

1711. December 14. WILLIAM COCKBURN of CAULDRA against ADAM GRAY.

ADAM Gray, feuar in Dunse, being debtor to William Nisbet, flesher there, in £457, by bond; Nisbet, in his testament, nominates William Cockburn of Cauldra, his executor, and, amongst other legacies, he leaves and bequeaths the said L.457 bond to William Gray, son to the said Adam, and assigns him specially to it. Cauldra confirms the testament, and charges Adam the father, with horning, to pay to him the sum of the bond; who gives in a complaint to the Lords, That the horning and charge was most unwarrantable; for, *in græmio* of the same testament making you executor, is my legacy ingrossed; so you can never misken it, and was *in pessima fide* to seek it up, when, at the same moment, I could force you to give it back again, *nam frustra petis quod mox es restituturus*. If it had been in a separate codicil, you might pretend ignorance; but being incorporated with your own right, it makes you inexcusable. And, as to general legacies, though executors may uplift them, and the legatars are to get them *ab ejus manu*; but where it is special of an individual subject, the property and dominion is directly stated in the legatee, that he can *rei vindicatione* recover it. And, as he has the *incommodum*, if the subject perish, or the debtor turn insolvent, he has no warrandice against the executor to make it up, but it perishes to him: so he ought to have the benefit of enjoying it, free of all defaulcation or abatement, except in the case where the inventory is exhausted by debts. And it was both illegal and unjustifiable in him to charge for the debt, when he knew he was obliged, by the defunct testator's order, to deliver up the bond: for, where one legates to the debtor himself his own debt, that is called *legatum liberationis*; but when he leaves the bond to a third party, it is called *legatum nominis*. See also the decision, 21st July 1665, *Spreul* against *Murray*.

ANSWERED for Cauldra the executor,—1mo, I have done no wrong in charging you, for I am burdened with several debts, and the prestation of some facts; till which be performed, I know not how far the defunct's effects will answer; and, therefore, you must pay it in to me, till the event tell how far it will be free. 2do, I, not being a depender on the house, cannot be thus summarily convened on a bill.

Some thought the executor had the *jus exigendi*, as well as the special legatar, and that the power was cumulative. Others thought the special legatar had immediate access to it, on his finding caution to refund, if the debt exhausted all. But others said, this was not the proper place for trying this fact, and that it would best come in by way of suspension. And therefore they ordained Gray to expedite a suspension, without either caution or consignment; which would bring in the whole, and make it appear if the charge was warrantable or calumnious.

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1711. December 18. Captain FRANCIS CHARTERS, Complainer.

CHARLES, Master of Elphingston, and Mr John Campbell of Mammoir, the Duke of Argyle's uncle, gave bond to Captain Francis Charters, in the Queen's