

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^{mo}, By the civil law, wives had a hypothec in their husband's goods; 2^{do}, 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^{tio}, 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^{to}, 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-

No 11. leged debts, such as funeral expenses, and the like, which is *pia causa*; 2^{do}, If wives had a privileged security for their jointure, then it would affect lands and *immobilia*, as by the civil law; 3^{tio}, This point was never yet decided upon a full hearing before the Lords; 4^{to}, When relicts are confirmed executors-creditors, either alone or with preference to others, the acceptance 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^{to}, 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.

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