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-

No 5.
had an assignation thereto from the defunct.

ed by the Earl of Murray, whereupon he convenes the Earl as debtor, and Mr John Dougal as executor, for his interest, to pay the special legacy. The Executor *alleged*, That the sum belonged to him, because he had assignation thereto from the defunct, before the legacy. The pursuer *answered*, That, *hoc dato*, there was sufficiency of free goods to make up this legacy; and albeit it had been *legatum rei alienæ*, yet being done by the testator *scienter*, who cannot be presumed to be ignorant of his own assignation, lately made before, it must be satisfied out of the rest of the free goods;

Which the LORDS found relevant.

Fol. Dic. v. 2. p. 309. Stair, v. 1. p. 205.

1669. *February* 16. GILBERT M'CLELAND *against* Lady KIRKCUDBRIGHT.

No 6.
A conveyance, *per ambages*, may be effectual, where, if directly done, it would not be sustained.

THE said Gilbert being infeft in an annualrent out of the lands provided to the Lady in conjunct fee before her infeftment, and long thereafter having got a new infeftment for the whole bygone annualrents accumulate in a principal sum; in competition betwixt them for preference, the LORDS found that M'Cleland ought to be preferred for the whole annualrents yearly of the sum contained in his first infeftment; but as to the annualrent of these annualrents, as being accumulated and made a principal sum, whereupon the new infeftment was granted, they found that the Lady ought to be preferred, in respect her liferent infeftment was prior thereto, so that it could not be drawn back in prejudice of her right;—notwithstanding, it was *alleged*, That if M'Cleland either had, or should yet comprise for the whole bygone annualrents, undoubtedly he would be preferred to the mails and duties for the whole sums contained in his infeftment; for the LORDS found there was a difference betwixt voluntary rights and legal diligence, and the contract to make the annualrent a principal to bear annualrent was odious, and posterior to the Lady's right.

Fol. Dic. v. 2. p. 309. Gosford, MS. p. 43.

*** Stair's report of this case is No 44. p. 10648. *voce* POSSESSORY JUDGMENT.

1675. *July* 8. SCRYMGEOUR *against* The Earl of NORTHESK.

No 7.
Found in conformity to M'Cleland against Lady Kirkcudbright, *supra*.

UMQUHILE Major Scrymgeour being infeft in the lands of Achmethie, upon an apprising deduced against Guthrie of Achmethie's daughter, Margaret Scrymgeour being infeft as heir to him, pursues a reduction of a disposition, and infeftment of the same lands, granted by Achmethie to the Earl of Northesk's father, then designed Earl of Ethie, upon this reason, that the Major's infeftment, upon his apprising, was long prior to Ethie's infeftment. The defender *alleged*, Absolvitor, because, though his father's infeftment was posterior,