No. 3. years, doing nothing all this time, ought not to make him liable to her. The charger answered, That legacies cannot be allowed, so long as there is any debt; and as to the debt paid to the sister, that cannot make defalcation, nor be allowed, seeing that same writ whereupon the sister recovered sentence contained expressly, that the like sum was owing to this charger, so that he could not have mis-known both the debts to be alike, and to have paid fully the one sister to the prejudice of the other; but he ought to have taken *cautionem mutianam* for his own security, to repay the sums paid by him, in case he should thereafter be distressed, by other emergent creditors, albeit this acclaimed cannot be called emergent, being known to him, as said is, when the other sister pursued him; so that he ought not to repeat what he has paid to others, that the same may be made forthcoming by him to this charger, according to the proportion of her just debt with the other creditors, without respect to the legatars, as long as there is not enough to pay the defunct's debts. And the suspender answering, That her cessation for the space of sixteen years, and his payment *bona fide* after sentence, ought to free the executor; neither was there necessity of caution, seeing the whole persons to whom he has paid are *solvendo*, which supplies the caution; and albeit her debt was contained in the same writ, whereupon the other sister obtained decree, yet that ought not to put him *in mala fide*, for he was not obliged to know more than in law he was holden to know; and the rather, since she took no notice thereof herself, never pursuing therefor; so that he ought not to be put to repeat the same from the creditors or legatars, whom he has paid, and whose decrees he could never have staid; for the proponing, that there were other creditors, would never have been admitted by the Judge, there being no other creditor pursuing him, to have staid sentence; so that the most that this charger can claim is, to pursue the creditors and legatars whom the executor has paid; and the executor ought not to be put to that pursuit, as is expressly statuted, L. Scimus 22. § Etsi præfatum. 4. et deinde per totum Paragraphum, C. De jure deliberandi. This was controverted, If the executor should repeat, or if the other creditors should repeat from the creditor satisfied, or if both should concur to repeat, to the end that the gear in the testament should be proportionally divided; but it was not decided.

Act. *Nicholson.* Alt. *Stuart & Hope.* Clerk *Gibson.*

Durie, p. 734.

1663. *February* 21. WARDLAW *against* FRASER.

No. 4. A legacy of an heritable subject contained in a testament found null.

Stair.

*** This case is No. 86. p. 5703. *voce* HOMOLOGATION.