tained at the instance of both the executors, the half belonged to the nearest of kin of the conjunct executor, who was dead.

It was REPLIED, That a testament cannot be said to be executed by a decreet, unless payment had been made; which is the opinion of Sir Thomas Hope, in his Treatise, that *instrumentum non est executum* but by intromission of the executor; and therefore, *jure accretionis*, the defunct's part did belong to the surviving executor.

The Lords did sustain the defence, notwithstanding of the reply, and found, That an executor, either sole or conjunct, obtaining a decreet for payment to him of the defunct's debt, the testament is fully executed, and his creditors may affect the same; or, if he die, it is *in bonis defuncti*, and belongs to the nearest of kin: and that the naked office of executry does only accrue to the surviving executor; as it was found in a case of the Lord Southwall, who, as creditor, had arrested the executor's goods, who had obtained sentence, and [was] preferred, in respect of his diligence, to the proper creditors of the defunct, to whom the executor was confirmed; albeit the competition was for the debts belonging to the defunct, for which the executor had gotten decreet.

Page 176.

1671. *June* 24. STEVENSON *against* DOBIE.

STEVENSON, having comprised the lands whereof Dobie was tacksman, did pursue for maills and duties. It was ALLEGED for Dobie, That he was infeft in an annualrent, and in possession before the compriser's infeftment or diligence; which being found relevant for proving his possession, *in termino probatorio*, at the advising of the cause; It was ALLEGED for the compriser,—That the tack could not prove possession of the annualrent; because the first term of payment thereof was after the compriser's infeftment; and so it could not be drawn back, there being *medium impedimentum*. It was ANSWERED, That the annualrenter being tacksman, and in natural possession, could do no diligence against himself for obtaining a decreet of possession; and therefore, his possession, from the time that he was infeft, behoved to run, and make his annualrent clad with possession.

The Lords did repel the defence, and preferred the compriser; and found, that the annualrent could not be clad with possession until the first term of payment was past; but, if the annualrenter had obtained decreet of poinding the ground against the heritor, the term of payment being elapsed, the case would have been more difficult. *Page* 176.

1671. *July* 4. MR WILLIAM DOUGLAS *against* The LAIRD of BALFOUR.

IN a pursuit, for maills and duties, of the lands of Airly, at the instance of the Laird of Balfour, upon a comprising whereupon he was infeft; compearance was made for Mr William Douglas, who had comprised the said lands *in anno* 1652; whereupon he ALLEGED, That he ought to be preferred; because his comprising was expired long before the pursuer's right.

It was ALLEGED, That no infeftment followed upon Mr William Douglas's apprising until that year that the pursuer had led his apprising; and, by the late Act of Parliament anent debtor and creditor, it being declared, That the first effectual comprising being that whereupon infeftment follows, and that all comprisings, within year and day thereof, shall come in *pari passu*, as if they were one comprising, the said Mr William's comprising must be calculated from the date of his infeftment, and not from the date of the comprising.

The Lords, having considered the Act of Parliament, and the several arguments and inconveniences adduced, did find, That, by that Act of Parliament, ordaining all comprisings to be alike, within year and day of the first effectual comprising, whereupon infeftment followed, could not be extended to comprisings which were long prior to all these within year and day, or whereof the legals were expired; which was noways the meaning of the Act of Parliament, that case not being at all expressed: neither did the reason of the Act quadrate therewith, which bears only, that, within year and day, creditors, who live at a distance, may be ignorant of the diligence done by others; therefore, if they shall do diligence within year and day, they shall come in *pari passu*: but, where comprisings were several years before, and whereof the legals being expired, albeit no infeftment followed thereupon, the law did not at all take from them the benefit of their comprisings of old; neither did the late Act of Parliament innovate the same. *Page* 178.

1671. *July* 5. JEAN JOHNSTOUN, Relict of IRVING of BRUCKLAW, *against* ALEXANDER KEITH of MIDBELTY.

IN the action before mentioned, at Keith's instance, against the tenants of Overaltrie, liferented by the said Jean;—it being ALLEGED, That Keith, being a wadsetter of the lands of Brucklaw, and for security of the monies lent upon the wadset, conform to the power given him in the contract, having comprised the liferent lands long before the lady's infeftment, and she being paid of the back-tack duties for many years before the liferent right, he had good interest, upon his comprising, to pursue for the maills and duties of the liferent lands for the whole years of the back-tack duty that he wanted.

It was ALLEGED, That the comprising could be no title, albeit prior to the liferent; because the Lords, having already found, that the comprising was only for farther security, and on warrandice in case of eviction of the principal lands, or that the rental was deficient, that could be no ground to quarrel the liferent given by the granter of the wadset to his wife; in respect that the right of the wadset of Brucklaw was never questioned nor taken away: and the wadsetter, suffering his author to possess, could not prejudge the liferenter, it being the wadsetter's fault: especially seeing, by a mutual condescendence, he had agreed that the liferenter should possess that part of the lands whereof he had been in possession.

The Lords did sustain the defence, and found, That, albeit the wadset and comprising were prior to the liferent right, they could not prejudge the same, there being no eviction; and that, having subscribed such a condescendency, he could never quarrel her right.

Page 180.