No 5. ed to that sum, and was not respected as a bond to make up a full debt, which would affect the whole goods of the testament.

1631. *January* 20.—THE bond whereupon this pursuit was intented being alleged to be null, because it was made by one Scotsman to another, and was not subscribed by the maker thereof, but only by the first two initial letters of his name and surname, which *non constat* to be written and put to by himself, nor by two notaries before four witnesses, as is requisite by the laws of Scotland, the LORDS repelled the exception, and sustained the bond, having the two initial letters of the party subscribed thereto, and done before witnesses, and done in Ireland; neither was it found necessary, that the pursuer should be holden to prove, that the party was in use to subscribe after that manner.—*See* WRIT.

Fol. Dic. v. 1. *p.* 535. *Durie, p.* 552. & 556.

1636. *March* 2. GEORGE MELVIL *against* LORD MELVIL & L. HAHIL.

No 6.
An executor being also universal legatee, it was found, that the legacy transmitted to his nearest of kin, although the testament was not executed, and so there was no occasion for a dative *ad non executa*.

THE Lady Ross, spouse to umquhile Lord Melvil, in her testament testamentar, given up by her own mouth, estimates all the plenishing and moveables in the three houses pertaining to the said Lord Melvil, her husband, and her, *viz.* Burntisland, Monymail, and her dwelling-house in Edinburgh, to L. 3000, and declared, that she thought it needless to give up any other inventaries of her goods and gear, or debts, in respect all the same was assigned by her, and her said husband, to creditors, for satisfying of their just debts; (these are the very words of the testament;) and therein she subjoins, that she nominates and makes her said husband her sole executor, and leaves to him all her goods and gear whatsomever, in universal legacy. After her decease, the Lord Melvil, her husband, confirmed the said testament in St Andrew's, within which diocess she died, *viz.* in Monymail. The husband thereafter living five years, and no question being made thereanent, after his decease, the said George Melvil obtains from the Commissary of St Andrew's *a dative ad omissa et male appretiata* of the Lady Ross's gear, omitted out of her foresaid principal confirmed testament, or which were not justly appretiated therein, and pursues the heirs and executors of the umquhile Lord Melvil, her husband, to restore the same; the said goods and moveables of the said three houses, and other goods acclaimed by him, being particularly expressed in his summons, and libelled to extend to L. 40,000, or thereby; whereas, the same was only confirmed to L. 3000. In this process, the defender being convened, as behaving himself as heir to the deceased Lord Melvil, by intromitting with his heirship goods; and it being *alleged*, That he could not be so convened, in respect by act of Parliament 6th, cap. 76th,

James IV. and Parliament 7th, James V. cap. 106. it was appointed, that the heir ought not to be convened within the year after the defunct's decease, seeing for that space the executor should only be answerable, and it was not yet a year since the Lord Melvil died; this allegeance was repelled, seeing the defender was not convened as charged to enter heir to the defunct, *quo casu* the Lords would have given no process *hoc nomine*, against him within the year; but being convened as behaving himself as heir by intromission, it was alike as if he had served himself heir, and had been retoured, *quo casu* by his own deed process would have been granted against him; and sicklike in this case, the LORDS having heard the parties dispute in their presence concerning this case, they assoilzied the defender simply from this pursuit, and found that there was no place to the pursuer, as executor dative *ad omissa et male appretiata*, to pursue the same, in respect that there could be qualified, neither any fraud upon the part of the Lord Melvil, who was principal executor confirmed, nor yet prejudice done to any person, by any pretended omission, or evil appretiation, as was acclaimed; which fraud or prejudice is the only ground or cause, whereupon such datives *ad omissa* are in law and practique sustained; for the testament being given up by the Lady testatrix her own mouth, wherein she esteemed the goods to such a particular expressed avail, and subjoining the reason thereof, *viz.* that the rest were assigned to creditors for their debts, the executor nominated by her, in that same body of the writ, had necessity to confirm that writ, as it bore; and could of no reason nor equity do otherwise, that estimation being her deed, and not his; whereas, if the up-giving of the inventary had been committed to him by the defunct, then possibly the estimation within the avail, if he had made it, might have been questionable; and prejudice there could be none, for there are no creditors, they being satisfied by the assignation, mentioned in the testament, and none is compearing to oppone the same; and the nearest of kin to the Lady have no prejudice thereby, they being secluded by her universal legacy made to her husband; and also no prejudice to the quot, in respect the Commissary had *scienter* confirmed this testament, bearing this valuation, and with that reason admitted by him, anent the assignation of the rest of the goods to the creditors, *&c.* so that no person being thereby prejudged, the executor's self, who was also universal legatar, could never have been convened in his own lifetime, for that omission; and if he had, he would ever have been permitted to have eiked and confirmed the same, which would ever have been granted, and he therein would ever have been preferred to any executor dative; far less can this action upon this dative be now sustained, after his decease, against his heirs and executors, in respect he had the only interest, as universal legatar, which benefit dies not with himself, as the office of executry unexecuted doth, but is transmitted in his heirs and executors, who may

No 6.

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.* Alt. *Advocatus, Nicolson, & Lermonth.*
Clerk, *Gibson.*

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; 2*dly*, 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