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

was but the destination of the manner of payment of it, by liberation; and which failing, the principal legacy stands, and must be fulfilled and adduced; see a decision, the last Session, whereby a legacy of a heritable bond was ordained to be made up by the executor, out of the moveables, (See APPENDIX). The defenders *answered*, That their defences stood yet relevant; for legacies being pure donations, did not carry warrandice; so that a thing legated being evicted, the legatar had it but *cum periculo*; and that in the law, *legatum rei alienæ est prestandum*; because, legacies being favourable, whereby the testator leaves there expressly, under the name of that which belongs to another, his meaning is extended, to purchase that, or the value thereof, to the legatar; but where he left it as his own, and his knowledge of the right of another appears not, there, as in all donations, the legatar hath it upon his peril, without warrandice; as if a testator should leave a bond, or sum, to which he had right by assignation, if it were found, that there were a prior assignation intimated, and so the sum evicted, the legatar would have no remedy; or, if he left a sum due by a bond, defective in some necessary solemnity, as wanting writer and witness, such bond failing, the legatar could not return upon the executor; and for the instance of a heritable bond, that is not alike, because it was not *res aliena*, but *propria testatoris*, though not testable. The pursuer *answered*, That legacies were most favourable, and ever extended, and that this was *legatum re alienæ et ex scientia testatoris*; for the testatrix knew that a bond conceived in her name, during the marriage, would belong to her husband, *jure mariti*, at least she was obliged to know the same; for, *scire et scire debere, parificantur in jure*. The defender *answered*, That the action holds not *in mulieribus, presertim ubi questio est in partibus juris*; as in this case, the testatrix was, and might be ignorant of the extent of the *jus mariti*. No 4.

THE LORDS repelled the defences, and sustained the libel and reply, to make up the palpable and known law, that the testatrix was reputed as knowing the same, and that having a half of her husband's goods, testable by her, she might leave the sum as a part of her half; that there was no necessity to divide every sum, but the whole, as many co-executors discharging a bond, the discharge is relevant, not only for that co-executor's part, but for the whole bond, if that co-executor's part exceeded the value of the bond; but the Lords did not find, that the executors behoved to make up every legacy that were evicted, or that they were liable *de evictione*.

Fol. Dic. v. 2. p. 309. Stair, v. 1. p. 199.

1664. *June* 24. FALCONER *against* DOUGAL.

No 5.
A legacy of a bond in special was sustained, tho' the executor

ALEXANDER FALCONER pursues Mr John Dougal for payment of 1000 merks, left in legacy by umquhile John Dougal, by a special legacy of a bond, addebt-