

## 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 decret; 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 multiplepinding 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 discust 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-