

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,

which is *dominium limitatum et fiduciarium*, for this disposition is nothing in effect but an universal legacy with the burden of all debts; and, in both cases, the said Alice Thin might not only dispone by way of sale or exchange, but might, in any other way, transmit the dominion of the goods for an onerous cause, even to her proper creditors, who would be secure against the creditors of the defunct; but in this case, Alice Thin hath not transmitted the property effectually, for all that she hath done is only a disposition of her moveables, reserving her own liferent, with power to dispone otherwise, and with the burden of her debt, which is but a fraudulent deed, and cannot prefer one creditor to another, especially seeing the said Alice was insolvent, and not able to pay the debt due by her husband and herself, both which are a burden upon her means, and there is here no tradition of possession, but by an instrument, she retaining the natural possession all her life. It was *answered* for the proper Creditors of Alice Thin, That they ought to be preferred, because it is acknowledged, that Alice Thin had power to dispone and transmit the property, which she hath done by a real tradition, instructed by instrument, by which she did actually deliver the goods to Katharine Masterton, and no law requires that possession must be continued, but that there may be a reservation of a liferent of moveables, and yet is such a tradition as will transmit the property. As for the allegiance of *jus hypothecæ*, by Masterton's disposition, it can have no effect, for our law acknowledgeth no hypothee, but of fruits, and *invecta et illata* for rents, and therefore, though Masterton had in most ample form overburdened his goods with an hypotheck, it could have no effect, neither can dispositions of moveables with burdens or reservations infer a real burden upon the moveables transient therewith to singular successors, which the nature of moveables admitted not, but they must be current in all kind of commerce acted *bona fide*; so that Alice Thin having dispomed these moveables, and by tradition transmitted the dominion thereof, her husband's creditors have no preference therein, for no man is obliged to enquire after the written disposition of moveables, or the terms thereof.

THE LORDS found, That the disposition by Masterton to his wife was not plenary, but fiduciary, like to the right of an executor and universal legatar, and that she might not only have sold or exchanged her husband's goods, but if she had dispomed or delivered them to her own creditors, they were secure; and that we have no hypotheck by constitution, nor are singular successors liable to the conditions in the written dispositions of moveables; but found, that the disposition being affected and burdened with the defunct's debt, though it was no real right, yet it did infer a privilege and preference of the disponder's creditors in competition for the goods dispomed, whereof the dominion was not transmitted; and found this disposition with the instruments of possession qualified as said is, not to be a lawful transmission of the property from Alice Thin, and therefore preferred Masterton's Creditors to such of the goods as should be proved to have been Masterton's goods, and admitted both creditors according

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."