and necessity of the creditor, and make them condescend what was acted, treated, and communed betwixt them, the time of the granting thereof; or would assign a competent day, betwixt and which the debtor should pay it, either in whole or in parcels: and so supply the defect of what was agreed amongst them, and render it effectual, since the debtor's own discretion will not. See Labeo's interpretation of this clause,—*Do centum nomine dotis cum commodissimum esset; id est, quam primum sine turpitudine et infamia dari potest. L. 79, p. 1, D. de Jure Dotium.* See this already marked by me, *alibi. Wissembach, ad legem,* 125. *D. de Verborum Obligationibus.*

Advocates' MS. No. 420, *folio* 225.

1673. *November.* SIR JAMES DOUGLAS of Smithfield *against* JOHN HAY of Hayston.

SIR JAMES DOUGLAS of Smithfield, uncle to the present Earl of Morton, pursues a reduction against Mr John Hay of Hayston, one of the Clerks of Session. The case was, Sir James Hay of Smithfield being obliged to pay L.2000 Sterling, *nomine dotis,* with his daughter, to Sir James Douglas, who married her; and having thereafter disponed his estate to William Hay, his second son, he relieving John Hay, the eldest son, of all debts he could be liable for as apparent heir; Sir James Douglas intents a pursuit against William, for payment of his L.2000 sterling. Mr John Hay of Hayston being then, in 1657, advocate to, and adviser of, William Hay, procures a bond, wherein Sir James Hay, the said William his father, was obliged, conjunctly with one Archibald Hay, a cousin of his own, to Mr Dicksone at London, in L.1000 sterling; and having got an assignation thereto, he thereon obtained a decreet against William Hay and his brother John, for payment, and used all means to stop and impede Sir James Douglas in his pursuit, till he had comprised the lands of Smithfield for that debt, and was infeft; and then gave way to Sir James Douglas' diligence and decreet, and who also comprised and was infeft; but it was before the act of Parliament 1661, bringing in all aprisers within year and day *pari passu.*

Sir James Douglas, on his comprising, raises a reduction of Hayston's comprising, on thir reasons; 1*mo*, As to the bond granted to Dicksone by Sir James Hay and Archibald Hay, (which is the ground of Hayston's comprising,) though Sir James Hay be first named therein, and so in the construction of the English law he is presumed to be principal, and the other only cautioner; yet it appears by the presumptions mentioned in the informations resulting from Dicksone the creditor's oath, whom the Lords caused examine *ex officio,* and other grounds, that truly Archibald Hay was principal, borrowed the money, and applied it to his own use. And as it was his debt, so it was paid out of his means and estate; for Archibald, by his testament and codicil relative thereto, ordained Sir John Lenthall, keeper of the King's Bench, to be relieved, who was pursued by Dicksone the creditor, for suffering the said Archibald to escape furth of the said King's Bench, where Dicksone had incarcerated him upon judgments and sentences obtained against him, and ordained the satisfaction and relief to be furth of the price of Stockley Park; and accordingly, Mr Andrew Hay, who was executor and administrator to Archibald,

having sold the said Park to one Chaloner Shuts, did transact with Dicksone, and satisfy him; so that both Sir John Lenthall and Sir James Hay were thereby relieved. *2do,* Not only was that debt paid in the manner foresaid, but also Archibald Hay, in his testament above mentioned, both left a special legacy of 10,000 merks to Sir James Hay, which he would not have done if Sir James had been obliged to have relieved him of Dicksone's debt, for which the said Archibald had suffered so much, and if he had not been principal himself; but further bequeathed a general legacy of liberation of all sums of money wherein Sir James stood indebted to Archibald: and, consequently, *esto, argumenti causa,* Sir James had been principal, and Archibald only cautioner in the bond to Dicksone, and so had undoubted action of relief against Sir James Hay; the same must be imported and carried by this *legatum liberationis,* being a debt due by Sir James to Archibald, in so far as Archibald was distressed for it, and judgments given out against him, and he imprisoned; so that, *nata erat ei actio,* and his relief was competent; which exists in the English law, either in case the cautioner be distressed, or obtain an assignation to the debt.

