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 per-'sons, by bond, bill, contract, decreet, or any other manner of way, and like-'wise 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.

No 16.
A father, in a disposition of his personal estate, burdened the disponee with payment of all his debts heritable and moveable. He executed af-

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 disponed '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 possest of; *proviso*, That the

No 16.
terwards an entail of his land estate, in which he burdened the institute and substitutes with payment of all his debts heritable and moveable, impowering the heirs of entail to sell as much of the lands as would pay the debts. Found that the disponee to the personal estate had no relief against the heir of entail for payment of the entailer's debts.

'said Dougal, and the heirs substitute to him, should be holden and obliged 'to pay the respective provisions made, or to be made to his other children, 'and to satisfy and pay all his just and lawful debts and legacies, &c.' And of the same date, he granted a bond of provision to his three daughters, Margaret, Lillias, and Helen, for L. 1000 Sterling, equally among them, in full of all they could ask, &c.

On the 8th June thereafter, he executed a tailzie of his land-estate, containing prohibitory and irritant clauses against contracting of debt, or alienating any part of the lands 'in favour of himself in liferent, and his son Dougal, 'and the heirs-male of his body in fee; which failing, to the other heirs-male 'of his own body; which failing, to Alexander Campbell his eldest natural 'son, and the heirs-male of his body; which failing, to John Campbell his se-'cond natural son by another mother, and the heirs-male of his body; which 'failing, to his three lawful daughters, Margaret, Lillias, and Helen in their 'order, and the heirs-male of their bodies, &c. And this tailzie also contained a *proviso*, 'That the said Dougal, his son, and his foresaids, and the heirs 'substitute to him, should be holden and obliged to pay the provisions of his 'other children; and that the lands and others above exprest should not only 'be affected and burdened with the payment thereof, but also with the pay-'ment of all debts that should be due by him at his death, and the implement 'of all his obligements that should be then unfulfilled; all which the said 'Dougal and other heirs of tailzie should by their acceptation be obliged to 'pay and fulfill, albeit the said bonds and obligations be only personal, and no 'infeftment has followed thereon.' And, by an after *proviso*, it was declared, 'that it should be lawful to the said Dougal and the other heirs of tailzie, to sell 'as much of the lands as will pay the debts resting at his death, and children's 'provisions, the purchaser being always obliged to see the price so applied, and 'to no other purpose.'

In 1737, Archibald Campbell of Shirvan died, and his estate heritable and moveable devolved upon Dougal his only lawful son; who thereafter dying an infant, the succession of the land estate fell to the eldest natural son Alexander Campbell now of Shirvan; and as there was no special appointment made of the person to succeed to Dougal in the personal estate, the same fell in terms of the above settlement to the collateral heir-male Dougal Campbell of Kilmartin; who, upon a transaction with the daughters, whereby they were to pay him 11,000 merks, and to relieve him of their father's debts, disponed to them his whole right to the personal estate, in virtue of the disposition above recited.

Upon this transaction, the daughters, in right of Campbell of Kilmartin, pursued Alexander, the heir of tailzie, for relief of the debts that were resting by their father at the time of his death; upon this ground, that from the several clauses and provisos in the tailzie, it appeared to be the intention of the granter, to lay his debts ultimately upon the heir of tailzie; particularly from that clause, whereby it is declared, 'that the lands should be burdened and af-

fected with the payment of all the debts he should be resting at his death, &c.' That clauses burdening a disponee with the payment of debts, such as that in the disposition to the personal estate, are no other than usual clauses of stile, which *de jure insunt*, but clauses burdening the lands are legal evidence of the granter's intention, that the debts should ultimately affect the heir succeeding in the lands. That as our law was understood to stand at the date of this deed, the disponer's debts would by this clause have been made real, even in a question with a singular successor; and though since that time our law has undergone an alteration, yet the granter's intention by such a clause does not therefore vary; wherefore such clauses still retain this effect, to shew the intention of the disponer to exclude that relief which otherways the disponee would be entitled to from the moveable estate; that this intention is further confirmed in this case, by the power given to the heir of tailzie, to sell lands for the payment of the debts; for which there was no occasion, if the heir of tailzie was to have relief from the personal estate, as that was more than sufficient to pay all the debts. And *lastly*, The decision, Lady Margaret Cunningham *contra* Lady Cardross, July 23. 1680, No 6. p. 2449. was appealed to, where, although there was no clause burdening the lands disponed, but only a clause declaring, that by the acceptation of the right, the disponee was to be bound to pay the debts, he was found to have no relief against the heir. No 16.

