

No 52. letters raised upon that bond, and so she was in *mala fide* to seek the said exoneration, except that he had been called thereto with the rest of the creditors, his debt being notified and intimated to her by the said arrestment. This reply was found relevant, and the decret of exoneration, and payment made to the creditors, of the defunct's whole goods, conform to their sentences, was not sustained, in respect the pursuer was not called with the rest of the creditors thereto; and the LORDS found the arrestment foresaid a good and sufficient intimation of his debt, which was sustained to put the excipient in *mala fide* to have proceeded in her exoneration, without citation of him as a creditor; albeit when the said arrestment was raised, the defunct, who was his debtor, was deceased before, and no sentence was given against him; neither was there any dependence or action intended, either against him, or against any other upon that bond, when the said arrestment was raised and executed, which of reason ought to be the ground to sustain the arrestment; likeas he having done no diligence upon the said arrestment, but that the rest of the creditors having used greater diligence, and obtaining sentences, she alleged that she was in *bona fide* to pay them, conform to their diligences and sentences, and had no necessity to know the pursuer, who did no further upon his arrestment, which was repelled; and notwithstanding thereof, the arrestment was sustained as a sufficient ground against her, to put her in *mala fide* to have sought exoneration without calling of him, albeit there was no sentence upon the bond, nor yet dependence thereupon; and albeit the arrestment was not executed against the party who was bound in the bond, but against his relict and executrix, which was found sufficient.

Act. Morvat.

Alt. Cunninghame.

Clerk, Scot.

Fol. Dic. v. 1. p. 275; Durie, p. 159. &amp; 161.

1626. December 5.

JAFFREY against GRAY.

No 53.

After action is raised against an executor, if he make payment to another creditor, even upon decree obtained against him, he will not be exonerated, because he ought to have raised a multiplepoinding.

IN an action betwixt Jaffrey *contra* Gray, where the wife being convened, as intromissatrix with her husband's goods, to pay a debt owing by her husband to the pursuer, *pendente liti*, she being confirmed executrix, and having confirmed a testament; and thereafter another of her husband's creditors having recovered sentence against her, for payment of debt owing by the husband to that creditor, which debt exhausted all the gear contained in the said testament, and which sentence she had satisfied, and reported the said creditor's acquittance thereof, whereupon she having proponed an exception against the pursuit foresaid, now pursued, *alleging* that she ought to be assoilzied, in respect that she was executrix confirmed, and that she had paid a debt conform to the sentence foresaid, which exhausted all the free goods, and therefore she could not be convened as intromissatrix, she being confirmed executrix; and if she had any

further intromission with any more of the goods and gear of the defunct than she had confirmed in testament, the pursuer might take a dative thereof, but therefore she could not be reputed nor convened as intromissatrix. This allegation was repelled, and the action sustained against her as intromissatrix, notwithstanding of the testament wherein she was confirmed executrix, and notwithstanding of the decret obtained by the other creditor, and payment alleged made of the debt exhausting the testament; for the LORDS found, That she could not make payment to another creditor, in prejudice of the pursuer, who had a pursuit depending before the said payment, and before that sentence; but she ought to have suspended upon double poinding, where the creditor's right would have been discussed according to the force of the same, and their diligence done by them, and thereby she would have been in security to pay to the creditor who should be found to have best right; and so she could not at her own election prefer one creditor to another.

No 53.

Act. Craig.

Alt. Stuart.

Clerk, Gibson.

*Fol. Dic. v. 1. p. 275. Durie, p. 241.*

1628. December 2.

LYLE against HEPBURN.

No 54.

Found as  
above.

WILLIAM LYLE having convened Margaret Hepburn, relict and executrix of Francis Lyle, to hear and see a bond of 300 merks granted by her husband to the pursuer's father, registrate against her as executrix, *alleged, Quod non tenebatur ultra vires inventarii*; and true it was, that all the free goods contained in the testament were exhausted by lawful sentences upon lawful probation, conform whereunto she had made payment. *Replied*, Not relevant, unless she alleged the decret, whereupon payments were made, were obtained before the intending of the pursuer's cause, for she was in *mala fide* to pay any other after the pursuer had intended his cause, but she should have suspended upon double poinding, and her voluntary payment should not prejudice him.—THE LORDS repelled the exception in respect of the reply.

*Fol. Dic. v. 1. p. 275. Spottiswood, (EXECUTORS) p. 119.*

\*\*\* Durie reports the same case :

IN this action, a creditor convening the executrix to the debtor, who *alleging*, that the whole free goods in the testament were exhausted by sentences recovered by other creditors upon lawful probation, whereof she had made payment, this was not sustained to exclude this pursuer, and to liberate the executrix, except she should allege, that these other decreets were obtained by the other creditors against her, before the intending of this pursuit against her, without which she was not *in bona fide* to have paid them after the pursuer's citation, if