

1721. *January.* MARY RAE *against* JAMES BROWN.

THE deceased Helenor Rae assigned and disposed to James Brown certain bonds, and her whole other moveables, with the burden of L. 110 Sterling to Mary Rae, in name of legacy. Several of the funds belonging to the defunct were subjects bearing annualrent; her debts did in part not bear annualrent: And entering the account at the death of the testatrix, the debts exceeded her effects; but by the growing of the annualrents after her decease, and the creditors not exacting their payment, it fell out that the subjects left by the defunct were increased above her debts; upon which the question arose, In legacies, if *tempus mortis spectandum*, or *motæ litis*?

For the legatrix it was *pleaded*, That annualrents arising after the testatrix's death, ought to be counted in order to enlarge the fund of her payment; for the executor is still liable, unless he can say, that the inventory is exhausted the time of the dispute.

It was *answered*; That legacies being only payable out of the free gear; since there was no free gear at the death of the testatrix, there could no legacy be due; and so not being then a debt, it could not thereafter convalesce.

Replied, Were legacies *ipso jure* diminished to the proportion of the free gear at the defunct's death, the answer would be good; but since the deficiency of a free fund for paying the legacies affords an *extrinsic* exception only, whenever the cause of the exception is removed, the exception falls of course.

THE LORDS found, That the growing annualrents of the subject in the disposition are to be brought *in computo*, in order to afford the pursuer her legacy.

Fol. Dic. v. 1. p. 276. Rem. Dec. v. 1. No 22. p. 50.

S E C T. VIII.

If there be a Co-executor.—If the Executor die before obtaining Sentence.—Every creditor may take decree, and the defence of exhaustion will be reserved *contra executionem*.

1548. *March 14.* SIR STEPHEN CULROSS *against* JOHN BALVAIRD.

Gif thair be twa or mae executouris to ane persoun that is deceist, and ony of thame lauchfullie refusis the office of executorie, or zit acceptis the samin, and

No 68.

An executor must not only account for the principal sums confirmed, but for annualrents arising due after confirmation, and before up-lifting.

No 69.

A co-executor dying before sentence.

No 69.
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executor.

thairefter happins to deceise, the hail office of executorie aucht and sould pertene to the uthar as executour *in solidum*, and na part thairof to the executour of the executour that is deceist.

Fol. Dic. v. I. p. 277. Balfour, (EXECUTOR.) No 14. p. 221.

1567. February 26. LOVAT against FRASER.

No 70.

THE executor that is livand may be callit without the heir or executor of him that is deid.

Balfour, (EXECUTOR.) No 14. p. 221.

1625. July 23. AITKIN against HEWART.

No 71.
Found as
above.

IN an action betwixt Aitkin and Mr Peter Hewart, who was convened as being one of three executors to umquhile Janet Wood, to make payment of a legacy left by the said Janet to the pursuer, to be paid by her executors; the LORDS found, That where there is more executors confirmed to any defunct, and all the rest are deceased but one, that that one surviving, hath good right to pursue for the whole gear pertaining to the defunct, even as if all the other executors were living, and might pursue; likeas that executor surviving may be lawfully pursued at any of the defunct's creditor's or legatar's instance, for the whole debt or legacy *in solidum*, in case his part of the executry would extend to as much as would satisfy that debt acclaimed, albeit the rest of the executors deceased had intromitted with their own parts of the defunct's goods; and that the said executor was not subject in his own part of that legacy only, as if it should divide proportionally among all the executors, but that he was subject *in solidum* for the whole, if his part of the executry would be so much as might satisfy the whole debt; which whole debt, in case foresaid, the one executor was holden to pay, albeit he had not intromitted with as much of the defunct's goods as might pay the same, if there was as much in the testament belonging to his part as would extend thereto, and so had right to intromit with and seek the same; for he ought to do diligence to recover the same; and not doing diligence, he is alike answerable to the creditors and legatars as if he had uplifted the same; and all the defunct's goods are affected for payment of the defunct's debt, the payment whereof may be sought out of any part thereof, either from all the executors, or any one of them that hath intromitted, or may intromit with as much as may satisfy that debt; and albeit one of more executors had paid out to other creditors or legatars, as much as would exhaust his own part of that legacy, yet that he remains debtor to any other creditor or legatar of the defunct's, so far as the rest of the gear of the testament, pertaining to the other executors deceased, will extend to, if any part thereof remain unexhaus-