

No 325.

said decret were only proved by the executor's own oath, or her being held as confessed; which probation of debt, after that manner and sentence following thereupon, without other lawful adminicle to prove the debt, the LORDS found not sufficient to exoner the executors, and to prejudge either the bairns of their legitim, or any other lawful creditor of the defunct qualifying a lawful debt; neither did the LORDS respect what the executor alleged, that where the debts were referred to her oath, which she knew to be true debts, that in such cases she could not perjure and manswear the same, and therefore, that she ought not to be prejudged to pay the debts, being truly known to her, and not to be exonerated thereby; which the LORDS repelled, seeing they found that other creditors could not be prejudged, as said is; in which cases it would appear, that the judge ought not to decern upon such manner of probation, but with the hazard to the party obtainer of the sentence, that he should be subject to relieve the executor at all other creditor's hands, who should have more lawful manner of probation to verify their debt; and, for that cause, to be subject to refund the money so paid by the executor; and that the executor here, before sentence should be recovered upon her confession, desired the judge to provide for this; see 13th March 1627, Ker *contra* La. Covington, *infra*.

Act. Scot.

Alt. Sharp.

Clerk, Scot.

Fol. Dic. v. 2. p. 238. Durie p. 285.

1627. March 13.

KER against LA. COVINGTON.

No 326.

An executor was sued for a debt, the verity whereof was referred to her oath. Found, that her oath should only affect her own claims on the executry, not those of others.

IN an action betwixt Ker, tailor in Edinburgh, and La. Covington, who was convened as executrix to her husband for payment of a debt owing by her husband to him, the verity whereof was referred to her oath, in place of all other probation, and she contending that she could not be compelled to give her oath thereupon, because if sentence should follow upon her oath, it would not be a ground to infer exoneration to her, for the defunct's other creditors would not allow payment to be made, conform to that sentence;—the LORDS found, That she ought to give her oath, and that the sentence to follow thereupon, if she granted the debt, should only be prejudicial to herself, in so far as she might have any benefit as relict, or legatrix, or executrix to the defunct, but that the same should not be prejudicial to any other of the true and lawful creditors of the defunct, or his other legatars; and therefore they ordained the pursuer to find sufficient caution to repay the said sum to be recovered by him against the executrix upon her oath, in case that she should be distressed by the other creditors or legatars of the defunct, if the rest of the defunct's goods contained in the testament should be exhausted by their debts; and this order they found ought to be observed, when the like case occurs.

Fol. Dic. v. 2. p. 238. Durie, p. 289.