

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 intenting of the pursuer's cause, for she was in *mala fide* to pay any other after the pursuer had intented 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 intenting of this pursuit against her, without which she was not *in bona fide* to have paid them after the pursuer's citation, if

No 54. decreets were recovered sinsyne; but she ought to have suspended it upon double poiding, that the pursuer's debt might have been discust, and she either freed thereof by the Judge, or that he might have come in with the rest of the creditors *pro rata*.

Act. Craig.

Alt. Mowat.

Durie, p. 403.

1629. July 16.

TELFER *against* WILSON.

No 55.

THOUGH an executor so far acknowledged a creditor as to make a partial payment, this was not found to bar him from making payment to other creditors, and exhausting the testament thereby.

Fol. Dic. v. 1. p. 275. Durie.

* * * See This case, No 27. p. 2190.

* * * Spottiswood reports the same case :

JANET TELFER having pursued N. Moffat as executrix to her husband's bond, for payment to her of a sum of money, *alleged*, The testament was exhausted by decreets lawfully obtained by the defunct's creditors, and she had obtained decret of exoneration thereupon. *Replied*, She was in *pessima fide* to seek any decret of exoneration, unless the pursuer had been called thereunto, in respect that the defender could not but know her to be one of the defunct's creditors; because, since her husband's decease, the defender had paid annualrent for the said sum to the pursuer sundry years. *Duplied*, She was not obliged to know any; but they that had done most diligence behoved to be answered and obeyed by her; and if this pursuer were presently contending with the rest of the creditors, they would be preferred to her.—THE LORDS ordained the pursuer to dispute with the remanent creditors as if it were yet in seeking of the exoneration.

Spottiswood, (EXECUTORS) p. 120.

1629. December 16.

WHITE *against* The RELICT of the Minister of Jedburgh,

No 56.

Found again
in conformity
with Jeffrey
against Gray,
No 53. p.
3866.

ONE being pursued as executrix by the defunct's creditor, she defending, that the goods were exhausted by decreets obtained by other creditors for just debts, the party pursuer quarrelling no part of the allegiance, but only that the defender ought to allege, that the decret was obtained before the intent-