

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.*

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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.