

1711. December 27.

WILLIAM GRAY SON TO ADAM GRAY Feuair in Dunse and ADAM for himself, and as Administrator in law to his Son *against* WILLIAM COCKBURN of Caldra.

No 19.
An executor cannot charge for payment of a special legacy, but only the legatee.

WILLIAM NISBET flesher in Dunse, having named William Cockburn to be his executor, to pay his debts and legacies, to put on a through-stone upon his grave, and to finish the building of a tenement in Dunse out of the first and readiest of the executry; and having left several legacies, particularly a special legacy of L. 457, with annualrent thereof, contained in his father's bond granted to the testator; William Gray and Adam his father complained to the Lords of William Cockburn, for his unwarrantable charging Adam Gray, as administrator in law to William Gray, with horning, denouncing and registrating him at the horn for the said debt, as due to him *qua* executor to William Nisbet; albeit the debt was specially bequeathed and assigned to William Gray in the very body of the testament, the charger's title.

Answered for the charger; If the legatary had no right till the testament be executed, and the debts and deeds preferable to the legacy were paid and performed, the executor had *jus exigendi*, that he might either pay it to the legatary, or be accountable to him for the same out of the free gear, *actione ex testamento*, Laird of Balnamoon *contra* Laird of Balcomy, No 25. p. 3844.; Forrester *contra* Clerk, No 36. p. 2194.; and he the executor must be discharged with respect to this legacy; so that there is no ground of complaint against Caldra, for his using *jure communi*. It is true, by the Roman law, *legatarius* might recover *legatum speciei, rei vindicatione*; but *legatum nominis* could only be recovered *condictione certi*, at the instance of the heir, against whom the legatary had action competent to him, *ex testamento*.

THE LORDS found the charge of horning unwarrantable, and ordained the horning and executions thereof to be put in the clerks hands, that the same might be cancelled and razed at the signet.

Forbes, p. 563.

1724. February 13.

HUTTONS *against* HUTTON.

No 20:

A PERSON having granted a bill, on death-bed, for L. 350, to his brother, which, by the brother's declaration, was gratuitous as to L. 300 of it; the LORDS, at the instance of the children, reduced the bill, in so far as it was gratuitous; and found, that a legacy could not be validly constituted by a bill on death-bed.

Fbl. Dic. v. 3. p. 374. Edgar.

*** This case is No. 16. p. 1412. *voce* BILL OF EXCHANGE.