

No 60.
hands of a third person, to a certain value. Having pursued the holder for exhibition, he offered to pay the value confirmed, and insisted, if the executor allege it to be worth more, he must add the same to the testament. It was found, that the executor was not bound to add the greater price till the coffer was produced.

as executor confirmed to the defunct; and in the testament among the inventory of the goods, the coffer being given up by the executor at the estimation and value of 100 merks; the suspender offering to pay that 100 merks, the price put by the executor's self thereon in the said confirmed testament; whereby he *alleged* he ought to be freed of exhibition of the coffer, specially seeing it was his own estimation, confirmed and sworn with the rest of the inventory the time of the confirmation; and, if he would allege the same to be of any more worth, he ought to add the same to the testament, and confirm it before he can be heard to pursue or seek the samen; and there is place to the executor *ad omissa*, or *male appretiata*, to acclaim the same, and not to this executor, who hath given up the foresaid price;—THE LORDS found, that the executor confirmed, notwithstanding of his up-giving of the coffer at the foresaid price, might seek exhibition of the coffer, and was not holden to accept the said price confirmed in case the coffer be yet extant; and that the executor needed not to add the greater price to the testament, to the effect the same should be confirmed, until the time the same were first exhibit, that he might know at what avail and further price the same should be confirmed; and, therefore, that the defender was not freed by the offer of the price confirmed, but was holden to exhibit the coffer, seeing it was not controverted by him, but that it was extant.

Act. Hope.

Alt. Mowat.

Clerk, Gibson.

Fol. Dic. v. 1. p. 275. Durie, p. 316.

1632. March 10.

L. LUDQUHARN against L. HADDO.

No 61.
An executrix was found liable to account for goods at the value given up in the confirmed testament, though they were sold at less prices; and, at the time of confirmation, she had protested only to be liable for the prices she should get for them.

THE Lady Haddo having confirmed her husband's testament in April after her husband's decease, who died in October preceding; and wherein he left his bairn, being then in his mother's womb, now this party, who was his only bairn, his executor; and she having obtained a factory of the bairn's tutor; after the years of tutory, there were actions *hinc inde* intended betwixt them for tutor-compts, *directa et contraria tutela*; in discussing of the articles whereof, there was an article, by the which the Lady and Ludquharn, her second husband, were charged to compt, for the goods contained in the confirmed testament, given up by herself, and intromitted with by her; and for the prices of the corns pertaining to her husband, of the lands, which then at his decease, viz. in October, he had in mansing, and the increase thereof, as the same was given up by her; whereanent she *answering*, That albeit she gave the same up, yet seeing the Commissary of Aberdeen, and all the other Commissaries of Scotland, in the confirmation of testaments, have a common estimation of the increase, and that the prices were given up probably by her, as she esteemed the same, yet of no reason ought she to be burdened with more quantity nor the corns truly did extend to, nor with other prices than they gave, and were sold

for, specially seeing at the time of the confirmation she made protestation, that she should be no further obliged than as said is, albeit the same was confirmed at the rate foresaid; and also, that after the confirmation, the same were appraised by unsuspected persons, for a less price and quantity, for which she was content to be answerable; and as the bairn should want nothing of his own, so it were against equity, to lay more on her nor she got; it being improbable, that she would not make the best use of the corns, and others, to the use of her own only bairn. THE LORDS found, that notwithstanding of the protestation foresaid, made by the relict, and the apprising of the goods and corns thereafter; yet that she should be answerable, both for the prices of the corns and goods, as they are given up by herself in testament, without respect to the prices of the comprisers, specially the alleged comprising in May, which ought to have no respect for the goods, viz. oxen, kine, and other bestial, which then were at the worst estate, viz. after bear-seed, whereas the defunct died in October, at which time the goods were at the best; and so the prices given up, were found to oblige the upgiver thereto. *Item*, The relict defending herself with a decret of exoneration, wherein the Commissaries had found her super-expended in L. 800 more nor the whole free gear of the testament, the LORDS found not this sufficient, seeing it was general, and bore not the particular debts paid by her, wherein she was super-expended, nor the instructions of the particulars; therefore ordained her to qualify the same in this place; and she *alleging*, That she had produced all her instructions and discharges before the Commissaries, in that process of exoneration, and that the Commissary, nor his clerk, would never give them up again; likeas, it is the custom of all the Commissaries of Scotland, to keep the instructions for the warrant of their sentence, and never to give them up again, and both the Commissary and his clerk being dead, the party ought not now to be prejudged thereby, seeing his sentence must put her *in tuto*, which it is probable the Commissary would never have pronounced, nor no public judge in his office, without clear probation. THE LORDS found, That they would try, if there was such a custom, and consider thereof thereafter.

Act. *Advocatus, Nicolson, & Mowat.*

Alt. *Stuart.*

Clerk, *Gibson.*

Fol. Dic. v. 1. p. 276. Durie, p. 628.

1662. February 1.

BELSHES against BELSHES.

No 62.

IN an account and reckoning betwixt Belshes and Belshes, concerning executry, the LORDS found, that the prices given up by the defunct in his testament of his own goods, should stand, and the executor be accountable accordingly, seeing there was no enorm prejudice alleged, as if the defunct had