

1709. December 24.

PATRICK GELLIE and Mr ALEXANDER THOMSON, Executors to THOMAS BURNET Merchant in Aberdeen *against* ROBERT PANTON Merchant in Campvere, and GILBERT STUART Merchant in Edinburgh.

THOMAS BURNET having named Patrick Gellie and Mr Alexander Thomson his executors, and left to Andrew Burnet his nephew 6000 merks Scots; to John Burnet, Andrew's brother, 3000 merks; to Elspeth and Bessie Burnets, his sisters, 4000 merks; and all these sums to be liferented by John Burnet elder, father to the legatars; with power to the executors, without consent of John Burnet elder, to pay the 6000 merks to Andrew, or so much thereof, and at such times, as they should think fit, they always paying the superplus of what they kept off him to his brother and sisters, by such proportion as they, with consent of John Burnet elder, shall think expedient.

THE LORDS found, that the executors could not, after old John Burnet's death, exercise their power to evacuate the legacy left to Andrew Burnet by ordaining the whole to be paid to his brother and sisters, in prejudice of Robert Panton, Andrew's lawful creditor; and found the said legacy subject to the payment of a bill of exchange for 1231 gilders drawn by Andrew upon the executors, payable to Robert Panton. Albeit it was *alleged* for the executors, that since a legacy might be effectually left *in arbitrio tertii*, L. 43. § 2. *D. De Legat. 1.*, and even might be made payable by the heir to this or that person he pleased, L. 16. *D. De Legat. 2.* or the proportioning thereof among the legatars might be committed to his discretion, L. 3, § 2. *D. De annuis legatis*, it is clearly in the power of the executors, who are *heredes in mobilibus* to pay the whole legacy in question to Andrew Burnet's brother and sisters, passing by himself. In respect it was *answered* for Robert Panton, That the laws cited for the executors, concern the case of a legacy transferred by the testator, *de persona in personam*, or left by him with this quality, 'if the heir please;' or a legacy whereof the terms of payment are referred to the heir's arbitrement; neither of which is the present case, where the executors pretend to evacuate Andrew's legacy in prejudice of his just and lawful creditor, which they cannot do; seeing the testator having left 6000 merks to Andrew, and only 7000 to the other three, is presumed to have had most affection for him, and not to have designed that the executors should put him in a worse case than the rest. The faculty given to the executors to pay the whole, or a part to Andrew, without his father's consent, was in Andrew's favours, and could only be exercised in the father's lifetime, who had interest in the disposal of the superplus more than was paid to Andrew. For had the testator designed, That the executors should have power so to restrict and dispose of Andrew's legacy, after the father's death, these words, 'without his (i. e. the father's) consent,' would not have been adjected, as needless at a time when his interest by the liferent ceased.

No 18.

A person left a legacy in liferent, with power to his executors to apportion the fee as they pleased, to persons named, without consent of the liferenter. Found, they could not exercise this power after the liferenter's death.