them, that the marriage being dissolved within year and day by the death of their father, all provisions by contract of marriage did fall in consequence; so that this bond, posterior to the contract, at most ought to be looked upon as a legacy; and the children of the first marriage, besides the heir, being provided to the sum of 28,000 merks, in contemplation of their portions natural, the father, by his latter will and testament, having burdened his eldest son, whom he had nominated his sole executor, with the said provisions made to them, they ought to be preferred, not only as to their legitimate portions, the inventory receiving a biparted division, by the dissolution of the marriage within year and day, but likewise in so far as the said provision did exceed the half, they ought to be preferred to the said Katharine, and exhaust the defunct's part *pro tanto*. There was likewise compearance made for a legatar, who craved to come in *pari passu* for 1000 merks left in a legacy, upon that same grourd, that the wife was only a legatar by her bond. It was *replied*, notwithstanding of what was alleged she ought to be preferred to the children, because the bond granted to her not being for implement of her contract of marriage, but for just and onerous causes, and that prior to any bond granted by the children, and the executors being burdened, by the testament, in the *first* place, with the payment of that yearly annuity contained in the bond, and it being less than what she is provided to by her contract of marriage, it can never be interpreted a legacy, or pure donation, but a true debt, to affect the defunct's moveables without any division, and so she ought to be preferred both to the children and legatars.——The Lords having considered this case, and the bond, did find, that the wife's provision, albeit the marriage was dissolved, should affect the husband's third part as if he had lived year and day, and that the rest of his third should only be liable to the children, in so far as they were not satisfied by the legitim portion; and likewise did prefer her to the legatars, which was just upon that ground, that she was a creditor, notwithstanding of the dissolution of the marriage; but the supposing of a tri-parted division, as if the marriage had stood, which was dissolved by death, seemed to me to be strange. No 13.

Gosford, MS. No 919. p. 595.

1677. *February* 6.

Janet Tait and Campbell, her Husband, *against* Tait. No 14.

The Lords found, that a bond, being granted on death-bed, with consent of his apparent heir for his interest, bearing an obligement to pay a sum of money, is to be considered, not as a legacy, but as a bond *inter vivos*; seeing, by the common law, all persons are *in legitima potestate* as to the granting of bonds; and our custom, whereby persons on death-bed are not in *in liege poustie*, is qualified with an exception, viz. unless the heir consent, in whose favours the same is introduced.

Reporter, *Castlehill.*

Dirleton, No 449. p. 219.

*** 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