of relief arising from the making such repairs, likewise was a moveable claim descending to his executors, and found that the pursuer having paid these repairs, has right to be repaid of the same out of the first and readiest of the mails and duties of the subjects repaired, and therefore preferred the pursuer, and decerned;" and refused a petition reclaiming against this interlocutor, without answers. No 17.

The view the Lord Ordinary explained himself to have taken in this case, was, that Henry Halyburton had by his adjudication, the legal whereof was expired before his application for the warrant to repair, acquired the irredeemable property, against which there lay scarcely a possibility of a challenge, as his accumulated sum and interest then due exceeded the sum at which the inquest had valued the subject, and that no other creditor appeared to have adjudged, and that therefore the executor had no relief against the heir in this case, more than the executor of any other proprietor will have relief against his heir of any debt that may be resting at his death to tradesmen whom he had employed to repair his house.

But the Lords took the matter in a different view, and as nothing differing from the common case of repairs made by a creditor upon a tenement in burgh upon the warrant of a Judge; for, supposing the legal to have been expired, the same was opened by the application for the warrant to repair; and in all those cases, as by the law in burgh, the tradesmen who had been at the expense of making the repairs, had a preference upon the subject for their payment, as well as a personal action against the representatives of the employer; so when the executor pays that debt, he is in the like case with an executor who pays a moveable debt, in which the defunct was bound cautioner, and had got an heritable bond of relief, where, though the debt as moveable, affects the executor, yet he will have relief in virtue of the heritable bond out of the estate of the principal debtor affected by it.

Fol. Dic. v. 3. p. 255. Kilkerran, (HEIR AND EXECUTOR.) *No. 5. p. 235.*

1758. *December 20.* DAVID MULLO *against* JAMES and ROBERT MULLOS.

No 18.
An heir was found entitled to relief from the executor of the provisions in a contract of marriage, although the obligant in the contract had bound himself to lay out money or land for these provisions.

BY marriage-contract, in the year 1743, betwixt Alexander Mullo and Christian Robertson, Alexander had 'bound and obliged him, his heirs and 'executors, at and against the term of Whitsunday thereafter, to provide and 'have in readiness, of his own proper means and effects, the sum of 10,000 'merks; and to ware, employ, and bestow the same, upon land, or other 'good security, for annualrents; and to take the rights and securities to be 'be granted therefor, conceived in favour of himself, and the said Christian 'Robertson, his promised spouse, and longest liver of them two, in liferent, 'and to the child or children to be procreated between them of said marriage, 'their heirs, executors, or assignees, in fee; and failing of children, L. 1000

No 18. ' of said principal sum, to fall, accresce, and belong to the said Christian Ro-
' bertson, her heirs, executors, or assignees, in case she shall happen to sur-
' vive the said Alexander Mullo, her apparent husband.'

An after clause in the same marriage-contract is in the following words: ' And in order that the said Christian Robertson may be the better secured in ' the regular payment of the annualrent of the foresaid principal sum of 10,000 ' merks, in case she shall happen to survive him, he thereby binds and obliges ' him and his foresaids thankfully to content, pay, and deliver, to the said ' Christian Robertson, during all the days of her lifetime, after his decease, ' an yearly annuity or jointure of 500 merks, or any other annualrent agree-' able and corresponding, by the laws of this kingdom for the time, to the ' foresaid principal sum of 10,000 merks.'

After this marriage, Alexander purchased a tenement of houses in Dundee, of L. 20 yearly value, the rights of which he took, not in terms of the contract of marriage, but, in general, to himself, his heirs and assignees.

Alexander died in the year 1755; Christian Robertson survived him; there were no children of the marriage; his subjects were the above tenement, and L. 700 of personal estate.

When on death-bed, Alexander executed two settlements; by the one, he conveyed his moveable subjects to his nephews James and Robert Mullos, and burdened them with the payment of 200 merks of his wife's jointure provided to her by the above contract of marriage; by the other, he disponed the tenement in Dundee to another nephew, Alexander Mullo; with this proviso, ' Pro-' viding and declaring, that the said Alexander Mullo shall, by acceptation ' hereof, be expressly bound, burdened, and obliged, to content and pay ' yearly to Christian Robertson his spouse, during all the days of her life, after ' his decease, the sum of 300 merks Scots, as a part of the yearly jointure ' provided to her by the marriage-contract entered into between them.'

David Mullo, heir of conquest to Alexander, brought a reduction of Alexander's disposition of the tenement to his nephew Alexander on the head of death-bed, and prevailed in it. But James and Robert Mullos, the legatees of Alexander, and who were likewise, with others, executors to him, appeared for their interest in the process, and claimed relief of the sum of 300 merks yearly, payable to the relict, as provided by the death-bed disposition, to which extent they insisted to support the validity of the death-bed disposition.

Pleaded for David Mullo; Alexander Mullo, by taking the investitures of the tenement to his heirs in general, did not implement the obligation in his contract of marriage, to take to his wife and self in liferent, and children of the marriage in fee. This last provision therefore remained only *in nudis terminis* of a personal obligation, and as such was ultimately prestable by the executor, who was bound to relieve the heir thereof. Neither could that obligation be transferred from the executor upon the heir, upon the footing of the second clause above mentioned of the contract of marriage; for the first clause

is the primary, principal, and capital obligation; the after clause is only an accessory obligation to the other. It is so immaterial, that nothing is therein expressed which would not have been implied, whether expressed or not; it being plain, that if the husband was bound to lay out 10,000 merks for the wife's liferent, he and his representatives would have been liable to her for the interest of the money whether laid out or not; and therefore any question of relief betwixt the heir and executor must be regulated by the governing clause; in which view that clause never having been implemented, the implement of it lies now upon the executor. No 18.

Answered; 1mo, There is no law that establishes a privilege to a clause first inserted in a writing, to abolish the subsequent clauses of the same deed. All the clauses, whether first or last in point of order, are to be considered equally as declarations of the will of the parties, and to have their full effect in the several events for which they are calculated. Nor is it to be presumed, that any clause is added that is entirely insignificant or useless. It is to be presumed, that the parties had a view to a different event in the second clause; if it will admit of that construction, any construction will be taken rather than to suppose they meant to say nothing, or *nihil agere*. Now, it is obvious that there are two separate events, to which these clauses fall respectively to be applied. The *first* is, Where the wife and children shall happen both to be creditors to the father at his decease. The *second* is, Where there are no children existing, but the wife is the sole creditor upon the contract. In the *first* event, the father is bound to lay out the sum in favour of himself and his wife, and longest liver, in liferent, and the children of the marriage in fee. But for the *other* event, when there happens to be no children, and the wife is the only person who has an interest in the provision, the other clause is adapted for securing her in the due payment of the annuity or annualrent yearly, during her life. Suppose the wife had been past child bearing at the time of the marriage, no writer could have inserted the first clause in the contract; the second would then have been thought the only proper obligation to lay upon the husband, viz. to pay or secure to his wife a yearly annuity, to be paid to her in case of survivance; and if that would have been the only clause, had the event that has now existed been foreseen at the time, it seems pretty plain, in constructing the effect of the obligation, that that is the clause to be chiefly considered; and not the other, which was calculated for a different event that has not happened.

Now, this being taken for granted, it is an indisputable point, that an obligation for payment of an annual sum, which is to take place after the debtor's death, will affect his heirs principally; and the executors, if sued on it, will be entitled to relief against the heir. This takes place, though the obligation has no respect to lands; and the reason is, that the executry is a limited succession, which comprehends only the moveables that belonged to a defunct at the time of his death. They are supposed to be all contained in an inventory

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?