

No 9. to their diligence as to the goods acquired by Alice Thin, after Masterton's death.

*Fol. Dic. v. 2. p. 176. Stair, v. 2. p. 387.*

\*\*\* Gosford and Dirleton's reports of this case 8th and 9th December 1675, are No 141. p. 5939, *voce* HUSBAND and WIFE. See also No 6. p. 3595, and No 8. p. 9118.

No 10.  
An executor  
creditor  
found liable  
for funeral  
charges and  
servants  
wages, as  
being pre-  
ferable to his  
own debt.

1680. November 25.

CRAWFORD *against* HUTTON.

DAVID CRAWFORD having obtained decret before the Commissary of Hamilton against Hutton, 'as intromitter with the defunct's goods,' for payment of the defunct's funeral charges and servants fees, and some furnishing to the defunct; Hutton suspends on these reasons; *imo*, That he is executor-creditor, and is preferable for his own debt to the charger; *2do*, That the decret is null, the quantities being proved by the charger's oath. It was *answered*, That funeral charges and servants fees are privileged debts, preferable to all other creditors, whether they confirm themselves executors or not; and as to the probation, the decret bears, 'That there were funeral charges expended and servants fees,' and the oath in supplement is only taken for the quantities, which cannot any otherways be known but by the expender.

THE LORDS preferred the funeral expenses and a year's fees of the servants, which were current at the defunct's death, and the term not come, unless the suspender instructed that the servants were only feed for half years, in which case only they preferred the current term; but as to the other furnishing, preferred the executor-creditor, and found him liable for the superplus, if any were.

*Fol. Dic. v. 2. p. 176. Stair, v. 2. p. 805.*

\*\*\* Fountainhall reports this case:

DAVID CRAWFORD against Arthur Hutton in Hamilton; the LORDS found Crawford having debursed the funeral charges and servants fees, he ought to be preferred, *quoad* these privileged debts, to the said Alexander Hutton, though he had confirmed himself executor-creditor for a just debt owing to himself; though some thought servants fees were only privileged for half a year's fee and no more, because they use to be paid termly; yet the words of the interlocutor are, "they prefer the charger, and find the executor-creditor who suspends, liable for the funeral expenses, and for the servants fees for a whole year, unless the executor-creditor will prove that the servants were feed termly; and find the suspender liable for the other grounds of debt contained in the decret obtained against him before the Commissary of Glasgow, and charged on, in so far as the sum confirmed will extend to, after the executor hath retained satisfaction to himself of the debts for which he is confirmed executor-creditor."

And as to the reason against the probation used in that decret, viz. that the Commissary took the cedent's oath of supplement to prove the particulars of the furnishings, it being only proved in general by witnesses that they were in use to furnish, which (they *alleged*) was illegal, and to make them judges *in re propria*; "the LORDS repelled the same, and found the decret sufficiently proved; there being no other possible way of probation to be got in such cases." That funerals are a preferable debt in law, *vide* Vinn. ad S. S. 3. Instit. Ad l. falcid; & l. penult. D. De religios.

No 10.

*Fountainhall, v. 1. p. 118.*

1688. February 17.

KEITH against KEITH.

No 11.

THE debate between Keith of Lentush and Marjory Keith being advised, the LORDS found, that wives had no preference on their contracts of marriage, but conform to their diligence; and that the *jus hypothecæ*, which they had in the Roman law, was not *pro donatione propter nuptias*, but only *pro restitutione dotis*, wherein they had a *jus prælationis*, and not for their jointures. Annæus Robert. lib. 4. rer. judicator. cap. ult. shews the Parliament of Paris decided the same. This is an unfavourable interlocutor for widows; but it was stopped on a bill till farther hearing.

*Fol. Dic. v. 2. p. 176. Fountainhall, v. 1. p. 498.*

\* \* \* Harcarse reports this case :

It being *contended* in a debate in presence, That wives were preferable creditors for their jointure, out of their husband's moveable estate, for these reasons; 1<sup>mo</sup>, By the civil law, wives had a hypothec in their husband's goods; 2<sup>do</sup>, Such a privilege to wives is necessary, in respect they cannot, *stante matrimonio*, have execution against their husband's moveable estate, seeing that would revert to the husband's *jure mariti*; 3<sup>tio</sup>, To secure wives' provisions, *stante matrimonio*, would sow division betwixt them and their husbands; and would render a moveable estate useless for commerce, especially to merchants; 4<sup>to</sup>, The Commissaries of Edinburgh and others, by constant and immemorial custom, *quæ pro constituto habetur*, prefer wives as to their jointures.

*Answered*; By the Roman law, wives having the *dominium directum* of their tocher when estimated, it was just that the *dôs*, when *æstimata*, for the benefit of the husband, should be secured by privileges, which yet extended to the *dôs* only, and not to any donation *ante* or *propter nuptias*, given the wife by her husband. But the policy of our law differs in this matter from the Roman constitution; for with us wives are secured in terce and third, without any tocher given; and the tacit hypothecs in the civil law take no place in Scotland, except in masters' rents and a few cases; and we own but a few privi-