June 29. 1825. the charter of 1716. It may be important that the Court of Session should have an opportunity of considering, whether they mean to draw any distinction between the one set of lands and the other. I would propose to remit this for the Court to consider, whether the respondent has produced a sufficient title on which prescription can be founded; and whether the acts of possession and taking the coal in Tappuck or Tappuckstone, and Whiterig, respectively, in proof in the cause, are sufficient to establish a title by prescription in the respondent to the coals under the lands of Nicolton, Weetshot, Hillside, Gilmeadowland, and Parkhall, and under the lands of Whiterig, or any of them; and it is farther ordered, that the Court to which this remit is made do require the opinion of the Judges of the other Division upon the matters and questions of law in this cause in writing, which the Judges of the other Division are to give, and communicate the same; and after so reviewing the interlocutors complained of, the said Court do decern in this cause as may be just. In reviewing their interlocutors, if, in their judgment, they think any distinction can properly be made, that question will be quite open to them; and when the matter comes before your Lordships again, we shall know the opinion of all the Judges of the Court of Scotland as to prescription to coal under land, the surface of which belongs to another person, and whether that right of coal was lost by positive prescription or enjoyment. I propose to your Lordships to remit the cause with the directions I have stated.

J. CHALMER—J. RICHARDSON,—Solicitors.

No. 57. LIEUTENANT-GENERAL MONCREIFF, Appellant and Respondent.

PATRICK GEORGE SKENE, Esq. Respondent and Appellant.

Relief—Heir and Executor—Clause—Legacy.—1. A party having executed an entail of an estate in favour of a certain series of heirs, declaring that the heirs should be bound 'to pay and perform all debts payable and prestable by me or my ancestors, 'and every other claim and demand to which the said lands and others, or any part 'thereof, are now, or may happen by law to be subjected or made liable;' and also, unico contextu, a general disposition of the estates of which he should die possessed in favour of the same heirs, under a declaration, that 'the real and 'personal estate hereby conveyed is and shall be burdened with the payment of all my just and lawful debts;' and the succession to the entailed and unentailed properties having afterwards gone to different parties;—Held, in a question between them, (reversing the judgment of the Court of Session), That the two estates were liable in relief pro rata of a debt constituted by the granter over them both. And, 2. A legacy having been left by the granter of the above deeds, payable by one of the heirs and his representatives, in case of his succeeding to the estates; and he not having succeeded, and his representative having only got a part of the succession, while the other part went to the legatee;—Held, (reversing the judgment of the Court of Session), That the legacy was not exigible.

GENERAL ROBERT SKENE of Pitlour or Hallyards, in the county of Fife, entered into a transaction with the Duke of Athole for the purchase of the estate of Falkland at the price of L.16,000, but which, in consequence of his death, was not completed. He was succeeded by his brother, General Philip Skene, who, on the 10th of August 1787, executed two different deeds, the one being an entail of the estate of Pitlour or Hallyards, and other lands of which he was then in possession, and the other being a deed of settlement in relation to all the other property and effects of which he should die possessed. Both of these deeds were made in favour of himself, and the heirs of his body; whom failing, to Captain David Skene of the 28th regiment of foot, some time inspector of military roads in Scotland, his brother-german; whom failing, to David Skene, son of Captain David Skene, and the heirs of his body; whom failing, to Mrs Helen Skene, alias Moncreiff, his sister, relict of Colonel George Moncreiff of Redie; whom failing, to Patrick Moncreiff, Esq. of Redie, and the heirs of his body; whom failing, to a series of substitutes therein named. The entail contained the usual clauses, with a power of alteration and revocation, and a declaration that the heir succeeding to the lands should be bound 'to pay and perform all debts payable and pres-
'table by me or my ancestors, and every other claim and demand
'to which the said lands and others, or any part thereof, are now,
'or may happen by law to be subjected or made liable.' In the deed of settlement there was this clause,—'Reserving to me, not
'only my liferent use of the whole subjects hereby disponed, but
'also full power and liberty, at any time of my life, et etiam in
'articulo mortis, to alter or revoke these presents, in whole or in
'part, as I shall think proper; providing always that the real and
'personal estate hereby conveyed is and shall be burdened with
'the payment of all my just and lawful debts, and the charges of
'my funeral, and also with the payment of any legacies that I
'may think fit to legate and bequeath to any person or persons;
'under which express burdens and provisions these presents are
'granted by me.'