Answered for the defender, That where a person settles his estate, not by way of succession, but by disposition *inter vivos*, reserving a liferent and power over the estate to himself, the disponee takes not as heir, and especially if he be not *alioqui successurus*, the creditors cannot recover their payment, but by the circuit of a reduction upon the act of Parliament 1621; and therefore it is the universal practice, where one settles his estate upon a series of heirs, to burden the disponee, and the heirs succeeding to him, with the payment of the debts; and the intention of such burdening clause is understood only in favour of the creditors, to give them the like access against the disponee, as if he had taken the estate by service, but by no means to deprive him of the like relief that would have been competent from the moveable estate, had he taken the estate by service; and that so the law stands, even where the land estate only is disponed with such burdening clause, and the moveables left to go to the heir *ab intestato*, as was found in the case between Russel and Dall, No 15. p. 5211.

Nor does the decision, Lady Margaret Cunningham *contra* Lady Cardross, contradict this doctrine, as being in a special case, where Sir William Stewart, having a weak man for his eldest son, had disponed the bulk of his estate to his second son, with this provision, that by his acceptance, he should be bound to pay all his debts, leaving a small matter to descend to his eldest son for his subsistence, and which it could not be supposed he meant was to be affectable by the by the second son for his relief; and this being once established, that the clause burdening the disponee with the payment of the debts, does not exclude

No 16. his relief; such general clause, though also burdening the lands with the payment thereof, can have no different effect, as it does not make the debts real burdens upon the lands.

And as to the alleged speciality in the present case, that at the date of the deed, the law so stood, that this general burdening clause would have rendered the debts real, &c.; *answered*, *1mo*, That it was doubted, if at any time, a general clause respecting even debts to be contracted, rendered such debts real burdens. *2do*, Be that as it will, the law was known to be as it now stands, long prior to the date of the deed in question, even as far back as the judgment of the House of Peers *anno* 1720, in the case, Creditors of Innes against Duff, *voce* PERSONAL and REAL; which has ever since been followed; so that, *3tio*, The question is no other than what has been stated, whether in all cases a general clause in a disposition, burdening the disponee, and the lands disponed, with the payment of the disponer's debts, is to be held as laying the debts ultimately on the disponee, although, as the law now stands, it imports no more than a personal burden upon the disponee. And on this the foresaid decision between Russel and Dall was appealed to as in point; for in that case the clause was exprest with equal anxiety, and in the precise same words as in the present case, burdening not only the disponee, but also the lands disponed, with the payment of the debts; and nevertheless, it was found, that he had relief of the moveable debts out of the executry.

And as this is the legal construction of the burdening clause, it is also enforced from the circumstances of the case. All the question is, What was the defunct's will? His declared purpose was to rear up a family by an entail; first to his lawful son, next to his natural sons, and failing them, to his daughters; and that while he fences this entail with prohibitory and irritant clauses against alienation, or contracting debts, he should intend even to lay his funeral charges on it, and leave the moveables entire, and that even when his son was the institute both in the land and moveable estate, is so inconsistent, that no body can imagine it to have been his intention. *Lastly*, The two deeds, though a few days distant in dates, are one settlement, and there is no making that settlement consistent with itself, without supposing that he intended relief to the disponee in the land-estate, in the event of the several estates falling to distinct heirs. The disponee to the personal estate, and those substituted to him, are also burdened with payment of the debts; which is consistent according to the defender's doctrine, that both clauses were intended only for the benefit of the granter's creditors; but if it is supposed that the burdening clause subjects ultimately to the debts, the settlement is unintelligible, and one part of it inconsistent with the other; as in both the institute and substitute would be made ultimately liable.

