

No 39.

ther the testament was now exhausted by sentences, or ineffectual by diligence, or notour irresponsality.

Fol. Dic. v. 1. p. 274. Stair, v. 2. p. 370.

1676. December 2.

HAY against MALLOCH.

No 40.

An executor found not to have power to prefer one creditor to another.

JAMES HAY having pursued Robert Malloch, as executor to David Trench, for payment of a debt of David's, he proponed a defence upon a decret of exoneration, which being sustained with a reservation *contra producenda*, and being now to be advised, it was *objected* by the pursuer, That he was not called to the decret of exoneration, and that several articles in it are paid, after his citation. —It was *answered*, That the executor having paid, might propone upon the creditor's diligence to whom he paid; *ita est*, the said creditor used the first citation, before this pursuer, and so was preferable.

THE LORDS found that the executor ought to have convened both creditors, and that they would have come in *pari passu*, albeit the citation of the one was before the other.

Stair, v. 2. p. 471.

No 41.

1677. June 7.

ANDREW against ANDERSON.

Executors have no power to prefer one creditor to another, or to pay without sentence. But an executor is in safety to pay privileged debts, and debts given up by the defunct in his testament, without sentence.

PATRICK ANDREW pursues Anderson as executor to his brother, for payment of his debt, who did allege exhausting by lawful sentences, before the pursuer's citation; but at advising of the cause, he only produced discharges of the defunct's debt, and alleged that this was sufficient, and that he might pay the defunct's debt without the expenses of a sentence, before he knew of any other debt, or at least the debt he had paid should come in *pari passu* with the pursuer's debt.

Which the LORDS repelled, and found the creditors doing first diligence preferable, and that the executor might not pay any of the defunct's creditors without sentences, except testamentary creditors, funeral expenses, servants fees, and the like, and that the executor could not voluntarily prefer one creditor to the rest.

Fol. Dic. v. 1. p. 274. Stair, v. 2. p. 521.

* * * Gosford reports the same case, calling the parties Patrick against Anderson.

PATRICK ANDREW having pursued Anderson as executor confirmed to his debtor, it was *alleged*, That he could not be liable for the whole debt, because the inventory of the goods would not satisfy the whole debts of the defunct,

and so he was only liable to make furthcoming to all the creditors, with deduction proportionally to these debts he had paid, and all the rest of the debts.—It was *replied*, That the defence ought to be repelled, because the payment of that debt was without any diligence, and so being voluntary, could not prejudice the pursuer, or others who had done diligence.—THE LORDS did repel the defence, and found that a voluntary payment, without being pursued, could not exoner him of payment of the full debts of creditors who had done diligence. This sentence was thought hard by some, whereof I was one, upon this ground, that the executor being undoubtedly liable, and having truly paid and retired the bond, as that creditor would certainly come in *pari passu*, it was hard that doing his duty without any process, he could not come in the place of the creditor whom the pursuer could never exclude; but it was carried contrary, upon that reason that it was a general practice, that executors could not make voluntary payment to the prejudice of other creditors doing diligence; yet no special practice *in terminis* hath been shown, and the reason and interest of executors who have only *medium-officium* seemed to be much for them.

Gosford, MS. No 976. p. 667.

* * * Dirleton also reports this case:

AN executor having alleged that the testament was exhausted, and for probation having produced the defunct's bond, with a discharge from the creditor after the defunct's decease; and it being found, that the same did not prove, unless there had been a sentence produced, it was thereafter *alleged* for the executor, That seeing he instructed the debt, and that he had paid the same *bona fide*, the same ought to be allowed for his liberation; at least that the said debt should come in *pari passu* with the pursuers, unless they could object against the same, as not a true debt; which was repelled, in respect no legal diligence had been done for the said debt.

Some of the LORDS were of opinion, that it should have been allowed to come in *pari passu*, in respect the diligence, used by the pursuer in intending a pursuit against the executor, was only personal, and did not affect the goods; and the executry being short, and the goods being to be furthcoming to all parties having interest, any creditor may compare for his interest, and crave to have a proportion of the same at any time before sentence; otherwise a great creditor in as much as may be equivalent to the executry, if he should pursue the executor before the other creditors, they may be all frustrate.

Clerk, Mr Thomas Hay.

Dirleton, No 454. p. 220.

See No 37.
P. 3855.