

1675: July 29.

JOHN HALL, late Bailie of Edinburgh, and other CREDITORS of the RELICT of JAMES MASTERTON, *against* MARGAET THOMSON, and other CREDITORS of the said JAMES MASTERTON.

IN a double pouding raised at the instance of Stennis Milne, in whose hands the whole goods and insight plenishing which were in the house, and possessed by Alice Thin, relict of the said James Masterton, were sequestrated, 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 favour of the said Alice, his relict, with the burden of his debts; and therefore, whatsoever goods she had by the same disposition, it was really affected with his creditors' debts. It was *answered*, and *alleged* for the creditors of the relict, That she never accepted of any such disposition, nor made use thereof, but on the contrary, any intromission she had was as executrix to her husband, whereby the property of the goods became hers, and she might dispose thereof. Likeas, she did dispoise the same in favour of Margaret Masterton, her sister-in-law, with the burden of her proper debts, and so her creditors had best right thereto. THE LORDS did find, That if the said Alice Thin had only right as executrix, that the proper goods and gear which belonged to the husband, and were intromitted with by her, being yet extant, would belong to the husband's creditors, and so preferred them conform to a former practise in the case of the Lord Lee against Veitch, No 1. p. 3123, where the LORDS did ordain it to be a practise, that the creditors of the defunct should be preferred to the creditor of the executor as to his goods; but as to any goods that were acquired by the relict herself after the husband's decease, and did only appertain to her, and were never possessed in common, they did prefer the relict's own creditors to the creditors of the husband, who hath never done any diligence to affect the same, nor had recovered decret against the relict, as executrix, to constitute her debtor during her lifetime.

1675. November 24.—IN the double pouding before-mentioned, wherein the creditors did crave preference, it was *alleged* for David Niesh, That he being a domestic servant for many years to James Masterton, and to his wife after his decease, for which he had recovered decret, that he ought to be preferred to both their creditors, because servants' fees are a privileged debt, and preferable to all others. It was *answered*, That albeit by our law, servants' fee are so favourable a debt, that they may be paid before confirmation by intromitters with defunct's goods, the time, or after their decease, yet if they have not been paid by any representing the defunct, they are not privileged debts as to all other creditors. THE LORDS did refuse to prefer Niesh, there being no

No 8.

Servants' fees are so far privileged, that they may be warrantably paid before confirmation or dissolution of the family, to free the executors, but not being paid, they were found not privileged.

No 8.

ground in our law for such privilege, which did only extend to give warrant to pay them during their actual service, and before the family be dissolved.

*Gosford, MS. No 796. p. 500. & No 808. p. 508.*

\*.\* Dirleton's report of this case is No 141. p. 9541. *voce* HUSBAND and WIFE.  
The case which follows is the sequel of the above.

1675. December 17.

CREDITORS of JAMES MASTERTON *against* CREDITORS of ALICE THIN.

No 9.

An executor's own creditors were postponed to the creditors of the defunct competing for the debts of the defunct.

JAMES MASTERTON disposed his whole estate, both moveable and heritable, to Alice Thin, his wife, with the burden of all his debts, and with power to dispose otherwise in whole or in part during his life. She confirmed herself executrix in corroboration of this disposition, and having lived several years after her husband and kept the tavern, she became debtor to several merchants for wine and other furniture; and she gave a disposition of her whole moveables to Katharine Masterton for payment, and with the burden of her whole debts, reserving her own liferent, and with power to dispose otherwise during her life. After her death, upon competition of her and her husband's creditors, her goods were sequestrated in the hands of Mr James Ellis, and by him sold. There was decret obtained against him at the instance of the Thomsons, who got a bond from Masterton their uncle, payable after his and his wife's death, and likewise at the instance of the merchants who had furnished Alice Thin wine. Mr James Ellis suspends on double pointing, because the sum in his hand is not able to pay both. It was *alleged* for the Creditors of James Masterton, That a great part of the goods sequestrated were the proper goods of James Masterton, and his creditors are preferable as to these; for it is uncontroverted, that the creditors of a defunct are preferred to the proper creditors of the executor, for the executor's own debt, if they arrest either the moveables or debts of the defunct, so that the creditors of Masterton, whatever diligence they have done, are preferable to Masterton's goods in so far as extant, or to the price thereof in the sequestrator's hand. *2do*, If Alice Thin be considered as having disposition from her husband, whereby the property of the goods became hers, and that she was not as a naked executrix that had but an office, yet her husband's creditors must be preferred, because her disposition to her bears expressly to be affected with, and burdened with his own debts, which must import *jus hypothecæ* upon the goods disposed, whereby they are burdened, though they pass to singular successors, except only what is allowed upon account of commerce to those who buy or barter moveable goods, who are obliged to know no more than the sellers possession, unless the goods had been stolen, which is *labes realis*. *3tio*, This disposition doth not give the wife an absolute right of property, but it is equiparate to the right of an executor,