

1664. November 11.

JAMES JOHNSTON Merchant in Edinburgh, *against* The LADY KINCAIDE.

JAMES JOHNSTON pursues the Lady Kincaide, as executrix to her husband, who alleged absolvitor, because the testament was exhausted, and she had obtained a decret of exoneration, which being standing unreduced, she behoved to be assoilzied, seeing there was no reduction thereof raised; *2dly*, Albeit the said exoneration were quarrellable *hoc ordine*, yet it appears thereby, that the testament was exhausted.—The pursuer *answered*, That the first defence on the exoneration *non relevat*, unless the pursuer had been cited to the giving thereof; it operates nothing against him, nor needs he reduce it; *2dly*, The second member of the defence of exhausting the testament, mentioned in the exoneration, *non relevat*, unless it were alleged exhausted by lawful sentences, before intending of the pursuer's cause.—The defender *answered*, That it was relevant to allege that payment was made of lawful debts of the defunct's, instructed by writ, before intending of the pursuer's cause; for, seeing the debt was clear, the executor ought not to multiply expenses, by defending against the same, unless it were alleged there were collusion to prefer the creditors paid.

THE LORDS repelled both members of the defence, and found that the executrix might not, without a sentence, prefer any creditor; especially, seeing it was not a debt given up in testament by the defunct, neither was it alleged, that the pursuer had long neglected to pursue.

Fol. Dic. v. 1. p. 274. Stair, v. 1. p. 223.

1675. November 18. BINNING *against* HAMILTON.

MR JAMES BENNING, as assignee to a decret obtained in *anno* 1654, at the instance of the relict of Alexander Hamilton, General of the Artillery, against his son and heir, for payment of L. 100 Sterling yearly to her, during her life, in case he died within year and day, pursues Anna Hamilton, as representing her brother, for payment; who *alleged* absolvitor, because the decret of the English Judges was unjust, having repelled this lawful defence, That the obligation was *in lecto*, and had but the effect of a legacy, and that the testament was exhausted, the inventories being scarce sufficient to pay the debts.—It was *replied*, That these decreets, by the act of Parliament 1661, are ratified, with this exception, That they might be called in question within a year after the session sat down, even upon iniquity; but that time being elapsed, it cannot now be questioned on that ground.

THE LORDS having perused the decret, sustained the same; for the defence proponed was not relevant by exhausting, unless it had been alleged by lawful sentences; and the extent of the debts before decret thereupon was only a ground *pro cautione mutiana*; but they allowed the defender to be heard, whe-

No 38.

An executor cannot safely pay a debt unless upon decree, even though the debt is instructed by writ.

No 39.

Found as above.

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.

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.

1677. June 7.

ANDREW against ANDERSON.

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,