

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 decret, 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 decret 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 decret.

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 infest in an annualrent, and in possession before the compriser's infestment 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 infestment ; 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 decret of possession ; and therefore, his possession, from the time that he was infest, 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 decret 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 infest ; 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.