To which reasons it was ANSWERED, 1*mo,* That the presumptions and qualifications adduced to prove that Archibald Hay, and not Sir James Hay, was principal in the bond, are absolutely denied, and other probabilities opponed thereto, besides the presumption of the English law; which see in Hayston's information. To the second, though *omnibus debitoribus ea quæ debent recte legantur, iisque remitti possunt, parag.* 13. *Instit. de Legatis, ibique Vinnius in commentario uberiore;* and that, *facilius pervenitur ad liberationem quam ad obligationem, l.* 47, *D. de Obligationibus et Actionibus;* that legacies are favourable, *et sic amplianda et non restringenda;* that general charges are to be extended *ad generalia,* as a special is *ad specialia,* or *quoad specificata*; and that the legacy of liberation can operate in no other thing, since no other debt can be condescended on owing by Sir James to Archibald. Yet these are all but general topics, almost applicable to any case, and which lawyers say, *plures habent fallentias quam exempla,* and are, in this particular case, of no moment, and inconsistent with the solid principles of law, and Mr Archibald's testament, and their first reason of reduction, as anything can be imagined; but are groundless and irrelevant, and have not the least colour and foundation in law; nor do they amount to the least weight to brangle, convell, or redargue the certain grounds of law whereon the defender bottoms, or the clear, evident, and undeniable will of the defunct. For, 1*mo,* Testaments, liberations, and legacies, are favourable, but not to be extended beyond their proper subject, or the meaning of parties, being privileged only *in propria materia et quoad effectus actionum bonæ fidei,* in so far as concerned *usuras, moram, et fructus.*—(*Vide infra, num.* 574, §. 4*to,* about 14*th June,* 1657.) *2do,* A legacy of liberation in sense imports no more but a discharge and releasement of any debt the legatary owes to the bequeather; but not to debts owing by them both to a third party, as this is; for that were, by an intolerable stretch and violence, to detort and wrest any conception or *formula* of words, against the plain meaning and interest of the party given. *3tio,* A legacy of liberation is altogether distinct in law from *legatum nominis,* which is the way Archibald should have legated Dicksone's debt to Sir James, if he had intended it. *4to,* The *formula* used by Archibald in this his legacy of liberation, everts the extension to which it is now drawn; for he uses thir words:—"I forgive him all sums of money he stands indebted to me;" whereas, to make it carry Dicksone's debt, it behoved to be conceived thus—*Damnas esto hæres meus centum solvere Titio, ut inde libera-*

tur obligatione sua Sempronius,—or words equivalent. Do not think I am so ignorant as to mistake the *jus Codicis novissimum* of the Roman law, that has equalled all the four *genera legatorum*, and ordains them, *per præceptionem, damnationem, et sinendi modo*, and to have the same effect *cum legato vindicationis;* or that there is any weight in a precise *formula* of words; yet I contend the phrase and conception used by Archibald, is neither proper nor apposite to extend this legacy of liberation farther than what Sir James was owing to the defunct testator. And never lawyer under heaven was guilty of any other imagination in this affair; for they lay it down as a solid principle in law, founded on the rational interpretation of the wills of testators, that whenever he intends to legate what the legatary was properly owing him, then *verba executiva diriguntur ad legatarium;* as here, in our case, they are to Sir James Hay; and are *verba imperativa*, and take present and full effect; but if the defunct design to relieve the legatary of a debt owing by the said legatary to a third party, then *verba executiva diriguntur ad hæredem, et sunt precaria et obliqua.* And which distinction is no subtilty. *See par.* 2 *et* 3, *Institut. de Legatis, ibique interpretes.* 5*to*, A legacy of liberation partakes of the nature of a discharge, and are subject to the same rules, limitations, and restrictions, discharges are: *videlicet, ut quam minimum gravent, ut non extendantur ad ea quæ quis verisimiliter in specie non esset concessurus, l.* 6, *D. de Pignoribus et Hypothecis;* that they do not carry greater sums under the generality than the sums expressed. *Vide* act of Parliament 63, in 1503, and the marginal note there; all which see excellently applied to the case in hand in the informations.—See the debate between Sir A. Ramsay and Francis Kinloch upon this, *alibi.* 6*to*, A legacy of liberation is of the nature of donations; for the genus, in its definition, is *donatio, p.* 1, *Inst. de Legatis, par.* 1. *Instit. de Donationibus; Tit. D. de Liberatione Legata.* Now *nemo presumpitur jactare suum*, farther than the will of the defunct appears, which ever qualifies and restricts the legacy; as, for example, in a liberation of sums due by the legatary and others, *tanquam correi debendi*, the liberation does not carry the whole debt. Next, in such a *formula rationes exigi veto:* it is not a discharge of the debt, but a *relaxatio scrupulosæ inquisitionis* as to what is omitted or lost. (3*tio*,) At this rate, if a co-tutor, co-executor, *socius, exercitor, institor*, &c. should bequeath liberation to him that was adjoined with him in the administration, it would extend not only to debts owing by that conjunct to the testator, but to any debts owing upon the account of the administration by the legatary to third parties; which is absurd and ridiculous to imagine. (4*to*,) Such a legacy of liberation could not carry an infeftment for relief of warrandice, whereon distress had ensued. 7*mo*, It appears, Archibald Hay never looked upon this debt of Dicksone's as his own, else he had never suffered so much extremity by imprisonment, nor refused so obstinately to pay it. And as to the ordering Lenthall's relief furth of the overplus price of Stockley Park, this designed no payment to Dicksone; but, on the contrary, that furth of that overplus, Lenthall should be secured and defended against Dicksone's pursuit: as appears from Mr Caik, an eminent lawyer, his deposition; though it be pretended he is much balanced by this defender. As to Hayston being William's trustee and advocate, see it answered in the informations; as also see there a reply to this whole answer.