And as to the clause in the tailzie, impowering the heirs to sell part of the lands for payment of the debts, nothing is more ordinary than such a clause in the

strictest entails; and particularly in the so often mentioned case of Russel and Dall, there was the very same clause, which was found to have no influence; for as it is not in any man's power to exempt any part of his estate from the diligence of his creditors; unless they be *aliunde* paid, the creditors might, notwithstanding the entail, proceed to adjudge, and the adjudications carry off the estate, and put an end to the family, which was intended to be perpetual; to prevent which, is the sole intention of such clause, that the heir may sell a part to preserve the rest. No 16.

Upon this debate, the LORDS were much divided; and at first, upon report, Jan 14 1747. 'Found that relief of the debts of the tailzier was competent to the pursuers in the right of Campbell of Kilmartin, against the defender heir of tailzie.' But upon advising petition and answers, upon the 17th February thereafter, 'Found that relief of the debts of the tailzier was not competent to the pursuers in the right of Campbell of Kilmartin, against the defender, heir of tailzie in the land-estate;' and again, on advising petition for the pursuers and answers, upon the July 1747, 'Adhered.'

In no cases are men so apt to be of different opinions, as in those that are called *quæstiones voluntatis*, nor in the nature of things can they be brought within one rule. Mean time, as this particular *questio voluntatis*, Whether one heir or another is intended to be ultimately liable in the debts? has generally its rise only from the conception of the burdening clause, so much may be thought to be established by the decision in this case, and that of Russel and Dall, that no clause, however anxiously burdening the heir or disponee, is to be constructed to exclude from the relief competent to him by the operation of the law, unless either the clause be such as makes the debts real burdens, or that by apt words such relief is excluded.

Fol. Dic. v. 3. *p.* 256. *Kilkerran*, (HEIR AND EXECUTOR.) *No* 4. *p.* 231.

N. B. This judgment was, upon an appeal, affirmed.

*** D. Falconer reports the same case:

DOUGAL CAMPBELL of Shirvine, in his son Archibald's contract of marriage, 1st July 1721, settled his said estate on the heirs-male of that or any other marriage; which failing, on a person to be named by himself, with consent of his son; and failing sons of that marriage, he settled certain provisions upon the daughters.

Afterwards he settled his estate by a strictly fenced entail, 12th December 1728, on himself and his son Archibald in liferent, and Archibald's son Dougal in fee, and the heirs-male of his body; which failing, on Archibald's other heirs-male of his body; which failing, on the three natural sons of Archibald *successive* and the heirs-male of their bodies.

Archibald Campbell of Shirvine, 28th May 1732, disponed his bonds heritable and moveable, and whole personal estate to Dougal Campbell his son;

No 16. and failing him, to the other heirs-male of his body; whom failing, to a person to be named by him by a writ under his hand; whom failing, to his nearest heirs-male with this provision, 'That the person benefited, should be holden 'and obliged to pay the respective portions and provisions, provided or to be 'provided by him to his other children, conform to the several bonds granted 'or to be granted by him to them thereanent, and also to satisfy and pay his 'just and lawful debts and legacies, and the expenses of his funerals, with and 'under which burdens and provisions that present right was granted and no 'otherwise;' and at the same time he gave a bond of provision to his three daughters for L. 1000 Sterling.

He made a tailzie of the estate of Shirvine, 8th June 1733, on himself in liferent and his son Dougal in fee, and the other heirs-male of his own body; and failing them, on his three natural sons; which deed contained these clauses: 'And further, it is hereby expressly provided and declared, that the said 'Dougal Campbell, my son, and his foresaids, which failing the other heirs of 'tailzie and provision above-mentioned, shall be holden and obliged to pay 'the portions and provisions of my other children, already procreated or 'to be procreated of my body, and the lands and others above expressed shall 'not only be affected and burdened with the payment thereof, and annual-'rents of the same, according to the tenor of my bonds of provision, granted 'or that shall be granted by me to them; but also with the payment of all 'debts that shall be due by me, at the time of my decease, and the implement 'of all obligements granted and to be granted, and which shall be then unful-'filled, all which the said Dougal Campbell my son and his foresaids, which 'failing the other heirs of tailzie and provision above-mentioned, shall be hold-'en by the quality and acceptation of this right, to perform and fulfil, albeit 'the said bonds and obligements be only personal, and no infeftment has fol-'lowed thereon.'

