

1624. *March 31.* L. CURRIEHILL *against* EXECUTORS OF CUMMING.

No 51.

After an action is raised against an executor, he is not at liberty to prefer another creditor, even though that creditor's debt is acknowledged by the defunct in his testament.

IN the action pursued by L. Curriehill, whereof mention is made, No 2. p. 2937, and No 1. p. 3591, the Lady Cowie being convened as executrix to her husband, who was executor to umquhile Walter Cowie, debtor to the pursuer, for payment to the said pursuer of the debt owing to him by the said Walter, the LORDS sustained the action against the defender, for so much of the said defunct's, viz. Walter Currior's goods and gear, as were intromitted with by the Laird of Cowie before his decease, or by his Lady, who is defender, at any time sinsyne allenary, and found process against her allenary, for her own and her husband's intromission, with any of the said Walter's goods, to make her answerable *pro tanto*, to the pursuer for his debt, and not to make her subject to pay any further than her and her husband's intromission extended unto, in respect that the said umquhile Walter Currior's testament was confirmed in July, shortly thereafter, viz. within a half year after Walter's decease, after which confirmation, the executor confirmed, viz. the Laird of Cowie, died in August that same year; so that for the shortness of time intervening betwixt the confirmation and the executor's decease, he could not of reason be subject in any more than was intromitted with by him, and consequently, that his executor could be no further answerable than himself, except *pro tanto*, if she intromitted with any more sinsyne herself: And where the defender desired some defalcation of her husband's intromission foresaid, of some particular debts paid by her husband to Walter Currior's creditors, the LORDS would not allow any article of defalcation for such debts alleged paid by him, after the time of the intending of the pursuer's first action, which was moved by him against the Laird of Cowie, in his own lifetime, and before the testament was confirmed by him; albeit the defender *alleged*, that the saids debts were given up by the defunct with his own mouth, and contained in his testament, subscribed by himself; and being a testament testamentar, whereby it was alleged that there needed no further warrant to pay the same, but the testament itself and the party's discharge, it being a true debt, which allegiance was repelled; for the LORDS found, that the executor being once summoned before payment, and before confirmation of the testament, the testament unconfirmed, albeit bearing the debts, could not be a warrant to exoner him, in his payment thereof, there being no sentence recovered thereupon against him, whereby to prejudge the pursuer of his debt, at least of his proportion thereof, amongst the rest of the defunct's creditors, seeing by his citation, he had timeously interrupted the executor's voluntary payment.

Act. *Lawtie.*

Alt. *Nicolson, senior.*

Clerk, *Scot.*

*Fol. Dic. v. 1. p. 275. Durie, p. 125.*