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-

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,