

No 15.

A legacy left, to be paid out of a particular fund, was held not to be limited; but payable out of the total executry, if the particular fund should be deficient.

1676. July 11.

FINLAW *against* LITTLE.

A LEGACY being left in these terms, viz. That it should be paid out of the testatrix her household plenishing, and debts due upon accounts; THE LORDS found, That albeit the said plenishing and debts should not extend to satisfy the said legacy, that it was not a limited legacy, but ought to be satisfied out of the other executry; and that the said words were only *executiva* as to the order and way of payment in the first place; and *interpretatio* should be *ut actus valeat*; especially seeing the legatar was the defunct's relation. And it is to be presumed, that the foresaid qualification was only as to the way of payment; in respect the defunct did look upon her plenishing and debts foresaid, as sufficient to pay the same; and did not declare that the said legacy should be only paid out of the same, and in case it should be short, that she should have no more. And it appeared to the LORDS, That the executors had given up a very inconsiderable inventar of the plenishing, and far short of what a person of the defunct's condition and profession, being a great innkeeper, behoved to have in order to her calling.

Act. Dalrymple; &amp;c.

Alt. Hog.

In presentia

Fol. Dic. v. 1. p. 145. Dirleton, No 378. p. 184.

No 16.

A tack was set, bearing, 'certain lands containing 48 measured acres, with pasturage and pertinents, every acre to pay six firlots.' The setter insisted in a declarator, that there were 60 acres, and that the tacksman should pay accordingly; which was repelled, in respect the extent of the acres was not taxative, but designative.

1679. January 31.

ROCHEAD *against* BORTHWICK.

THERE being a tack set by Halliburton of Inverleith to Isobel Borthwick and her husband, for certain years, bearing, 'Headshill containing forty-eight measured acres, with pasturage and pertinents,' Mr James Rochead having now right to the estate of Inverleith, pursues a declarator that there were sixty acres of land, and that the tack bearing every acre to pay six firlots, the defender should remove from twelve of these acres, or pay therefor.—The defender *alleged* absolvitor, *1mo*, Because the tack mentions the acres to be measured, which being acknowledged by the heritor, he or his successors, could never crave a measuring again; *2do*, The tack-duty is not for every acre of the land, but for every acre of 48 acres, and the land hath a common designation of Headshill; and the mention of the acres is not taxative but designative; and the very like case was so decided betwixt Hamilton and Robertson in July last.—It was *answered*, That this tack being *locatio*, the law says, *si mensor falsam mensuram dixerit* it does not prejudice the setter; and as to Hamilton's case, the question there was for repetition; which the Lords sustained not against the setter, having spent it *bona fide*.—It was *replied*, That *ratio decidendi* in that decision, was the same that the quantity was not taxative; and here the number of the acres is not upon the assertion of a metter, but upon the acknowledgement of the setter.