

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.

No 57.

in the defunct's testament, and given up as a debt by himself, and which she had confirmed herself, and was also known to her, she being a contractor with her umquhile husband in the cedent's contract of marriage; for the LORDS found, that she ought to have suspended these creditors' decreets, and summoned this creditor thereto, that he might have been heard to have claimed his part of the defunct's goods *pro rata* with the rest of the creditors; and albeit she *answered*, That though she had suspended, yet the creditors who had obtained sentence would have been preferred to this pursuer who had done no diligence, yet this was not respected; for the LORDS found, that she could not pay other creditors, thereby to frustrate this party. *See CITATION, No 24. p. 2188.*

*Act. Mowat.**Alt. Gibson.**Clerk, Scot.**Fol. Dic. v. 1. p. 275. Durie, p. 577.*

* * * Spottiswood reports the same case :

It is the custom before the Commissaries, when the creditors of a defunct get a decret against the executor, that if there be any other creditors to whom the defunct has given himself up in testament to be owing any debt, they make that creditor, obtainer of the decret against the executor, to find caution to refund, to the other creditors testamentars, a part of that which he recovers from the executor, according to the proportion of their debt, whenever they shall recover sentence against the executor. Conform hereunto the LORDS decided betwixt Duff and Alves; for Duff having pursued Alves as executor, the defender *alleged*, The testament was exhausted by lawful sentences obtained against her before the intenting of the pursuer's cause, conform whereunto she had made payment. *Answered*, The defender, being a creditor testamentar, could not but know she ought not to have made payment to any before the pursuer had been called thereto. *Replied*, She behaved to pay them that did most diligence, and she was not bound to know any other.—THE LORDS repelled the exception in respect of the reply.

Spottiswood, (EXECUTORS) p. 121.

* * * This case is also reported by Auchinleck :

EXECUTORS being pursued for a debt contained in the defunct's testament given up by his own mouth, they allege the whole goods and gear contained in the testament were exhausted by lawful sentences, deduced upon lawful probation, before the intenting of this action. To which it was *replied*, That the excipients alleged no decreets of exoneration wherein the pursuer should have been called, seeing such creditors as the defenders could not have been miskenned, seeing the debt is given up in the defunct's testament; in respect whereof the excipient was in *pessima fide* to have made payment to other creditors that used diligence before the pursuer; but to have suspended, and to have got caution to

make the same furthcoming when this debt should be craved.—THE LORDS
repelled the exception in respect of the reply.

Auchinleck, MS. p. 77.

No 57.

S E C T. VII.

The appretiation in the confirmed testament may be corrected by a
confirmation *ad male appretiatā*, or by proof of higher value.—Li-
cense to pursue.

1610. July 19. PATERSON *against* BANNATYNE.

No 58.

HE who was cautioner for an executor, in confirmation of a testament, will
not only be decerned to make the gear confirmed furthcoming to the creditors at
the prices contained in the confirmed testament; but also for greater prices, if the
goods be decerned to be of greater avail nor the prices confirmed.

Fol. Dic. v. 1. p. 275. Haddington, MS. No 1976.

1621. December 14. HALYDAY *against* ———.

No 59.

IN an action pursued by Halyday against ———, for payment of certain
sums, and goods pertaining to the defunct, unto the pursuer, as the executor-
dative decerned *ad omissa*, and having license to pursue therefor, the LORDS
found, that there ought to be a testament of the omitted goods acclaimed first
confirmed before the pursuit could be sustained; and would not find process
upon the license to pursue an action for goods omitted out of the principal con-
firmed testament, albeit they sustained pursuits at the instance of the executors
decerned in principal testaments, upon license to pursue before confirmation of
the principal testament.

Act. *Belshes.*

Alt. *Henderson.*

Clerk, *Gibson.*

Durie, p. 7.

1627. November 24. GOURLAY *against* ———.

No 60.

IN a suspension betwixt Gourlay in Leith and ———, anent the exhibition
of a coffer, for the which there was decret given at the instance of the charger,

An executor
confirmed a
coffer in the