

No 6.

claim all which he might ; in respect whereof, the LORDS assoilzied from this pursuit, moved by the executors dative, *ut supra*.

Act. Stuart, Mowat, & Robertson.  
Clerk, Gibson.

Alt. Advocatus, Nicolson, & Lermouth.

Fol. Dic. v. 1. p. 535. Durie, p. 799.

1663. July.

KINLOCH against LUNDIE.

No 7.

ROBERT LUNDIE, by his latter will, nominates Mr Thomas and Robert Lundies his executors, and leaves in legacy to Mr Robert Kinloch, a sum of money due to the defunct by Sir Robert Fletcher ; for which legacy Mr Robert pursues his executors. It was *alleged* for the Executors, That they cannot be liable, because it is *speciale legatum*, due by such a bond, whereunto the executors cannot have right as executors, because the sum is heritable, and so not liable to a legacy ; no more than if he had left such a thing *in arca*, which was not *in rerum natura* ; in which case, *periculum est legatarii*. To the which it was *answered*, That a legacy of this nature, *viz.* a debt which is heritable, is as if it had been *legatum rei alienæ* ; in which case, by the law, *hæres tenetur luere, secundum vires inventarii* ; and, therefore, if there be free moveables, the legacy should be made good.

Which the LORDS found accordingly.

Gilmour, No. 87. p. 67.

1665. July 21.

SPREUL against MILLER.

No 8.

BARBARA MILLER having left two legacies, and named William Wilson her executor and universal legatar, he nominates his wife, and one Giffin, his executors. Spruel having right to the two legacies, pursues the relict, and executors of Wilson, who was executor to Barbara Miller, for payment of the legacies. He *alleges* absolvitor, because the first testament was not executed ; *2dly*, The special legacies must be abated proportionally with the general legacies.

THE LORDS repelled both the defences, and found the general legacy not to come in *pari passu* with the special ; and found, that the executor of the executor was liable, unless he could allege, that the first executor had done diligence, and had not recovered, or was exhausted.

Fol. Dic. v. 1. p. 535. Stair, v. 1. p. 300.

\* \* Newbyth reports this case :

UMQUHILE Barbara Miller, widow in Glasgow, by her latter will and testament, left in legacy to Janet and Helen Millers, her nieces, 500 merks betwixt