

## No 27.

An executrix pursued, founded her defence upon a decree of exoneration. The pursuer answered, he had not been called thereto, as she knew of the debt. The defence on the exoneration was sustained.

1629. July 16.

TAILZIFER *against* WILSON.

A CREDITOR pursuing his debtor's executrix for payment of the debt, and the executrix *alleging* the free goods in the testament to be exhausted by sentences of other creditors, and that she was exonerated by a decree; and the pursuer *replying*, That she could not be freed of this debt, because the pursuer was not called to the exoneration, whom she could not misken, seeing she had made payment of a part of the debt to him, long before the exoneration, and therefore knew his debt, and could not misken it; this being before the sentence obtained by the other creditors against her, whereby she was in *mala fide* not to oppose against their pursuits, this debt of the pursuer's, and also not to cite the pursuer to that sentence of exoneration, that he might come in *pro rata* for his debt with the rest of the creditors; THE LORDS, notwithstanding of the reply, found the exception of exoneration relevant, seeing they found that he needed not to be cited to that process of exoneration, neither needed the executrix to have opposed against the creditors pursuit the pursuer's debt, for if she had done it, it would not have staid their pursuit; neither did her knowledge of the debt libelled, and paying of a part thereof, bind the executrix to a citation of the pursuer, seeing her knowledge was only voluntary, and not legal, and the same never intimated to the executrix, nor never any action intended by the pursuer for that debt; and if he had been cited in a multiplepounding against all the creditors, the LORDS found they would have preferred all the creditors who had done diligence, to the pursuer who never had done any diligence.

Act. Morwat.

Alt. Lawtie.

Clerk, Scot.

Fol. Dic. v. 1. p. 134. Durie, p. 462.

## S E C T. VI.

## Citation in Process against the Cautioners of Executors.

## No 28.

A party discussed an executor, and then insisted against his cautioner. In the action against the cautioner, the executor was called. He

1623. December 5. ROCHEID *against* HIS DEBTOR'S EXECUTOR.

ROCHEID having obtained sentence against the executor of a defunct, who was his debtor, and having denounced him thereupon to the horn, and discuss him, by seeking his lands and goods, and finding none poindable, or to be comprised, intents an action thereafter against L. Manderston, who was cautioner for the executor in the testament, to make the goods confirmed furthcoming; in the which process the executor being also called for his interest, and decess-

ing after the cause was reasoned, the LORDS found no necessity to summon any person to represent the executor, or to transfer the process, but that it might be sustained against the cautioner, without citation of the executor, whom the LORDS found no necessary party, he being discust, as said is. And it being *alleged*, That the whole goods of the testament were exhausted, by a sentence obtained at another creditor's instance against the executors, who had made payment thereof, which absorbed the whole goods thereby confirmed, and that before this pursuer's sentence, it was *replied*, That the payment cannot be sustained in prejudice of this pursuer, who had cited the executor before the making of payment; so that the executor could not, after his citation, be found in *bona fide*, to have paid all to one creditor, but he ought to have suspended upon double distress, that the pursuer, as a creditor, might come in *pro rata* for his debt; seeing he was, by the citation executed before making of payment, certiorate that he was a creditor, and so ought not to have voluntarily done any thing, or to pay to his prejudice. The excipient *duplied*, That the pursuer had past from that citation in process, so that he cannot be reputed to have done fraudulently in paying the other creditor.—THE LORDS sustained the exception of payment, and found, that a citation preceding, which was past from, was no impediment to stay the payment; and that it was no such certioration to the executor, which might astrict him to know the pursuer to be a creditor, the said citation being past from, which passing from, rendered the parties and process in that same estate, as if he had not been summoned at his instance.

Act. —.

Alt. *Belsbes.*Clerk, *Gibson.**Fol. Dic. v. I. p. 134. Durie, p. 87.*

No 28.  
died during  
the depen-  
dence. No  
necessity  
to call his  
representa-  
tives, as it  
was unne-  
cessary to  
call himself.

## S E C T. VII.

Citation in Process against a Woman *vestita viro.*

1622: July 18.

CALDWELL against CALDWELL.

In an action of ejection pursued by Caldwell, which was libelled to have been committed by Caldwell defender, being a woman, and whom the defender alleged to have been clad with a husband at that time, when the pursuer, by his summons, affirms that she committed the ejection, which was now pursued against her after the decease of her husband; and therefore *alleged*, That no process ought to be granted against her, while the heirs or executors, or some person to represent her umquhile husband were called in that process; seeing if the ac-

No 29.  
A woman,  
while mar-  
ried, made a  
person be e-  
jected. Be-  
ing pursued  
for this in her  
widow-hood,  
process was  
sustained a-  
gainst her,  
without cit-