

1625. January 26. COWPER against LA. HALTON.

IN an action betwixt Andrew Cowper and the Lady Halton, as executrix to her husband, for payment of a debt owing by him to the pursuer, it being *alleged* that she could not be convened as executrix, because the whole free gear in the testament was exhausted by lawful sentences, recovered against her by the defunct's creditors, for just debts owing to them, and whereof she had made payment before the intènting of this pursuit, this exception was found relevant to liberate the executrix; albeit it was *replied* by the pursuer, That long before the payment made by her, and before the sentence obtained by the creditors against her, this pursuer had arrested the defunct's whole goods in her own hands; which arrestment, being so executed against herself, put her in *mala fide* to have misknown the same, or to have made payment to his prejudice; for albeit she could not impede the obtaining of the sentences by the creditors, yet she needed not to have made payment, but ought to have suspended upon double poinding, against all the parties who made any claim against the defunct's goods; in the which process, this pursuer behoved to have been called, and wherein he would have gotten his proportion of the gear effeiring to his debt, which not being done, by her own default, that voluntary payment made by her cannot prejudge the pursuer. This exception was found relevant to liberate the executrix, notwithstanding of the reply; and the payment made by her was sustained, notwithstanding of the preceding arrestment executed against her before the sentence; which arrestment, the LORDS found could not put her in *mala fide*; in respect that nothing followed thereupon, and that no pursuit nor diligence was moved thereupon, at the pursuer's instance, at any time preceding her payment; for the naked arrestment, without further diligence, would never have hindered the rest of the creditors to have obtained sentences, and so cannot be a hinderance to the execution thereof, and to make payment conform thereto.

Act. Lermontb.

Alt. ———.

Clerk, Scot.

June 14. 1625.

IN an action of registration pursued by Andrew Cowper, against the Lady Halton, as executrix to her husband, who was debtor to him in the bond, which he craved to be registrated against her as executrix; who compearing, defended herself by a sentence of exoneration, the pursuer *replied*, That that exoneration could not be sustained against him, because he was not called thereto, he being a lawful creditor, and his debt intimated to her before the summons, whereupon the sentence of exoneration proceeded, in so far as before her said summons and citation he had arrested in her hands all the goods and gear which she had of her husband's, to be made furthcoming for satisfaction of that debt contained in that obligation, which arrestment was executed by virtue of

No 52.

A creditor of the defunct arrested in his executor's hands, which he could not legally do after his debtor's death; yet this was found a sufficient notification of the debt and interpellation, after which the executor was not at liberty to prefer others.

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