

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 ineffectment 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 obligations 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.*