

No 44.

1683. *February.* LITTLEJOHN *against* LITTLEJOHN.

IN the action of count and reckoning at the instance of Jean Littlejohn, Tailzeor, against her curator, the LORDS found that servants fees, and funeral charges, must be paid by the curator upon the parties' receipts, without constituting the same by a sentence against the defunct's representatives.

*Fol. Dic. v. 1. p. 274. Sir Pat. Home, MS. v. 1. No 399.*

1685. *January.* Mr JAMES ROSS *against* THOMAS BRUCE in Blackhall.

No 45.

An executor expended the defunct's effects upon the education of his children, in respect no debts appeared. Many years thereafter, an action was raised against him by a creditor of the defunct, and the Court decerned against him, though the children were insolvent.

AN executor nominate having expended the little free gear in the defunct's testament that remained over the expense of his funerals, upon the education of his younger children, in respect no debts appeared, he was many years after pursued by a creditor of the defunct's.

*Alleged* for the defender; That the testament was exhausted, and he exonerated.

*Answered* for the pursuer; An executor not to pay debt without a sentence, unless contained in an inventory given up by the defunct; and the children's interest takes only place in the case of free gear, and is no better than a legacy; so that the executor should have taken *cautionem mutianam* for his security against creditors, especially where the children had recovered no decret against him, as is observed by my Lord Stair, in the case of Johnston and the the Lady Kincaid, No 38. p. 3853.

*Replied*; The pursuer not having claimed his debt before the executor was denuded in favours of the children, nor for many years thereafter, he, the executor, cannot be prejudged for not taking caution, seeing the superplus free gear belonged to the children, partly as their legitim, which is stronger than a legacy, partly as the dead's share; and in the practise cited, the creditor pursued soon after the confirmation; whereas the pursuer hath been *in mora* for many years.

'THE LORDS allowed the funeral expenses to the executor; but decerned against him for the superplus.' Here the children upon whom it was expended were insolvent.

*Fol. Dic. v. 1. p. 274. Harcarse, (EXECUTRY.) No 465. p. 126.*