No 2. and also to pay and deliver the particular goods intromitted with by them, back to the grand-child to whom they appertained by virtue of his universal legacy. *Excepted*, 1*mo*, by Mr Robert, No action against him as intromitter, because the said John was executor confirmed before the intenting of the cause. 2*do*, The contract being made between them two majors, could not be annulled. *Replied*, 1*mo*, The legatar being *rei legatæ dominus*, hath action competent to him, either against the executor *actione personali*, or the possessor *rei vindicatione*. 2*do*, Albeit the parties contractors could not pursue the reduction of the contract, being both majors, yet the minor *super cujus re contraxerunt*, and in whose prejudice they had divided his gear, might quarrel it lawfully. "THE LORDS repelled the exception, and sustained process against the possessor Mr Robert, notwithstanding of an executor confirmed; as likewise found, he might lawfully quarrel the contract, in so far as it did prejudge him allenarly.

Spottiswood, (LEGACIES.) *p.* 194.

*** Durie's report of this case is No 28. p. 3846, *voce* EXECUTOR.

1628. *February* 29. RUTHVEN *against* CLEIK.

No 3.

A FATHER leaves a legacy to his son, who was out of the country in the easter seas the time of making the legacy, and failing of his son by decease, he leaves it to his daughter. The legacy was 600 merks, addebted to the defunct by bond of a debtor, who, supposing the first legatar to be dead, made payment of the annualrent to the sister, being the second person substituted in the legacy, for the space of 10 or 12 years. Thereafter being pursued to make payment of the principal sum to the sister, *alleged*, That he could not be *in tuto* to make payment of the principal sum to her, except she proved that her brother was dead. THE LORDS would not astrict her to this hard probation, but ordained her to find caution to warrant the defender at all hands.

Auchinleck, MS. p. 119.

1630. *July* 6. Doctor MONRO *against* Sir WILLIAM SCOT's Executors.

No 4.
A legacy *ad pios usus*, suffers a proportional deduction, if the funds be not sufficient for all the legacies, unless the legacy *ad*

THE Executors suspending against all the legatars, that the free gear confirmed would not be so meikle as will pay all their legacies; and so the legatars disputing amongst themselves, and Doctor Monro, as doer for the Kirk, *alleging*, That a legacy of 5000 merks, left for building of a kirk in the Elie, should be totally paid, albeit the rest of the legacies should suffer defalcation, because the same was left *ad pios usus*, which ought to have the preference to all other legacies; the LORDS found, that there ought no preference to be

No 4.
pios usus has been paid in the testator's own lifetime.

given to any of these legacies before others, where the free gear was not sufficient to pay all the legacies, and that all should suffer a proportionable deduction; for all the preference which in law a legacy, *ad pios usus*, had before other legacies, was only where the defunct's gear was sufficient to pay all, *ea casu Falcidia detrahebatur de cæteris legatis, et non de legato ad pias causas, sed quando legata excedunt vires hæreditatis, tum Falcidia detrahitur, tam de legatis ad pias causas quam aliis.* And, upon the 15th of July, they found, that a *legatum ad pias causas* being *solutum*, and delivered to the legatar in name of the kirk, and so being perfected by the testator in his own lifetime, should not suffer defalcation with the other legacies, albeit the free gear would not pay all the legacies. And that it was delivered by the defunct himself in his lifetime, was found probable by witnesses.

Act. *Nicolson.* Alt. *Stuart & Lermonth.* Clerk, *Scot.*

Fol. Dic. v. 1. *p.* 535. *Durie, p.* 526.

*** Spottiswood reports this case.

1630. *July* 6.—Sir William Scott having exhausted, by legacies, the part due to himself in testament, the legatars, after his decease, did strive among themselves for preference. Amongst other legacies, he had left 5000 merks for the building of a kirk in Ely, which was sought to be paid entire, without any rateable deduction with the rest of the legacies, in respect it was *legatum ad pias causas*, which should have a prerogative before all others. Yet the Lords found that legacy no more privileged than the rest; but that a proportional deduction should be taken off it, as well as off the rest.

Spottiswood, (Legacies.) *p.* 195.

*** This case is also mentioned by Kerse.

Legatum ad Pias Causas found to have no privilege of prelation to the rest of the legatars.

Kerse, MS. fol. 127.

1631. *January* 13. Houston *against* Houston.

No 5.

In a pursuit for payment of 500 merks, against the executor dative to the maker of a bond decerned and confirmed, whereby the maker was obliged to leave to the pursuer 500 merks, to be paid by his executors after his decease; it was found, that the bond of this tenor was but as a legacy, and so that it behoved only to affect the defunct's part of the goods confirmed, if it extend-