

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

them, and nominates John Wilson her only executor and universal legatar; and the said John names William Govan, and Barbara Miller his relict, executors to him; both their nominations being confirmed, umquhile Barbara Miller her inventory extends to L. 1156, who died in *anno* 1644, and the inventory of John Wilson's testament extends to L. 933 : 11 : 8, who died in *anno* 1645; the said Janet Miller being on life, assigns her right of the legacy to Andrew Spruel; and the said Andrew, as executor surrogated to Helen Miller, upon both their titles, pursues William Govan, Barbara Miller, and Henry Murray her husband, for his interest, as executors confirmed to umquhile John Wilson, whilk umquhile John Wilson was executor confirmed to the said Barbara, who left the said legacies. It is *alleged* there can be no process against the defenders for payment of the said legacies, because John Wilson being executor, and deceased before recovery of the goods, the benefit of executry pertains to the nearest of kin of the said umquhile Barbara Miller, which they may do by a dative *quoad non executata*. To which it was *replied*, That as the said John Wilson was executor, so he is universal legatar, and thereby the nearest of kin is excluded; and the pursuer representing the defunct who left the legacy, being executor to the said John Miller, which John Wilson was executor to the said Barbara who left the said legacies, they are liable in payment thereof, for they are *hæredes hæredis*. 2do, It is *alleged* the defender cannot be liable, but effeiring to what is received, and the defenders ought to have defalcation *pro rata bonorum*. To which it was *duplied*, That the defender having confirmed the said testament, the inventory thereof far exceeds the said legacies, he ought to propone his allegiance upon full and exact diligence, and of not recovery after full diligence, and to be special therein. 3tio, A special legatar ought to have preference to a general legatar. 4to, It is *alleged*, that there being two executors nominate to the said John Wilson, the defender can only be liable effeiring to the said legacies. To which it was *answered*, That the pursuer has converted both the executors of the said John Wilson, viz. William Govan, and the said Barbara Miller his relict, who were executors to the said John Wilson, and were both on life, and the inventory far exceeding the two legacies, the defender ought to pay the same; and the pursuer is content to find caution, in case any debts arise to impair and diminish the legacies; and albeit he had convened but one executor, the total legacy being far within the half of the inventory, which is the practice received; because the one executor libels *in solidum*, where he claims only his proportion of the inventory, for he may pursue his other executor for relief; except the defender would allege, that the hail inventory, after lawful diligence, were not able to equal the payment of the hail legacy and expences.—THE LORDS found, that the executors of the executor had good right to pursue for the legacy contained in the first executor's confirmed testament; and that the first executor being also universal legatar, the legacy was transmissible in the person of the next executor, albeit the testament was not execute, and so fell not under *quoad non executata*.