The Lords having considered this debate, depositions taken *ex officio*, and papers produced on both sides, found the reasons of reduction relevant and proven, and therefore reduced Hayston, defender, his comprising.

The great solicitations used by the pursuer, and the disadvantage Hayston lay under in common repute, furthered much this cause.

Advocates' MS. No. 421, *folio* 226.

1673. *November.* PALLAT, STEWART, GRAHAM, and MAXWELL of Pollock, competing.

IN a triple poinding between Pallat, Stewart, Graham, and Maxwell of Pollock, in which a man being at the horn, and assigning a bond to his creditor, and who, in right of the assignation, having uplifted the money from his debtor's debtor; the donatar to the cedent's escheat contends, that, *condictione indebiti*, he may repeat from the rebel's creditor what was so paid him, as *indebite et injuste solutum*, and assigned by him who had no power, and whose goods *fisco domini regis per ejus rebellionem erant acquisita.**

The Lords found, one at the horn could not assign, though it were in satisfaction to a lawful creditor whose debt was contracted *ante rebellionem;* but where the creditor, who was the rebel's assignee, has recovered payment before citation or interruption, they found that purged the vitiosity so far, as it could not be condicted by the donatar to the escheat; *Lege* 10. *D. Quæ in fraudem creditorum.*

This last part of the interlocutor seemed strange, how the numeration and solution could be of that energy and efficacy as to impede repetition, *et tractu temporis* validate that *quod ab initio non substiterat, contra regulam Catonianam;* unless we say, *multa fieri non debent quæ facta tamen valent: item,* after fungibles *quæ numero, pondere, et mensura constant,* as money, &c. are paid, *non amplius origo inspicitur. L.* 7. *C. Si certum petatur.*—M'Keinzie's Pleadings, p. 106. *Vide supra,* No. 156. Helen Hamilton *against* William Bell, 25th February, 1671; and 385. [Sir James Ramsay *v.* Robertson, February, 1673,] which seems somewhat contrary. *Infra,* num. 478. §. 2. [The Relict of Littlejohn *against* the Children, 17th June, 1676;] *infra,* No. 711, Deans and Purves, 18th January, 1678.

Vide Andreas Gaill, lib. 2. *Observatio* 25, *numero ultimo.*—See this debate and competition, between Veitch and Pallat, at much length elsewhere.

Advocates' MS. No. 422, *folio* 227.

1673. 11*th November.* PATRICK HOME *against* GEORGE CRAW.

MR PATRICK HOME, advocate, as having right, by translation, from Mr Hary Home, commissary of Lauder, who was donatar constituted by Sir Jo. Home of Renton, late Justice-Clerk, superior of the lands of Netherbyres, holden of his barony of Fleemington, of the liferent escheat of George Craw of Netherbyres, pursues a declarator thereof.

* See Hadington's Decisions, 26th February, 1612, Johnston; *item,* folio 91, Tarbet; *item,* folio 94. Tweedie.