real estate in Scotland, the same must be judged and governed by the laws of that country; and the circumstance of Colonel Frazer having died in England, and of having his personal property situated in that country, or in other countries where the law of England prevails, cannot affect or interfere with the succession to his real estate; and as land cannot, like moveable property, be transferred from one country to another at the pleasure of the proprietor, it must necessarily be subject to the rules and regulations of the jurisdiction within which it is situated; the rule, therefore, of the law of England cannot apply, that mortgages are a burden on the personal estate. Even if that rule did apply

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when followed out in the courts of England, the executors would still have relief against the real estate, as was found in Drummond's case. No doubt, in England, these heritable debts are charges on the personal estate; but the law is contrary in Scotland; yet, in some respects, it is similar. In England, a similar rule prevails to what prevails in Scotland, namely, that the personal estate is liable to pay heritable bonds or mortgages, unless the testator has exempted that estate from liability, and put the burden of payment expressly on the real estate; and Mr. Cruise, in his Digest, says, "Where a testator charges his lands with the payment "of his debts, this will not exonerate his personal estate, "for such a charge can only be intended for the purpose "of creating an additional fund, in case the personal estate "should not be sufficient." In Bridgeman *v.* Dove, Atkyns, vol. iii. p. 201, Lord Hardwicke said, "I know of no autho-"rity whereby the words, 'I make my real estate liable to "'pay my debts,' will exempt the personal estate with-"out any special exemption of such personal estate." Again, Lord Thurlow, in the Duke of Ancaster *v.* Mayer, laid down the following rules: "In the *first* place, the per-"sonal estate is liable, in the first instance, to the payment "of the debts; but, in exception to this, it is agreed that "the testator may, if he pleases, give his personal estate, as "against his heir or any other representative, clear of the "payment of his debts; and then it becomes a question, "what is the mode of expression to give the personal estate "exempt from such payment, when the rule of law is, that "such an estate is first liable? Perhaps it might not have "been unwise to have adopted the rule of law laid down in "Fereyes *v.* Robertson, *et al.*, that the testator must use "*express* words: but it is impossible to abide by the opinion "given in that case consistently with the rules in other "cases. The *second* rule is, that when there is a *declara-*"*tion plain*, that shall stand in lieu of express words. This "rule has been laid down so long, and acted upon so con-"stantly, that if other judges were to put the construction "of wills upon other grounds, how well soever it might "have been originally, it would be very unwise to make the "administration of justice take a course contrary to former "rules. Therefore, if there be a *declaration plain*, or ma-"nifestation clear, so that it is apparent upon the face of "the will that there is such a plain intention, the rule then "is, not to disappoint, but to carry such intention into exe-

Cruise Digest, vol. ii. p. 125. Also, Roper's Legacies, Ed. 1828, vol. i. c. 12, p. 595.

Atkyns, vol. iii. p. 201.

1 Bro. Rep. p. 462.

Bunbury's Rep. p. 301.

"cution. But should no such intention manifestly appear, "there is not a single case which does not take it for granted that the personal estate is by law the first fund for the "payment of debts." In a later case, Watson *v.* Brickwood, 9 Vesey, jun., p. 453, the rule, as above laid down by Lord Thurlow, was confirmed and adhered to.

Watson *v.* Brickwood, 9 Vesey, jun., p. 453.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be, and the same are hereby affirmed, so far as "in respect the set-"tlement by which the lands of Knockie are disponed "to Simon Frazer of Farraline, one of the defenders, "could only import a right to these lands, subject to "the heritable debt with which they were burdened, "and that the clause, taking the executors bound to "pay the debts, cannot have the effect of altering the "right of relief between him and the executors: Finds "the executors entitled to relief from Simon Frazer of "Farraline, Esq., of the heritable bond libelled on, con-"form to the conclusions of their action of relief, and "decern accordingly." And it is farther ordered, that with this affirmance, the said cause be remitted back to the Court of Session, without prejudice to any application by the appellant to the Court which he may be advised to make, touching the questions whether the processes should have been conjoined, and whether the appellant has been properly called in the action of these executors.

For the Appellant, *Sir Samuel Romilly, M. Nolan, Geo. Cranstoun.*

For the Respondents, *Wm. Adam, John Clerk.*

(Fac. Coll. vol. xiii. p. 544. Mor. App. Damage and Inter. No. I.)

THOMAS BOSWALL, late Merchant in Leith, now residing in Edinburgh, . } *Appellant;*
JAMES MORRISON, Merchant in Leith, *Respondent.*

House of Lords, 20th July 1812.

CONTRACT OF SALE—DAMAGES FOR NON-FULFILMENT.—Action was raised for delivery of four puncheons of spirits, or for damages for