

*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.

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.

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

No 20.  
It is the nature of the

No 20.  
obligation  
granted for  
the price of  
lands pur-  
chased at a  
judicial sale,  
and not of  
the debts  
ranked there-  
on, that re-  
gulates the  
relief, *quoad*  
these debts,  
between the  
purchaser's  
heir and ex-  
ecutor.

dication, an action of ranking and sale of that estate was brought, at the instance of the creditors; and the same having been purchased at the sale by John Rowan, writer to the signet, who granted bond, in common form, for payment of the price, payable to the creditors as ranked, decree of sale went in his name accordingly.

John Rowan having acted, in the premises, only as trustee for James Arbuthnot, he, by deed dated 27th November 1747, declared the trust, and granted a conveyance of the lands thereafter in his favour; and James having died in 1747, without issue, these lands devolved on Robert Arbuthnot, who procured himself served and retoured heir in general to his brother, whereby he carried the disposition of the foresaid lands, on which no infeftment had followed in James's person.

Robert, who survived James but a short time, made a settlement in favour of John Arbuthnot, the second son of the Viscount, then under age, and whom the creditors of James having attached for their payment, and it being judged necessary that Robert's estate should be sold, warrant was obtained for that purpose; and, when sold, the creditors, both of James and Robert, were paid, out of the price thereof, the respective sums due to them.

Thereafter, the present action was brought, at John's instance, against Mrs Ann Arbuthnot, the executor of James, concluding, that she should be decreed to make payment to the pursuer of the particular sums therein mentioned, which were paid by him, of the debts that were owing by the said James Arbuthnot, and also to relieve him of a debt of the said James Arbuthnot still outstanding. And in this action the Lord Elliock Ordinary 'repelled the defences, so far as concerns the debts due to the creditors ranked on the price of the estate of Finart, and the debt due by bond to Matthew Henderson; and found Mrs Ann Arbuthnot, defender, as executor of her brother, James Arbuthnot, liable in payment of the same.'

*Pleaded* in a reclaiming petition; As, in the course of legal succession, the heritable estate goes to the heir, and the executry, or personal estate, to the other nearest of kin, each of these *transit cum suo onere*. The heritable debts must be paid by the heir out of the heritable estate; and the moveable debts are a burden on the executry, and must be paid therefrom. Though both estates are equally liable to the creditors, they are entitled to mutual relief against each other, in so far as either have paid debts which do not ultimately fall upon them. And, as the debts in question had a real lien upon the estate, secured by infeftments or adjudications, and as these were not loosed by the judicial sale of the estate, but remained still a real burden upon it, they must fall ultimately on the heir, and not on the executor.

The pursuer's observation, that a debt may be heritable *quoad debitorem*, and personal *quoad creditorem*, *et vice versa*, is nowise applicable to the case in hand. The debts were heritable, both *quoad debitorem et creditorem*, being actually secured on lands, the property of James Arbuthnot, which undoubtedly made them heritable *quoad debitorem*.

*Answered*: As the right of succession is regulated by the *animus* of the creditor, so the question of relief between the heir and executor is regulated by the *animus* of the debtor.

Where the debtor grants a real security to the creditor, for his payment, as he has, by his own act and deed, made the same a real burden on the estate, the law does not presume it was the intention of the debtor, that the same should remain ultimately a burden on his heir; and, consequently, if he pays, he pays without relief; and, if it is paid by the executor, the executor will be entitled to be relieved thereof by the heir. But that is not the case at present. The obligation which, in this case, was granted by James Arbuthnot, or, which is the same thing, by John Rowan, his trustee, is a mere personal obligation, in common form, for payment of the price to the creditors, as they should be ranked.

It is no doubt true, that the debts were really secured on the lands; but then that real security was not created by the act and deed of M'Farlane, the original debtor; and there is no doubt that, in a question between his heir and executor, these debts would have been ultimately a burden on the heir; but the additional security that was given to the creditors by the purchaser, from its nature, burdened the executor, and the personal estate, and of which, therefore, the heir fell to be relieved by the former.

