No 18.

then taken up, and the extent of them to be ascertained at that period; and therefore, if a defunct had obligations due to him that depended upon distant events, which might or might not exist after his decease, such obligations, though merely personal, will not fall under his executry; *e. g.* if he had acquired a liferent annuity due to a third party, or had entered into a contract of victual for a tract of years, all such obligations, *cujus dies cedit de anno in annum*, will fall to his heirs, and not to his executor; and, *e contra*, obligations of that nature will ultimately affect the heir, who is entitled to a permanent succession, and not the executry, which comprehends only what is *in bonis defuncti* at the time, and cannot from the nature of the thing admit of a *tractum temporis*.

2*do*, Alexander's taking the investiture to the heirs in general, which would have made it go to the heir of the marriage, was a virtual implement of the contract.

"THE LORDS found, That in this case the heir is entitled to relief against the executor."

For David Mullo, *Lockhart*. For James and Robert Mullos, *Ferguson*.

F. D. *Fac. Col. No* 152. *p.* 270.

No 19.

An heir found entitled to relief of an annuity and a legacy, from the executor, although the estate had been disponed under the burden of debts and legacies.

1765. *March* 8. JAMES DENHAM *against* WILLIAM DENHAM.

JAMES DENHAM, joiner in London, disponed the lands of Birthwood to James Denham his nephew. He also disponed part of his personal estate to the second son of James, and the residue to James himself, under the burden of his debts and legacies, which were all cleared off by James, except a legacy of L. 100 Sterling due to one person, and an annuity of L. 12 Sterling due to another.

After the uncle's death, James disponed the lands of Birthwood to his eldest son William, with warrandice from his own proper facts and deeds; and power to burden them with any sum not exceeding 16,000 merks.

James exercised the faculty, by disponing the lands, to the extent of the 16,000 merks, to a trustee for his wife and younger children, declaring that the trustee should be bound, 'in the first place, to pay all his just and lawful debts, 'which should be owing by him at his death, in so far as the said William Den-'ham, by his acceptation of the foresaid dispositions, shall not be found liable 'or obliged to pay the same.'

Upon James the father's death, the question occurred, Whether William, the eldest son, was entitled to relief out of the 16,000 merks, with which the lands were burdened, of the legacy of L. 100 and annuity of L. 12, which still remained due?

Pleaded by the trustee; Nothing can be inferred from the obligation to pay such debts as the heir should not be found liable for; but, that the testator was desirous that justice should be done to his creditors, leaving the right of mutual relief among his representatives to the direction of law; but, by law, the heir is liable for his father's debts, as having possessed the estate *præceptione hæreditatis*, in virtue of a gratuitous conveyance. No 19.

Nor is the heir entitled to found upon the obligation of warrandice in the disposition. So it has been found with regard to debts contracted by the father himself, 11th December 1679, Creditors of Mousewal *contra* the Children, No 60. p. 934. And it must hold, *a fortiori*, in the case where the debts, being legacies imposed by James the uncle, can, in no sense, be considered as arising from the facts and deeds of James the father.

Answered for the heir; Though he is liable to the creditors *præceptione hæreditatis*, that makes no difference in the question between him and the chargers, who are no less liable for payment of the debts. These debts were burdens imposed by James the uncle, who, when he had it in his power to lay them upon the lands of Birthwood, declared them to be burdens upon his personal estate; and James the father made no alteration in that respect.

The disposition of his estate would have been elusory, had the father retained the power of burdening it without limitation; the extent, therefore, was specified, to which the lands might be burdened; all farther burdens were guarded against by the clause of warrandice, which ought to secure even against the debts left by James the uncle, as it was the fault of the father that they were not paid; at any rate, the clause of warrandice would not have been inserted, had it not been intended that William should receive the estate free of any burden beyond the 16,000 merks.

'THE LORDS found, That William Denham is entitled to be relieved of the annuity of L. 12, and the legacy of L. 100 Sterling; and that the executry of the deceased James Denham is liable, in the first place, for the said sums, and the sum of 16,000 merks liable for the said debts only in the second place; and that William Denham is entitled to retain that sum to the value of the said two debts.'

For the Charger, *Miller, Advocatus, Wight.* Alt. *Lockhart, Rae.*

G. F. *Fac. Col. No 8. p. 210.*

1773. *June* 23.

The Honourable JOHN ARBUTHNOT, second Son of the VISCOUNT of ARBUTHNOT, and the said VISCOUNT, his Administrator-in-law, *against* MRS AGNES ARBUTHNOT.

No 20.
It is the nature of the

THE estate of Finart, the property of John M'Farlane, having been incumbered with debts, partly secured by voluntary infeftments, and partly by adju-