

P A Y M E N T.

1628. January 26.

ADIE against GRAY.

No 1.

AN executor is empowered, *virtute officii*, to apply his intromissions for payment of the defuncts debts; and as he may pay *primo venienti*, so, if he himself be a creditor, he may of course retain for his own payment. It is true, an executor cannot safely pay without decree; but, as he cannot take a decree against himself, he must either be allowed to pay himself without decree, or not at all. And this was found in a case, where an executor, *qua* nearest of kin, had intermeddled before confirmation, and was pursued as vitious intromitter; but having thereafter confirmed within the year, which purged the vitiosity, the confirmation was drawn back, and sustained to found the executor in his right of retention, equally as if he had been confirmed before intromission.

In the same cause the executor was allowed retention of a debt he had paid as cautioner for the defunct, before intenting of the above process against him.

But an executor was not allowed to exhaust the testament by debts, wherein he was cautioner for the defunct, unless he had made actual payment before being interpellated by other creditors; yet he was allowed to plead his claim of relief thus far, to come in *pari passu* with the creditors doing diligence against him.

Fol. Dic. v. 2. p. 50. Durie.

. This case is No 193. p. 9866. *voce* PASSIVE TITLE.

1662. January 24.

Mr JAMES RAMSAY against EARL of WINTON.

No 2.

MR JAMES RAMSAY, as having right by translation from George Seaton, assignee constitute by my Lady Semple, to a bond due by the umquhile Earl of Winton, pursues this Earl for payment, who *alleged*, No process, because