By a subsequent clause, it is provided, 'That it shall be lawful to the said 'Dougal Campbell my son, and his foresaids, and the heirs of tailzie above-'mentioned, to sell and dispone irredeemably, as much of the lands and others 'above specified as will pay such debts as shall be resting and due by me the 'time of my decease, and for payment of such provisions as shall be left by 'me to my other children, at any time in my life *vel in ipso articulo mortis;* 'providing always, that the purchaser shall be obliged to see the price of the 'lands so to be sold applied for payment of the said debts and provisions, and 'for no other purpose.'

Archibald Campbell having deceased, and also his son Dougal under age, the succession to the entailed estate opened to Alexander, one of the natural sons, and that of the personal estate to Dougal Campbell of Kilmartine, the disponer's heir-male, who made over his right, upon a transaction, to Margaret, Lillias, and Helen Campbells, Archibald's daughters; and they pursuing their brother for their bond of provision, and relief of their father's personal debts,

it came to a question, Upon which subject these burdens ought to be laid; whether as they affected by law, or upon the heritage, in respect, as was pleaded, it appeared by the anxious conception of the above clauses, the father intended to lay them upon that, especially seeing the heir had power to sell, to the extent he should be burdened with, when it was alleged the testator's moveables were much larger than his debts, and he had no probable view of being encumbered. It was further *urged*, That the tailzie by which the estate was subjected to the debts, was the *ultima voluntas*, containing a sufficient provision for natural children, and the heir-male was *prædilecta persona*. No 16.

On the other side, That both dispositions were made liable to debts in justice to the creditors; but this did not determine the disponees' relief between themselves; that the dates were so near that they could not be looked upon as separate deeds, but one settlement of succession, and the testator had not in his view the separation of the subjects; and so was not laying his debts upon one, to the ease of the other; it was plain, that in his son Dougal they were to be united, and failing him, some other person was intended to be named to the succession of the moveables, preferably to Kilmartine, probably the heir of tailzie in the estate; but the nomination had not been executed, by which accident the question had arisen; to this purpose it was observed, that the disposition to the moveables being not holograph, Shirvine, without naming the substitute to his lawful son, had reserved power to appoint one, as his design in favour of his natural children was a secret; but the tailzie being in his own hand he had expressed them.

Decisions cited for the pursuers, 23d July 1680, Lady Margaret Cunningham against Lady Cardross, No 6. p. 2449.; November 1685, Lord Ballantine against Dundas of Arniston, *voce* PERSONAL AND REAL; July 1719, Creditors of Innes of Coxton against Duff, IBIDEM; 18th February 1729, Geddes against Younger, IBIDEM; 10th January 1738, Creditors of Smith against his Brothers and Sisters, IBIDEM; 30th June 1714, Creditors of Ross competing, IBIDEM; 1731, Barclay against Gemmil, IBIDEM.

For the defender, 23d January 1745, Russels against Russel, No 15. p. 5211.

THE LORDS, 14th January 1747, "Found that relief of the debts of the tailzier was competent to the pursuers in the right of Campbell of Kilmartine, against the defender heir of tailzie in the land-estate."

On bill and answers they found, 17th February, "That relief of the debts of the tailzier was not competent to the pursuers in the right of Campbell of Kilmartine against the defender heir of tailzie in the land-estate."

On a bill for the pursuers, and answers, "they adhered."

Reporter, *Kilkerran.* Act. *A. Macdowal, J. Graham & Lockhart.*
Alt. *W. Grant & H. Home.* Clerk, *Murray.*

D. Falconer, v. 1. No 185. p. 249.