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,

yet it did proceed upon real rights, viz. feu-duties and annualrents, which being *debita fundi*, any infeftment founded thereon would be drawn back *ad suam causam*. *Ita est* the defender's infeftment, although it be in the terms of an absolute disposition for sums of money, yet, by a back-bond produced, it is qualified, and declared to be for relief of the Earl of Ethie of his cautionry for Achmethie, in this manner: Achmethie being charged by letters issuing from the Exchequer for the feu-duties of his lands of Achmethie, he suspended, and found the Earl of Ethie cautioner; which suspension being discussed in Exchequer, the letters were found orderly proceeded; for the feu-duties being four thousand and odd hundred pounds due to the King superior, who thereafter gave a right to the Earl of Dysart, who disponed the same to Panmuir, whereupon Ethie made payment to Panmuir of the said feu-duties, and thereby came in place of the superior; so that a disposition by the vassal, for satisfying of these feu-duties, is equivalent as if the superior, or his assignee, had insisted by a poinding of the ground, and thereupon had apprised the ground-right and property, and had been thereupon infeft, which infeftment would, without question, have been preferred to any infeftment for a personal debt though prior; because the nature and constitution of *debita fundi* is such, that all apprisings thereupon are drawn back to their cause, and preferred to all other apprisings, and therefore, apprising being but a judicial disposition, a voluntary disposition and infeftment should be equivalent; and parties should not be necessitated, by legal and expensive diligence, to insist for the same, if the vassal be willing voluntarily to dispone and infeft the superior, or these deriving right from him for payment, or relief of these *debita fundi*, which is much more easy for all parties concerned; and the pursuer can pretend no detriment that Ethie took a voluntary disposition in place of an apprising. The pursuer *answered*, That the defence was noways relevant; for, albeit it be true, that the feu-duties and annualrents do secure the superior, and the annualrenter, against all rights proceeding upon the fiar's voluntary disposition, or apprising on his personal debt, yet the only habile way to make these *debita fundi*, to affect the properties of the land, is by poinding of the ground, which is a real action, introduced by law, and peculiar to these rights, and there is no other *habilis modus*; for if a fiar, by contract, be obliged to pay the feu-duty yearly, or to pay an annualrent yearly, if thereupon the superior, or annualrenter, should apprise, their apprising would have no priviledge, but from its date and infeftment, because it proceeds upon personal obligements, unless the apprising had been by poinding of the ground upon the real right; much less can a voluntary disposition by the vassal be drawn back *ad suam causum*, which is a progress never to this day founded upon or sustained; nor hath it any importance, that the pursuer cannot pretend any detriment by this right, more than if it were upon an apprising, because on that account the like might be pretended, if there were but an assignation granted by the superior; but there are habile and peculiar ways in law, to prosecute every right, which no equivalency can supply; and,

No 7.

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,