The transaction with the Duke of Athole was thereafter completed by General Philip, and a disposition of the estate of Falkland was executed in his favour on the 12th of October 1787, and the price paid, and the deed delivered, in November. In order to pay the price, General Philip borrowed L.16,000 from Sir Hector Monro, for which he granted an heritable bond over

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his whole estates, including both Pitlour and Falkland, on which infeftment was taken.

In February 1788 he made the following codicil:—'Where-'as by my will, my estates, real and personal, will fall to my 'brother David, and his heirs, and whereas, on failure of the 'heirs of his son, my nephew Patrick Moncreiff of Redie will 'succeed to the said property, now I do hereby direct, that in 'case the said Patrick Moncreiff, my nephew, does succeed to 'the said property, it is my will and orders, that he does imme-'diately, on such succession taking place, pay over to his brother, 'Captain George Moncreiff, of the 11th regiment of foot, the 'sum of L. 4000, for the purpose of promoting him in the line 'of his profession, or at his own option; and that he likewise 'release, acquit, and discharge him of and from all and every debt 'which now is or may be due by the said Captain George Mon-'creiff to his said brother, Patrick Moncreiff of Redie; and it 'is my will and orders, that this codicil may be equally binding 'upon the heirs, executors, and administrators of my nephew, 'Patrick Moncreiff, as it is upon himself.' His brother David died in March; and in June thereafter the General himself died at Dijon. David left an infant son, who succeeded, in virtue of the above titles, both to the entailed and unentailed properties: but he died in 1803 without issue. He was succeeded by his aunt, Mrs Helen Moncreiff, sister of the General, and widow of Colonel Moncreiff of Redie, who thereupon assumed the name of Skene, and made up titles under the respective deeds to the entailed and unentailed properties. Her eldest son, Patrick, died, leaving a son, the respondent Patrick George Skene, and she having a second son, the appellant General Moncreiff, she executed a mortis causa disposition in his favour of the estate of Falkland, of all the other unentailed property, and of her moveable effects. She died in 1816, whereupon the respondent succeeded to the entailed estate, and the appellant to that of Falkland, &c.

Two questions then arose between them,—1st, Whether the entailed estate was liable for a share of the heritable bond in favour of Sir Hector Monro, or whether the whole burden fell upon the unentailed property? and, 2d, Whether, as Patrick Moncreiff had not succeeded to the estates, and the succession had not been allowed to take place as provided by General Skene, the appellant was entitled to demand payment of the legacy in terms of the codicil from the respondent, as the heir of his father Patrick? To settle these questions the respondent brought an

action, concluding, 1st, That the appellant should be ordained to relieve the entailed estate of all the heritable debts and burdens by which it was affected; and, 2dly, That it should be declared that the appellant had no right to insist for payment of the legacy.

Lord Reston pronounced this interlocutor: 'Finds, that the 'entail and relative disposition executed by General Philip 'Skene, both of the same date, are to be considered as parts of 'the same general settlement: Finds, that ex figura verborum, 'as well as by the evident intention of the granter, his debts 'were to be paid out of the subjects conveyed by the disposi-'tion, without relief from the entailed property: Finds, that 'though the heritable bond granted to Sir Hector Monro, after 'the settlement, extends over both for the benefit of the creditor, 'this makes no alteration on General Skene's succession under 'the deeds which regulate the payment of his debts as at his death: 'Finds, that the late Mrs Helen Skene, having taken up both 'the entailed and unentailed property, was bound to relieve the 'entailed estate of the bond in question, and that that burden 'now devolves on the defender, as her gratuitous disponee; and 'decerns and declares accordingly: But finds, that by the 'second codicil executed by General Skene, the pursuer, in 'case of his succeeding under the general settlement, the event 'which has happened, was bound to pay the defender L. 4000 'sterling, and also to discharge the debts due by the defender to 'his (the pursuer's) father: Finds, that this obligation does not 'depend on the value of the unentailed property to be inherited 'by him, so that as, if the late Mrs Skene's debts had exhausted 'said property, the codicil would still have been effectual, it can-'not be lapsed from her exerting any faculty competent to her 'under the settlement; and therefore finds the defender entitled 'to the benefit of said codicil, and so far assoilzies him from the 'present action, and decerns.' To this judgment the Court adhered on advising two reclaiming petitions, with answers, on the 4th of December 1818, and 15th of February 1820.*

Both parties appealed,—General Moncreiff in regard to the heritable burden, and Mr Skene as to the legacy.

Appellant, (General Moncreiff.)—1. Although by the law of Scotland a creditor is entitled to recover his debt from any part of his debtor's estate, whether heritable or moveable, yet in ques-

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* Not reported.

