No 7. therefore, the voluntary disposition granted to the defender ought to be reduced, reserving the feu-duty to be proceeded upon *debito modo*, as accords of the law, which, if it be not extinct, will certainly affect the ground, but not in this method.

THE LORDS sustained the reason of reduction upon the priority of the pursuer's infeftment, to reduce this voluntary disposition, and found not the same equivalent to an apprising, but reserved the defender's right upon the feu-duties, as accords.

Fol. Dic. v. 2. p. 309. Stair, v. 2. p. 340.

*** Gosford's report of this case is No 30. p. 258. *voce* ADJUDICATION.

1673. *July* 8. EDMONSTON *against* PRIMROSE.

No 8.

A legacy of a bond was special, and appointed to be confirmed and communicated to the testator's niece by his wife, who was executrix and universal legatrix, there being no children. The bond became heritable by a supervenient security. The executrix not obliged to make it good.

GRISSEL EDMONSTON pursues Margaret Primrose for payment to her of a legacy, left to her in her uncle's testament, in these terms, I ordain my executrix to convert a bond of 800 merks, due to me by ———, to the use of Margaret Edmonston; and thereafter says, I ordain the bond of 800 merks to be confirmed, and to be communicated to the said Grissel. The defender *alleged*, Absolvitor, from payment of this legacy, because, it being a special legacy of a bond, the foresaid bond became heritable by a subsequent right, and so was neither testable nor legable, and all special legacies are given *cum periculo* as the defunct hath them, and being pure donations, they can import no warrandice, or making the same good against the executor. It was *replied* for the pursuer, That the will of the defunct is the sovereign rule of legacies, and they can never be understood to be given elusorily; so that when he legates that which he cannot give, it is always understood to be his mind, that the same should be made good, as *legatum rei alienæ scienter legatæ*. It was *duplied* for the defender, That this legacy was not *rei alienæ*, neither did the defunct know it to be so, for he orders it to be confirmed, and after confirmation to be communicated by the executor to the pursuer; which clearly shows that he knew not that it was heritable, it being in itself moveable, but became heritable by a supervenient security. It was *triplied* for the pursuer, That the legacy was *rei alienæ* as to executry, which the defunct could not dispose on, and that the legacy itself bearing to convert that sum to the pursuer's use, must import making it good; that the pursuer being the defunct's sister's daughter, and he having no children, and leaving all to his wife, it must be thought to be his mind to do it *cum effectu*. It was *quadruplied*, That if a stranger or a dative had been executor, this conjecture might have been good; but where the wife is executrix and universal legatrix, and the legacy left in special of a bond, which cannot possibly be so effectual as if it had been a general legacy,

which would have been out of the first und readiest of the whole executry; the will of the defunct can never be understood to prefer the niece to the wife, except as to this bond. No 8.

The Lords found that this executrix was not obliged to make up this special legacy out of the executry, and therefore assoilzied.

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

*** Gosford reports this case:

In the action of double poinding, raised by Ramsay of Ochtertyre against the Heir and Executor of William Edmonston, it being found that the bond granted by Ramsay was an heritable bond, and so could not fall under testament, nor belong to Grissel Edmonston, to whom it was left in legacy, the said Grissel did insist against Margaret Primrose, who was executor to the said William, upon this ground, that there being free goods, the executor is bound to make up that legacy, and pay the value thereof, seeing there are free goods for payment of all legacies; and the testator's mind and will being clear, that she should have the sum contained in that bond, the executor is bound to make it effectual as is provided by the common law *de legatis*, where there is *legatum rei alienæ quo casu hæres tenetur luere aut valorem solvere.* It was *alleged* for the executor, That this being *speciale legatum*, as in the case where *aliquod corpus legatur si intereat perit legatario*, so this legacy being found null and void, and the bond not to fall within testament, but to belong to the heir, the legatar only should suffer, and the heir should not be liable, this case not being *ubi res alienæ legatur*, in which case the lawyers make only the heir *prestare valorem ubi scienter et consulto res aliena legatur*, whereas here *res sua et propria legatur*; neither doth the defunct so declare his will, that in case the legatar doth not recover the same, the executor should be liable *prastare valorem*, but, on the contrary, doth ordain, that the executor should only *cedere actionem*, and resign the title that it may be recovered. The Lords did assoilzie the executor, and found that she was not in the case of *legatio rei alienæ scienter et consulto*; and that it being expressly provided that she should only *cedere actionem*, she was not in law obliged to make the legacy effectual, as not being the defunct's will.

Gosford, MS. p. 356.

1674. *November* 23. Doctor Paton *against* Stirling of Ardoch.

In the before mentioned action of declarator, at the said Doctor's instance, against Stirling of Ardoch, 9th June 1674, No 477. p. 12586. *voce* Proof, it was farther *alleged* for the pursuer, That the defender being not only heir, but executor to his father, the declaration subscribed by the father ought to No 9.