

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,