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.

No 9. affect the executry, which was opulent, as being of the nature of a legacy, or otherwise it being sufficient to constitute the pursuer a lawful creditor, and so make the defender liable in so far as the executry did amount to pay his just debt in so far as the right of the wadset did exceed the bonds and sums of money therein contained, otherwise this inevitable prejudice would follow, against all law and reason, that the pursuer would be liable to the bonds granted by him for borrowed money; and, besides, he would lose the whole benefit of the wadset, the bond of 7000 merks, and others posterior, not being included in the right of wadset, which was only granted for the first 300 merks. It was *answered* for the defender, That the said declaration being on death-bed, being in effect a reversion to a right of wadset, which is an heritable right and no legacy, which is a donation without an onerous cause; if, as heir, he was not liable, it could not bind him as executor, executry being only liable to moveable debts; and the bonds granted since the wadset, being true bonds, for sums of money not relating thereto, could not be taken away but *scripto*. THE LORDS, after much debate amongst themselves upon the nature of the trust, and the great appearance thereof in this case, the parties being so near, did at last find, That it could not affect the executor notwithstanding thereof, and therefore assoilzied, being induced upon these reasons; that albeit, as to moveable debts not constituted by writs, a declaration on death-bed is sufficient to affect the executry, yet that the declaration could not amount to so much as to take away an heritable right, to which only it did relate, and imported no less than a reversion of a wadset, and so it being noways obligatory against the heir, could not affect him as executor; but it being clear, by the back-bond, that it related to the whole bonds granted by the pursuer's deceased father, they found that unless he could prove that there were any new sums of money lent by Sir Archibald, beside the former bonds, which were due the time of the back-bond, that the pursuer should be freed thereof, and the same delivered up, or discharged, as being fully satisfied by the irredeemable right of the wadset; which was just, and without which the pursuer should be liable in double payment, not only by losing the right of his wadset, but by payment of new again of the same debts for which the wadset was granted.

Fol. Dic. v. 2. *p.* 308. *Gosford, MS. No* 712. & 713. *p.* 430.

*** Dirleton and Stair's reports of this case are No 477. p. 12586. *voce* PROOF.

*** A similar case is reported by Fountainhall, 22d November 1698, Cuming against Cuming, No 24. p. 5398. *voce* HEIRSHIP MOVEABLES.