
 ANNUALRENT due by Executors.

1705. June 26.

JANET and ISOBEL ROBERTSONS *against* Commissary BAILLIE.

In the action of count and reckoning betwixt these parties, called upon the 13th day of June instant, the Lords having repelled the 1400 merk article of exoneration, and found Commissary Baillie liable to the pursuers, as nearest of kin to Bailie Robertson, in a certain superplus of the inventory not exhausted: They craved annualrent for the said free superplus, upon the following grounds: *1mo*, *Nummi pupillares non debent esse inutiles vel otiosi*; therefore annualrent ought to be decerned *nomine damni*; and as some sums in the inventory are mentioned to bear annualrent, all are presumed to be of that nature. *2do*, The nearest of kin are legators *quoad* the superplus of the executry; and by *l. 3. §. ult. l. 34. ff. de Usuris*, annualrent is due for legacies. Yea, a father intromitting with a legacy left to his child, or the mother's third of moveables falling to that child, was found liable for annualrent thereof, 4th February 1665, *Begg contra Begg*, (Stair, v. I. p. 264. *voce* TUTOR and PUPIL); 15th December 1688, *Wynram contra Ellies*, (Stair, v. I. p. 570. *voce* PRESUMPTION, *donatio non præsumitur*.) And what holds in the case of a father cannot fail to be sustained against a step-father. *3tio*, The defender acted, and must be liable to the pursuers, as their pro-tutor, by the act of Sederunt, 10th June 1665, at least for annualrent of their means intromitted with by him, while they were minors.

Answered: The inventory was not given up by the defender, but by the defunct himself in his testament, who may be supposed to have known the nature of his debts and gear best; and the Lords are not in use to allow annualrents in name of damages to any but trading merchants for commerce sake. *2do*, *Esto*, the party did hold betwixt the interest of the nearest of kin as such, and that of legatars; yet the Roman law and our's differ as to annualrents in this, That regularly our law never allows annualrent but *ex pacto vel lege*, unless to merchants *nomine damni*; whereas the Roman law allows of it *in bonæ fidei judiciis ex mora*. *3tio*, The act of Sederunt 1665, can neither make the defender pro-tutor, nor subject him to annualrents; because, *1mo*, It has no retrospect; and the defender was confirmed executor before the date on't. *2do*, It relates only to such as intromit without any title, whereas the defender's title of intromission was a confirmed testament.

No 73.

An executor, a stranger, is pursued by the nearest in kin, minors, for their share of the inventory given up by the defunct himself. The executor found liable, from the date of confirmation, for interest of sums set down as bearing interest; but not for interest of other sums not so expressed.

(DUE BY EXECUTORS.)

No 73.

THE LORDS found annualrent due for the fums in the inventory bearing annualrent, and that from the date of the confirmation ; but not for other fums which were not mentioned in the testament, as bearing annualrent.

Fol. Dic. v. 1. p. 41. Forbes, p. 11.

No 74.

1730. July.

CREDITORS OF THOMSON *against* MONRO.

AN executor-creditor having confirmed and uplifted fums not bearing annualrent, and having a balance in his hand, after payment of his own debt, which he laid out upon interest ; he was found liable to account to the other creditors for the neat balance, only not the profits ; because an executor-creditor is not bound like a tutor, to lay out upon interest the fums he uplifts ; and if he does it, the risk is his own.

Fol. Dic. v. 1. p. 41.

1747. June 3.

THE COUNTESS OF CAITHNESS, and LADY DOROTHEA PRIMROSE, *against* The EARL OF ROSEBERY.

No 75.

An executor is not entitled by his commission, to lend out the executry funds upon interest. He is bound to gather in, in order to distribute. If he lend, it is at his own peril. Consequently he cannot be liable for interest.

JAMES, Earl of Rosebery, was confirmed executor to his father, 24th May 1724, and a process was raised against him by the Ladies Margaret and Dorothea, his sisters, to account for the half of the executry due to them by the defunct's disposition, and a decret obtained ; but this being opened, and in the review, the charge given up by him in inventory considerably restricted, there occurred a question, How far he was liable in interest for principal fums, and money upon government securities uplifted by him, especially the executry having been so long in his hands, and also for other subjects, though not bearing profit, when intromitted with ; on account of certain special circumstances to be afterwards noticed ?

Pleaded for the pursuers : An executor is a trustee, and it is agreeable to the nature of a trust, that it be managed in the most beneficial manner for the persons interested ; he is indeed to pay the debts ; and if the dead subjects will not do that, he may make use of part of those that are profitably employed ; but it is contrary to his engagement wantonly to uplift money bearing profit, to the prejudice of the owner, and employ it perhaps to his own advantage, and by delaying his accounting by litigious objections, draw more out of the executry than will fall to the person having right.

Pleaded for the defender : The business of an executor is to call in the effects, pay the debts, and distribute the remainder : He cannot lend out ; for he ought to have money to answer when called for ; and if he do lend it, he must run the