*** Gosford reports this case:

No 14.

In a pursuit at the said Janet's instance, and her husband, against Mr John Tait, as representing his father *nominibus passivis*, for payment of the sum of 500 merks contained in a bond, wherein the said Mr John Tait, his apparent heir, did consent, it was *alleged*, that the bond could not bind him as heir, because it was granted by the father when he was upon death-bed, and died the next day after; and the defender being left his executor and universal legatar at that time, he could only be liable upon that title, in case there were free goods after payment of his full debts, as to which he was content to count; and in case the inventory were not exhausted, to be liable; so that the bond being but *donatio mortis causa*, or of the nature of a legacy, albeit he consented it could not bind him, that being only sustained where there was a contract *inter vivos*, especially the pursuer and all the rest of the bairns being sufficiently provided. It was *replied*, That the apparent heir's consenting to his father's bond must be liable as heir, if he represent him *nominibus passivis*, and the creditor in the bond is not obliged to discuss the executor.—The Lords having considered the bond, and finding that the bond was as apparent heir, and not as executor nominate, or universal legatar, they repelled the defence, and sustained the consent, albeit the bond was granted upon death-bed.

Gosford, MS. No 953. p. 631.

1674. *November* 21. Cranston *against* Brown.

No 15.
Legatum rei alienæ is effectual, if the testator knew it was not his own. The executor must pay the value. Otherwise, if he supposed the thing his own.

A testator having left by testament a sum of money, due upon an heritable surety; and having named his sister as executor and universal legatar, she was pursued for payment of the said legacy; at the least, that being likewise heir, she should denude herself of the right of the said sum.

It was *alleged* for her, That the subject being heritable, the defunct could not bequeath the same in testament.

It was *replied*, That when *res aliena* is left in legacy, the executor in law *tenetur luere*, and ought to redeem the same, or pay the value; and *multo magis* in this case, the testator having in effect left *res sua*, though upon the matter *res aliena* as to the power of disposing of the same on death-bed, or by testament; and therefore the executrix, if she be heir, (as she is in this case) ought to give the same; and if she were not heir, ought to redeem the same, as said is.

The Lords, upon the debate amongst themselves, considered, that in law, *legatum rei aliena*, is effectual if the testator *sciebat rem alienam*; whereas *si nesciebat*, it is to be presumed he would not have left that which was not his own; and though the testator upon mistake was ignorant that it was *res aliena*, yet if the legatar was of so near a relation that it was probable he should have

No 15.

left the legacy, at least the value, if he had known it was *res aliena*, the legacy was effectual; and that in the case in question, the legatar was the defunct's nephew by his brother, and the sum that was left was his own, though heritable as said is; and the testator either knew that he could not dispose of the same, being heritable, and was presumed and obliged to know the law; and if he was ignorant in point of law, *ignorantia juris nocet*; and therefore the LORDS inclined to sustain the legacy. But one of their number having desired, that the decision might be delayed till the next day, that he might have his thoughts upon the case, the same was delayed.

Reporter, *Strathurd.* Clerk, *Hay.*

Dirleton, No 197. p. 86.

*** Gosford reports this case:

1674. *December* 2.—MR Robert Cranstoun minister having legated to the said Robert Cranstoun the sum of five hundred merks, for security whereof he had an infeftment; the legatar did pursue John Brown the executor for payment thereof for to transmit the right of the infeftment by serving himself heir, or making of a disposition. It was *alleged*, That the sum legated being an heritable sum, could not fall under testament, and so the testator *fecit quod non potuit*. It was *replied*, That albeit the sum legated was heritable, yet it ought to affect the moveables, which were opulent, seeing it was *speciale legatum*, and the defunct declaring his full intention that the same should be effectual having left his apparent heir his executor, he is far more liable than if he were in the case where he had made a legacy of that which belonged to another than himself, *quo casu* the executor *tenetur luere vel valorem præstare*, as was decided Drummond against Drummond, No 10. p. 2261. in the case where an heritable bond was disponed. 2*do*, It is offered to be proved, that the executor had homologated the legacy by the delivering of the evidents of the heritable infeftment. THE LORDS, after much reasoning, did repel the defence; which seems to be hard, seeing if this be granted it would give power, by testament, to dispone of heritable rights, which is not *habilis modus* by our law; and the privilege of *speciale legatum* is only to give the legatars privilege above common legacies.

Gosford, MS. No 716. p. 433.

*** Stair also reports this case:

1674. *December* 2.— MR Robert Cranston, by his testament, nominates Elizabeth Cranstoun his sister, and John Brown her son, his executors and universal legatars, and leaves to Robert Cranston 500 merks due to him by an heritable bond, upon which there was infeftment; who thereupon pursues Brown the executor, being likewise heir, to make good this legacy out of the execu-

No 15. try, to denude himself thereof as heir. The defender *alleged* absolvitor, because this being an heritable sum, the legacy thereof was void and ineffectual, and all that he could be obliged to do, was to give an assignation as executor, with warrandice from his own deed; for legacies being donations, have no further warrandice; which assignation would have no effect, nor would the debtor be obliged thereupon to pay, because the defender as executor hath no right to the sum, and as heir is not liable for any legacy. The pursuer *answered*, That law hath such respect to fulfil the will of defuncts, that when they legate that which is not in their power to legate, and is so known to them, it is understood to be their will, that the executor should purchase the thing legated for the legatar; but if the testator knew not the right of another, he legates any thing as he has it *cum periculo*; and here this testator did legate that which he could not legate, being heritable, and is presumed to know it was so, and mentions the sum as due to his father, and could not be ignorant of the infeftment of getting annualrent, so that albeit it be *legatim rei suæ*, yet seeing he could not legate effectually, it is equivalent as if it had been *legatum rei alienæ scienter legatæ*, the reason of the law from the presumed will of the defunct being one in both;

Which the LORDS found relevant. *See* QUOD POTUIT NON FECIT.

Stair, *v.* 2. *p.* 287.

1683. *March.*

PENNILAND and his SPOUSE *against* THOMAS WYLIE Treasurer of the College of Edinburgh.

No 16.

FOUND, that in the case of two special legacies of a defunct's whole estate, the failing of a part of one by its being heritable, did not diminish the other special legacy; though some *contended*, That such an inlake would be made up out of a general legacy, or out of the unlegated part of executry *tanquam legatum rei alienæ*. But thereafter the point was waved, in respect the last right was burdened with the other.

Harcarse, (LEGACIES.) *No* 662. *p.* 189.

1686. *February* JAMES CLERK's Creditors *against* Mr ROBERT BLACKWOOD.

No 17.

CERTAIN obligements made by a husband to his wife in lieu of her third and tierce, narrating as his motive that he was going to the fleet in the quality a major, and knew not what misfortune he might meet with, were found not to be *donatio mortis causa*, but to be granted for an onerous cause.

Harcarse, (LEGACIES.) *No* 665. *p.* 189.