

No 2.  
Found as  
above.

1674. December 16. LAIRD OF KELHEAD *against* IRVING and Others.

THE Earl of Queensberry being executor confirmed to the Countess his mother, raiseth a double pouding against her creditors for clearing their preference, especially the Laird of Kelhead, John Irving, and James Borthwick. Kelhead's interest is, that his son being married to Queensberry's daughter, beside the tocher contained in the contract, the Countess engaged for 5000 merks, and after, in her viduity in *anno* 1671, gave a new bond for the same sum, and for security thereof disposed all the moveables that she should happen to have the time of her death, and also assigned the rents; whereupon Kelhead arrested all the moveables in the Lady's own hand about the time of her death, and shortly after her death came to my Lady's house where the moveables were, and took instruments that he entered in possession thereof by his disposition; and when this Earl of Queensberry confirmed the Countess's testament, protested that it should not prejudice his right; he did also obtain decret before the Sheriff against the Earl for delivery of the Lady's moveables, as having right thereto by virtue of his disposition and possession. John Irving's interest is a bond granted by the Lady for L. 1000, bearing *to be justly resting and owing*, and which, he offered to prove, to have been for the funeral expenses of my Lord's burial. James Borthwick's interest was a bond due by the deceased Earl of Queensberry, prior to Kelhead's first bond, and an account of drugs to the Earl when on death-bed.—It was *alleged* for John Irving, That he is a privileged creditor, his debt being for the funeral expenses of the defunct, which is a privileged debt by law and our custom, introduced on a just and necessary ground of humanity, that defuncts by not unburied decently according to their quality; and therefore, whoever expend the funeral expenses, are preferred to all other creditors; so that Kelhead's debt cannot come in competition with this privileged debt, whatever diligence he could do, unless the same had been so complete as to have attained the full effect; and so Kelhead's arrestment is of no effect against him. And albeit a disposition of the moveables by the Lady, and delivery or possession attained in her life would have been sufficient to exoner this Queensberry her executor that he was not under double distress to deliver the moveables to Kelhead, and pay the debts to the privileged creditor out of the same moveables, yet this disposition and pretended possession is not sufficient to transfer the property of the moveables to Kelhead; because the law hath prescribed the method of affecting of defuncts moveables to be only by legal diligences; so that what is in *bonis defuncti* at the defunct's death, cannot be transmitted by possession attained after; and the disposition makes him only a special creditor, which does not exclude the privilege of the creditors for funeral expences, which privilege would not only prefer Irving in a competition against the Earl's

executor, but also against all representing him, so long as the inventory was not exhausted by payment made before citation upon the privileged debt.

THE LORDS found the funeral expenses to be a privileged debt, preferable to all others the defunct's creditors; and that the possession taken by Kelhead, after the Lady's death, was not effectual, and therefore preferred Irving to him: And likewise found, that James Borthwick's account of the drugs furnished to the defunct while he was on death-bed, had the same effect as funeral expenses; but would not allow his prior bond, though he alleged it was for drugs furnished upon former occasions.

As to which it was further *alleged* for Borthwick, That his prior bond is yet preferable to Kelhead, to this effect, that he may thereby affect such of the moveables as had been my Lord her husband, his debtors; because, in competitions betwixt the creditors of defuncts, and the other creditors of executors, for the executor's proper debt, the defunct's creditors are always preferable, when both of them do affect either the goods or debts of the defunct; *2do*, Borthwick's debt being anterior to the Countess's bond to Kelhead, the same is null by the act of Parliament 1621, against fraudulent alienations amongst conjunct persons; for the cause of the bond being acknowledged to be a prior bond granted by the Countess for an additional tocher with her daughter, privately granted, besides the contract of marriage, it was null as being a wife's bond, *stante matrimonio*; and albeit it be renewed in her viduity, yet being posterior to the pursuer's bond, and for an anterior cause not obligatory, the same is null by exception or reply, conform to the said act, it being no real right.

THE LORDS found Borthwick, as the defunct's creditor, preferable to Kelhead, who was only the creditor of the executrix as to such moveables belonging to the executrix at her death, which were the defunct Earls; and found also, that Kelhead's bond being posterior to this debt, without an anterior onerous cause, might be annulled by the act of Parliament without reduction. See PRIVILEGED DEBT.

*Fol. Dic. v. 1. p. 205. Stair, v. 2. p. 293.*

1675. July 29.

JOHN HALL, late Bailie of Edinburgh, and other CREDITORS of the Relict of JAMES MASTERTON, *against* MARGARET THOMSON, and Other CREDITORS of the said JAMES MASTERTON.

IN a double poinding, raised at the instance of Stennismiln, in whose hands the whole goods and in-sight plenishing which were in the house, and possessed by Alice Thin, relict of the said James Masterton, were sequestrate, until he should be first paid of the house mail;—it was *alleged* for the Creditors of the husband, James Masterton, That they ought to be preferred, because he had disposed his whole goods and moveables, in favours of the said Alice, his relict,

No 4.  
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