

No 35. 1609. December 5. LEITCH *against* LEITCH.

It is lawful for an executor to make payment of the wife's third, and the bairns third, confirmed in testament, without any decret obtained against him; as also of the debts and legacies given up and left by the defunct in his testament, the same being confirmed.

*Fol. Dic. v. 1. p. 274. Haddington, MS. No 1675.*

No 36. 1627. March 29. CRAIGMILLAR *against* ROBERT ROLLOCK.

A LEGACY being left to a woman's bairns by the mother's sister, the father administrator pursues for the same. The executor of the defunct craves caution to free him at the creditors hands. The pursuer *alleges*, That it was ten years since the decease of the defunct, and in all this space no creditor pursued her. —THE LORDS, in this case, find no necessity for caution, seeing their decret is sufficient warrant to the executor.

*Fol. Dic. v. 1. p. 274. Auchinleck, MS. p. 118.*

No 37. 1637. June 16. ANDERSON *against* MONTEIR.

An executor who paid a debt without decree was ranked *pari passu* with other creditors doing diligence. The reverse was found in No 41. p. 3855. as reported by Dirleton.

DR ANDERSON having obtained decret against Margaret Monteir, as executrix to Steven Philp her husband, who was cautioner for Archibald Drummond, for payment of 500 merks addebted to him by the said Archibald, and by her said husband, and as cautioner for him; which being suspended, that she was only answerable *secundum vires inventarii*, which was all exhausted by decreets, and payment made thereof, before the obtaining of the Doctor's decret: And the articles of the payment being desired to be instructed amongst the articles of defalcation, she produced a bond granted to a creditor of her husband's, which was not registrate, nor no sentence obtained thereupon, but only paid by the relict, (which she instructed,) and the bond retired by her. And the Doctor *answering*, That that ought not to be allowed without a sentence; the relict *alleged*, That there needed no sentence, the payment being made to a true creditor, before the Doctor's decret, to whom her husband was only a cautioner, whereby she neither could, nor had necessity to know that her husband was bound: —THE LORDS found, that this payment without a sentence ought not to be allowed in prejudice of a creditor who had done diligence, and recovered sentence; but found, that the Doctor should come in with her *pro rata*, and would not allow that payment as an article to exhaust the testament *in toto*, and to prejudice totally the Doctor.

Act. *Anderson & Morwat.*

Alt. *Paip.*

Clerk, *Hay.*

*Fol. Dic. v. 1. p. 274. Durie, p. 845.*