1000 merks left them by their goodsire, did intent action against Forbes of Pasling, as executor nominate and confirmed, for payment thereof.

It was ALLEGED, That the pursuers' legacy was *speciale legatum,—viz.* One thousand merks, to be paid out of the rents of the lands due by the tenants; but so it is, that the tenants were owing no rents, having paid the rents to the defunct; and the most that the executor was obliged to do, was to assign the pursuer; which he was content instantly to perform.

It was REPLIED, That albeit the tenants were not due in any sum, yet the legacy ought to be fulfilled, there being sufficient moveables to pay the whole debts and legacies; and where there is *speciale legatum*, albeit the same should perish as to the being or subsistence of the thing itself, yet the executor is obliged *prestare valorem;*—as was found in a case betwixt Falconer and M'Dougall, where a sum of ten thousand merks, due by the Earl of Murray, being left in legacy, and assigned by the defunct, in his own time, his executor was found liable to pay the like sum to the legator.

The Lords did sustain the action against the executor; and found, that an offer to assign was not sufficient, *post tantum tempus*, he never having done diligence against the tenants: but did not give their interlocutor *in jure* upon the first point, supposing that the defunct had truly uplifted in his own time, if in that case the executor should be liable; as to which it is thought he should be liable, albeit it be *speciale legatum;* seeing, by the law, if a defunct should leave that which belongs to another, and not to himself, his executor is liable *prestare valorem*, and a special legacy is *in favorem* of the legator, and so cannot put him in a worse condition than a common legator.

Page 301.

1673. *January* 20. MR ANDREW BRYSONE *against* MARGARET BRYSONE, his Sister, and JOHN FOULIS, Fiar of Ratho, her Husband, for his Interest.

IN a reduction at Mr Andrew Brysone's instance, as having acquired the lands of Craigtoun, wherein he was infeft, against Margaret Brysone, his sister, for reducing her infeftment of an annualrent effeiring to seven thousand merks, granted to her by her father, before he disponed the said lands, as being done *in lecto ægritudinis*:—

It was ANSWERED, That he, being a singular successor, could not reduce a right *ex capite lecti*, unless he had been heir served to his father. *2do.* Her right depended upon her mother's contract of marriage; whereby he was obliged to provide the said Margaret to seven thousand merks, as her portion, being a bairn of the said marriage, wherewith he had burdened the right of the said lands, purchased by the said Mr Andrew.

It was REPLIED, That the said provision was satisfied as to the sum of two thousand merks, in so far as the defender's father had provided her to the sum of two thousand merks, contained in a bond granted to him in liferent, and the defender in fee, by the Laird of Broomhall.

It was DUPLIED, That the said bond, bearing nothing that it was in satisfaction of the portion contained in the contract of marriage, it cannot be imputed in satisfaction thereof *pro tanto;* especially seeing, besides the portions provided

to the children of the marriage, he was obliged to provide them to the whole conquest of lands, or money, during the marriage.

The Lords did sustain the reduction, in so far as might be extended to the sum of two thousand merks only; and found, that taking the bond to her in fee, ought to be interpreted in satisfaction of her portion *pro tanto;* and could not be ascribed to the obligement of conquest, unless her whole portion had been first satisfied *aliunde*; and that the pursuer ought to be assigned to that bond.

Page 302.

1673. *January* 22. JOHN MADER *against* ANDREW SMITH.

IN a suspension of double poinding, raised by Archibald Don, as debtor to Richard Gavenlock, against Mader and Smith, as creditors to the said Gavenlock, who had both of them arrested, and obtained decreets to make forthcoming against the suspender,—it was ALLEGED for Smith, That he ought to be preferred; because he had done the first diligence, by getting a decreet to make forthcoming.

It was ANSWERED for Mader, That no respect could be had to Smith's diligence, because it was preposterous, *et nimia diligentia*, in respect the arrestment was used long before the term of payment of his bond; whereas Mader had arrested after the term of payment, and thereupon obtained decreet, before which he was not obliged to do diligence; as was found by practick in Durie, 12th January 1628, betwixt Douglas and Acheson.

The Lords preferred Mader to Smith, albeit posterior in diligence; and found, that Smith's arrestment and decreet, being before the term of payment, was *nimia diligentia:* which was hard; seeing that arrestments or inhibitions might lawfully be served before the term of payment; and the decreet to make forthcoming was justly given, superseding the execution, until after the term of payment; and that the case in Durie was upon the arrestment of a minister's stipend before it was due, being only *in cursu*, whereas, in this case of a personal bond, *cessit dies*, the time of the subscribing thereof by the debtor, *licet nondum venit*, until the term of payment.

Page 302.

1673. *January.* The LORD THESAURER-DEPUTE *against* The EARL of WEMYSS, NORTHESK, and OTHERS.

IN a declarator of recognition of the lands of Rossy, which pertained to the Laird of Craig, and held ward of his Majesty, at the instance of the Lord Hatton, theasurer-depute, as donatar to the gift of recognition under the Great Seal, against the Earl of Wemyss, as being infeft in an annualrent, effeiring to £17,000 principal out of the said lands, and Northesk and others, who were infeft upon dispositions or comprisings:

It was ALLEGED for the Earl of Wemyss, That his infeftment was public, and confirmed by a charter under the Great Seal long before the gift of