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tions of succession, and inter heredes, the debts are distributed into classes, affecting, according to their nature, one or other portion of the estate, and leaving the rest unaffected. Thus, an executor may be compelled to pay an heritable debt to the creditor, but he is entitled to relief from the heir; and, on the other hand, if the heir pay a personal debt, he has relief from the executor. A similar rule applies to heritable debts secured on different portions of the defunct's heritage, descendible to different classes of heirs. The respective estates are regarded in relation to the creditor as joint and several debtors, so that he may exact payment either from the one or the other, or from both; but in a question of relief, as between the two estates, they must contribute pro rata. This rule receives effect in every case where the ancestor has not, either by express words or a clear manifestation of will, excluded the right of relief; and therefore the question here is, Whether there is any such expressed or implied exclusion? It is admitted that there is no such express clause; and both the entail and the deed of settlement contain an obligation, that the respective heirs succeeding shall be bound to pay the debts of the granter. So far, therefore, from there being any clear manifestation that the whole debts were to be exacted from the unentailed property, there is an express declaration that the whole estates shall be jointly liable; and therefore effect must be given to the rule in law relative to the right of relief.

2. By the codicil it was declared, not only that the obligation to pay the legacy and discharge the debts due by the appellant to Patrick should be imposed on Patrick, but that it should be equally binding upon his heirs, executors, and administrators, and therefore it must be effectual against the respondent as his representative. It is no doubt true, that the respondent had not succeeded to the unentailed lands; but there was no condition to that effect in the codicil; or at least the condition there mentioned must have been intended to have had reference to the entailed succession to the property, seeing that there was no certainty that the respondent could succeed to that which was unentailed.

Respondent, (*Mr Skene.*)—1. The plain object of General Skene, when he unico contextu executed the entail and disposition, was, that his entailed property should be taken free and unencumbered, and that the debts affecting it should be paid out of his other funds. Accordingly, the obligation inserted in the deed of settlement was, that the property should be chargeable with 'all his just and lawful debts;' whereas that in the entail was merely to pay those 'to which the said lands and others, or

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'any part thereof, are now, or may happen by law to be subject-'ed or made liable.' It is plain, therefore, that what he meant was, that while the heirs of entail should be bound to pay those debts for which the estate might 'by law' be affected at the suit of any creditor, yet that his unentailed estates should ultimately be liable, and bound to relieve the entailed property. Indeed, any other construction would be inconsistent with the fundamental principle on which an entail is executed, which is to perpetuate the succession of a particular estate; for if the debts were to be thrown upon it, then that succession would to a great extent be defeated. Although, therefore, the general rules laid down by the appellant were well founded, they would have no application to the present case.

2. It is manifest, that when General Skene executed the codicil, he contemplated that the succession, both to his entailed and unentailed property, was to vest either in Patrick or in the respondent, and on that supposition he made the provision for the appellant. But the respondent has been deprived of a very valuable part of the succession, and therefore it is impossible that, consistently with the testator's will, the appellant can be found entitled to the legacy.

The House of Lords pronounced this judgment:—'The Lords 'find, that the appellant is not bound to relieve the entailed es-'tate of the debt of L. 16,000, with interest, but that such debt 'ought to be borne and paid by the respondent and the appel-'lant, rateably, and in proportion to the several estates charged 'therewith: And the Lords further find, that, in the events 'which have happened, the bequest of L. 4000 is not exigible or 'demandable from the appellant in the cross appeal; nor is he 'bound to release and discharge the debts due at the date of the 'codicil, or since, from the respondent to the father of the said 'appellant in the cross appeal: And it is therefore ordered and 'adjudged, that the interlocutors complained of in the said ap-'peals, so far as they are inconsistent with these findings, be re-'versed: And it is further ordered, that the cause be remitted 'back to the Court of Session to proceed further therein accord-'ing to this judgment, and as shall be just.'

Appellant's Authorities.—(1.) Carnousie, July 22. 1630, (5204.); 3. Stair, 5. 18.; 3. Ersk. 7. 52.; Drummond, June 7. 1798, (4478.); Rose, Jan. 17. 1786, (5229. reversed April 2. 1787); 3. Ersk. 3. 48.; Russell, Jan. 23. 1745, (5211.); Fraser, Nov. 13. 1804, (No. 3. App. Heir and Ex., affirmed July 20. 1812); Cruise Dig. 167.; 3. Aitk. Rep. 201.; 1. Bro. Rep. 262.; 9. Ves. Junior, 453.; Carr, July 19. 1751, (Elch. No. 41. Taillie.)

A. MUNDELL—J. CHALMER,—Solicitors.