

No 11. leged debts, such as funeral expenses, and the like, which is *pia causa*; 2<sup>do</sup>, If wives had a privileged security for their jointure, then it would affect lands and *immobilia*, as by the civil law; 3<sup>tio</sup>, This point was never yet decided upon a full hearing before the Lords; 4<sup>to</sup>, When relicts are confirmed executors-creditors, either alone or with preference to others, the acceptation and homologation of these others secures them in the one case, and their own diligence in the other. But this defender is confirmed executor simply, not *qua creditor*; and the protestation not to prejudge her saves only from the confusion; 5<sup>to</sup>, The allowing such a privilege would endanger creditors and commerce, seeing it would encourage husbands to give, in their contracts of marriage, large provisions to their wives, out of a prospect to secure a maintenance to them and their children; and creditors are not supposed to know what provisions may be in contracts of marriage.

THE LORDS found, That by our law wives have no privilege or preference out of their husbands moveables, but according to their diligences, and decerned; and declared this to be law, which will have a retrospect *ad praterita*. By the consequence of this interlocutor, though wives be confirmed executors-creditors, yet other creditors confirming within six months, will come in *pari passu* with them; and Commissaries' confirmations, preferring wives in a competition of creditors, will be quarrellable by reductions; wives being now in the same case with other creditors. See No. 13. p. 11835.

*Harcarse, (EXECUTRY.) No 478. p. 130.*

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1697. February 19.

JAMES AUCHINLECK *against* The EXECUTORS of Mr DAVID DINMUIR.

No 12.  
A wife's funeral expenses found privileged only on her own estate, not against her husband's creditors.

JAMES AUCHINLECK, apothecary in Edinburgh, pursues the Executors of Mr David Dinmuir advocate, for the medicaments furnished to him and his wife, (who died some months before himself,) and for the powders, oils, and sear-cloths for their bodies; and craved preference to all other creditors upon the account of this privileged debt. The Creditors confessed, that *quoad* the *sumptus in morbum et funus* of Mr David himself, he was preferable; but as to the funerary charges bestowed on his wife, he could claim no special preference, but only come in *pari passu* with the rest. *Answered*, That the *debitum humanitatis* obliged a man to bury his wife, and all the wise philosophers among the Grecians looked on it as a barbarous thing not to perform the officious rites of burial, even to enemies and strangers; and the Romans, a very prudent people, valued themselves much upon this, l. 17. D. De rebus auctor. judic. possid. *Answered*, The *officium humanitatis* was not the question, but the preference; for if our servants die, or sicken in our family, we are obliged to call for help and advice, and to bury them; and yet none will say *that* will be a

preferable debt on our executry. THE LORDS found the wife's funerary charges a privileged debt as well as the husband's, she having deceased before him. Then a new question arose, seeing the wife's executors in Holland, (where she was born,) had carried a part of her moveables, whether they or the husband's executors ought to be discussed *prima instantia*, or if they ought to be liable, *pro rata*?

On a new hearing, the LORDS altered, and found it but of the nature of a common debt, privileged on her own estate, but not against her husband's creditors.

*Fol. Dic. v. 2. p. 176. Fountainhall, v. 1. p. 769.*

1713. February 19.

ISOBEL ALLAN, Relict of James Cleghorn, Merchant in Dalkeith, *against His CREDITORS.*

ISOBEL ALLAN having moved an edict before the Commissaries of Edinburgh, for confirming herself executrix-creditor to James Cleghorn her husband, for the provision in her contract of marriage; several of the defunct's creditors craved to be conjoined in the office; but the Commissaries, conform to their usual custom, preferred the relict to them. The competing creditors brought the cause by advocacy before the Lords, where it was alleged for the relict; *1mo*, Contracts of marriage being *uberrimæ fidei*, and wives provisions alimentary, and often remuneratory for the tocher, which goes to the husband, they ought to be privileged. If it were otherwise, the relict would be postponed to all other creditors; because, her being *sub potestate viri*, disables her, during the marriage, to do any diligence against her husband's person or estate, both which lie exposed to the diligence of other creditors, so that she must be either first or last. Upon this account it is, that the husband's possession is reckoned the wife's possession, in order to make a base infeftment in her favours effectual; *2do*, By the civil law, the wife was preferable to all her husband's creditors, and had a tacit hypothec in all his means for her tocher to be restored, L. 12. C. Qui potiores in Pign. And our dowries, which come in place of the tochers, should be alike privileged; *3tio*, The ancient decisions of the Session, and the constant custom of the Commissaries, give the relict a preference upon her contract of marriage.

*Answered* for the Creditors; *1mo*, As a wife comes in for a liferent-infeftment only conform to the date and registration; so she cannot claim any privilege for any other liferent-provision in her favours; for otherwise, the widows of merchants and tradesmen, whose substance consists in moveables, should find more favour in law, than country Ladies who generally bring great portions with them, which is absurd. It was no privilege, but a piece of common justice, that the husband's possession was reckoned the possession of the wife, who

No 13:

A relict has no preference to her husband's other creditors for the provision of her contract of marriage, but according to the priority of her diligence.