QUOD POTUIT NON FECIT.

1559. *April* 10. STEWART *against* MOUBRAY.

No 1.
An interdicted person having alienated lands, warrandice was not sustained to take effect even against his person or moveables; because, if the deed was null *quoad* the granter himself, he could not be bound to warrant it.

ANENT the action pursued by Matthew Stewart against Moubray, brother to the Laird of Barnbougle, for removing from certain lands, upon a warning, it was *alleged* by the said Moubray, That he had the said lands annailzied to him *titulo oneroso* by his brother, A. Moubray; and, therefore, should have a day to call his warrant. It was *alleged* by the party warranting, That he ought not to warrant the said lands; because, the time he annailzied the said lands, and long before, he was interdicted, in presence of the Lords, from all alienation of his lands, without consent of certain persons, who consented not to the alienation, as was known to the pursuer. The said alienation was null in itself, and ought to have no warrandice. It was *answered* by the said Moubray, pursuer, That the said alienation was made at the free will of the warranter, and not at the instance of the party; and, therefore, he should warrant his own deed, notwithstanding the interdiction foresaid; which answer of the said pursuer was repelled by the Lords, and no warrandice of the said alienation, by reason of the interdiction foresaid.

Fol. Dic. v. 2. *p.* 307. *Maitland, MS. p.* 127.

1566. *February* 7. A. *against* B.

No 2.
Legatum rei alienæ.

IN an action, moved by A. B. against E. F. as executor and hail intromitter with the goods of C. D. for a black cloak and gown, left to the pursuer in legacy by the said ——; it was *answered* by the said defender, That the gear acclaimed was no heirship, and that the defunct had no free land, but only annualrent upon land, which could not make her to have an heir. It was *replied*, That, if she had an heir, she might leave in legacy the gear acclaimed, yet the

No 2. legatar should have the price of the said gear by the law, as if she had left another man's gear wittingly. The Commissaries absolved the defender from the petition, and decerned, that neither the gear acclaimed, nor price thereof, was owing to the legatar; because, by the law of Scotland, neither heritage nor heirship may be disponed upon death-bed, and all such disposition is null in itself.

Fol. Dic. v. 2. p. 308. Maitland, MS. p. 207.

1624. *January* 22. DRUMMOND *against* DRUMMOND.

No 3. DRUMMOND *alleging*, That umquhile David Drummond, servitor to the Earl of Holdernesse, had, by his testament, made in England, left to him in legacy the sum of L. 50 Sterling, owing to him by the Laird of Spot, pursued Archibald Drummond, executor to the defunct, to pay him the said sum. It was *excepted*, That the defender should be assoilzied, because the said sum was heritable, and could neither fall under testament, nor be left in legacy. It was *answered*, That the sum being expressed in the quantity, albeit the designation was erroneous, yet the legacy was valid in the sum, and behoved to be paid by the defender, off the readiest of the defunct's free gear, which far exceeded the quantity of the sum left in legacy, seeing, of the law, legatum rei alienæ licet non directe valet, tamen ejus pretium de prestandum est. In respect of the which reply, the LORDS repelled the exception.

Fol. Dic. v. 2. p. 309. Haddington, MS. No 2970.

*** Durie and Spottiswood's reports of this case are No 10. p. 2261. *voce* CLAUSE.

1664. *June* 16. MURRAY *against* The EXECUTORS of RUTHERFORD.

No 4. *Ignorantia juris non excusat, etiam in mulieribus;* for instance, that a bond, moveable in the wife's name, belonged to the husband.

JAMES MURRAY pursues the Executors of Katharine Rutherford, wife to Doctor Guild, to pay a legacy of 600 merks, left by Katharine in her testament to James, in these words; I leave to James Murray 600 merks, whereof 200 merks are in his hand, due to me by bond; which bond I ordain to be delivered up to him, and four more, to be paid to him. The defenders *alleged*, That they could be obliged no further than to discharge the bond of 200 merks, with warrandice from their own deed. The pursuer *answered*, That the bond belonged to Doctor Guild, the husband, *jure mariti*, and was recovered by his heirs and executors already from the defender; and, therefore, this being *legatum rei alienæ*, the defender behoved to make it effectual, and to pay it out of the defunct's free moveables; especially seeing 600 merks were left, and the adjection