

No 54. decreets were recovered sinsyne; but she ought to have suspended it upon double pointing, 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-

ing of this pursuit, the LORDS found not the allegiance relevant, except he alleged, that the decret was before the intenting of this pursuit; but in such cases these allegiances are not received, except the executors should also allege payment before the pursuit, whereby the goods were exhausted; but this was not quarrelled by the pursuer, as he might in law, for albeit sentence was obtained by another creditor, yet as long as the executor had not paid the whole quantity of the inventory, other creditors ought not to be stayed of their sentences; and then the executor must suspend against all the creditors; and then it would be tried who had the best right, and whose debt and diligence ought to be preferred, but the defender quarrelled not that part of the allegiance.

No 56.

Act. *Stuart.*Alt. *Cunninghame.*Clerk, *Scot.**Fol. Dic. v. 1. p. 275. Durie, p. 475.*

\* \* \* Spottiswood reports the same case:

ARCHIBALD WHITE pursued the Lady Yester, executrix confirmed to her unquihile husband, the Master of Jedburgh, for payment to him of L. 100 owing by the defunct. *Alleged*, Absolvitor, because the whole free goods, contained in the testament, were exhausted by lawful sentences obtained against her, whereupon she had raised summons of exoneration.—THE LORDS found she behoved to allege, by lawful decreets obtained against her, before the intenting of the pursuer's action.

*Spottiswood, (EXECUTORS) p. 120.*

\* \* \* This case is also reported by Auchinleck:.

AN executor being pursued at the instance of one of the defunct's creditors, *excepted*, that the whole goods and gear contained in the defunct's testament are exhausted by lawful sentences, which exception is not relevant, except the sentence be obtained and paid before the intenting of this pursuit.

*Auchinleck, MS. p. 74.*

1631. March 8.

DUFF *against* ALVES.

ONE Duff, as assignee by one Smith, to whom a sum was obliged to be paid by his contract of marriage, by one Warrand his father-in-law, pursues Alves, relict and executrix of the said Warrand, for payment thereof; and she *alleging*, That all the gear of the testament was exhausted by lawful sentences obtained by creditors, whereof she had made payment before this pursuit, the LORDS repelled this allegiance, because this payment was not allowed in prejudice of this pursuer, whose debt the defender could not misken, seeing it was contained

No 57.

Found in conformity with Scougal against Horsburgh, No 50. p. 3863.