Again, it is a trite distinction in our law, that obligations may be heritable *quoad creditorem*, but moveable *quoad debitorem*. Thus, bonds excluding executors, though they descend to the creditor's heirs, are payable by the debtor's executors, without relief from the heir; as the debtor's succession cannot be affected by the destination of the creditor. And the present case is likewise a very proper instance of it. These debts being really secured on the lands, so the supervening personal security granted by the purchaser, will not render these debts moveable, but the real security, as the *jus nobilius*, must remain, and regulate the succession of the creditor. The real securities, however, created by the act and deed of M'Farlane, cannot affect the succession of the purchaser; and, as he came under no more than a mere personal obligation, for payment of the price to the creditors as ranked, that obligation cannot, in the least, be affected by the nature of the creditor's rights, but must be performable by the purchaser's executor, out of his personal estate.

The respondents do not dispute that the debts do remain a burden on the estate, after the purchase, as much as before it, and that these burdens must likewise affect the heir; but the question is, Whether the heir is entitled to be relieved of these burdens by the executor? And it is contended, that, as the purchaser granted a personal obligation to pay the price to the creditors as ranked, that so he might be entitled to take the estate, disburdened of the debts of his author, that this personal obligation must be made good, after the death of his executors. Indeed, the debts cannot, with propriety, be said to be a burden on the estate of the purchaser. The estate is not the estate of James Ar-

No 20. butnot, until the price is actually paid to the creditors ; and, therefore, the price cannot be said to be a burden on his estate. The decree of sale does not give a right to the purchaser ; it gives no more than a conditional right, viz. on payment of the price to the creditors, as ranked ; and on James Arbuthnot's death, it was incumbent on his executors to purify that condition.

' THE LORDS adhered to the Lord Ordinary's interlocutors, and found Mrs Ann Arbuthnot only liable to the extent of the inventory.'

Act. *M<sup>c</sup>Queen.*

Alt. *Dean of Faculty.*

Clerk, *Gibson.*

*Fol. Dic. v. 3. p. 257. Fac. Col. No 74. p. 180.*

1782. November 19. SAMUEL BROWN *against* PATRICK BROWN.

No 21.  
Found, that  
the heir-  
general is  
liable to re-  
lieve the heir  
of conquest.

\* \* See, as explanatory of this case, a prior question between Samuel Brown and Peter Blackburn, *voce* PASSIVE TITLE.

THE pursuer having failed in obtaining relief from Mr Blackburn, as intruder with the personal estate, insisted against Mr Patrick Brown, as heir-general to the deceased, and consequently liable to relieve the heir of conquest from all obligations not immediately affecting the subjects falling under the succession of the latter.

*Pleaded* in defence ; The grandfather of the deceased left four sons. The defender represents the eldest ; the pursuer the second ; the defunct was the son of the third ; and there was likewise a fourth son, who had issue. As by the law of Scotland the heritage or general representation of the deceased brother or uncle descends to the next younger brother or uncle ; the representative of the fourth son, and not the defender, who is the descendent of the eldest brother, is heir of line to the deceased. In England again, the law of which regulates the succession in the island of Jamaica, as the real estate of every denomination goes to the eldest brother, the defender, in place of being obliged to relieve any other heir, would be entitled himself to the succession.

Hence, as matters stood at the predecessor's death, the period when rights of succession are finally ascertained, the present claim was altogether incompetent ; nor ought the extraneous circumstance, of the defender's having a residence in Scotland, to subject him to that right of relief, which the peculiarity of the law of this country indulges to heirs of conquest.

*Answered* ; In whomsoever the general representation of the deceased is vested, that person must be liable primarily to all his debts. Heirs of a particular denomination, such as conquest, provision, marriage, or heirs-male, who succeed to the subjects specially devised to them, either by provision of law, or the destination of the proprietor, are considered, with regard to him, as singular successors, and their several interests admit no defalcation, while he who is held to be *eadem persona cum defuncto* is possessed of effects sufficient for their relief.