

No 66. The like had been found in the case of a Lord of Session's testament, Creditors of Lord Mersington competing, No 63. p. 4849. ; and more lately by interlocutor in the case of the Lord Kimmergham's testament, No 67 *infra*. It is true, there was no decree in that case, a petition against the interlocutor having been appointed to be seen and answered, which never was advised.

Kilkerran, (FORUM COMPETENS.) No 1. p. 213.

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A confirmation *ad omnia* of the library of a Lord of Session in the commissariat where the library was, was preferred to a confirmation in Edinburgh. See No 63. p. 4849.

1753. January 19. WILLIAM HALL *contra* M'AULAY and LINDSAY.

UPON the death of Sir Andrew Home of Kimmergham, one of the Lords of Session, which happened at Edinburgh in March 1730, M'Aulay and Lindsay merchants there, furnished black cloth, linens, &c. for the defunct's children and servants, and for the widow. M'Aulay's account amounted to L. 70 Sterling, and Lindsay's to L. 35, which were afterwards constituted by decreets of cognition. To recover payment, they confirmed the defunct's library in the Commissary court of Edinburgh. Mr William Hall, another creditor, confirmed the same subject in the Commissary court at Lauder, within which jurisdiction was the family-seat of Kimmergham, where the defunct constantly resided, unless when attending his duty in Edinburgh. In a multiple-poining Mr Hall's confirmation was preferred. But M'Aulay and Lindsay insisting that their claim was a privileged debt, this point was remitted to the Ordinary. In the mean time it was agreed betwixt the parties, that Mr Hall should receive the price of the library, out of which he was to pay the two accounts due to his parties, upon bills to be granted by them, which were to be paid or retired according to the event of the process.

Matters lay over in this state till Mr Hall's death, when his heirs put the two bills in suit. The defence arose from the above history, viz. That the bills were not due, because the defenders were privileged creditors, and preferable to Mr William Hall.

THE LORDS sustained the defence ; but reserved to the pursuer to object against any articles that were not to be used at or before the interment, according to the custom of the country.

The interlocutor went upon this footing, That hanging a room with black, putting the wife and children in mourning, and the servants employed in the solemnity of the interment, are articles to be considered as part of the funeral expenses, where the condition of the defunct makes these articles necessary, or at least decent. I was of opinion, that as these articles hitherto, for what I could see, had not been reckoned part of the funeral expense, I was not for extending this claim as a privilege in *nece creditorum* ; that extravagant burials had been in fashion and might again be, that scarfs and mourning-rings might become the fashion here as in England ; and that it would be hard to

subject creditors to this expense without limitation, as much as when the person dies in opulent circumstances.

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I must observe, however, that this case will not be a precedent to any where the person dies a bankrupt, or habite and repute insolvent, which ought to put furnishers upon their guard. See PRIVILEGED DEBT.

Fol. Dic. v. 3. p. 241. Sel. Dec. No 35. p. 40.

* * * This case is reported in the Faculty Collection.

LORD KIMMERGHAM, one of the Ordinary Lords of Session, died in 1730, and the mournings for his widow, children *in familia*, and servants were furnished by Archibald M'Aulay and Patrick Lindsay, who, after the lapse of six months from Lord Kimmergham's death, confirmed themselves executors *ad omissa* before the Commissaries of Edinburgh, within whose jurisdiction the defunct resided during the sitting of the Court of Session, and within whose jurisdiction he died; and gave up, in the inventory, the defunct's library omitted out of a former confirmation.

Soon after, Mr Hall of Whitehall being a creditor to the defunct, also confirmed himself executor *ad omissa*, and gave up the said library in inventory, but expedite his confirmation before the Commissary of Lauder, within whose jurisdiction the defunct's estate and family seat were situated, and where the goods confirmed lay. The books were, by consent of parties, sold, and a competition before the Court of Session ensued, which depended on two points; *1mo*, Which of the confirmations was preferable. *2do*, Whether the mournings furnished to the defunct's family were part of the funeral expenses, and, on that account, a privileged debt on his estate.

THE LORDS, 17th July 1733, 'Found the confirmation at Lauder preferable to that at Edinburgh; and remitted to the Ordinary to hear parties procurators, how far mournings furnished to the children and servants, in competition with creditors, are privileged and preferable debts.'

After this, of consent, Mr Hall uplifted the price of the books, and granted an obligation to the merchants, to pay whatever sums of money should be determined to be paid them out of the price, in the event of discussing their preferences; and also gave to Mr M'Aulay L. 70 Sterling, and to Mr Lindsay L. 35 Sterling, being the amount of their accounts, but took their bills for these sums.

After Mr Hall's death, William Hall, his executor, brought a process against Messrs M'Aulay and Lindsay for payment of the said bills; which was remitted to, and conjoined with, the competition above mentioned.

It was *pleaded* for the defenders; That as, by the laws of all nations, funeral expenses are a privileged and preferable debt on the defunct's estate, so whatever, by the custom of the country, is decent and ordinary to be laid out on a funeral of persons of the defunct's rank, is considered as part of these expenses,

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and entitled to that privilege, though the defunct died insolvent; and therefore, as, by the custom of this country, there ought in decency to be mourners at the funeral of one of Lord Kimmergham's rank and station, and that his widow, children, and domestics, who were to bear a part at the funeral, either within or without doors, ought in decency to be in mourning; and as a husband is liable for his widow's mournings, a father for the cloaths, of whatever kind, furnished to his children *in familia*, and a master pays for the mournings into which he puts his servants, all these mournings must, as a part of the funeral expenses, have a privilege and preference on the defunct's estate.

Answered for the pursuer; That though mournings furnished to the widow and children be a debt upon the defunct's executry, yet it is only ranked in the third place, that is, after the privileged debts, and those owing to other creditors; the law gives the widow and children no preference, even for their aliment to the first term; and still less will it indulge a preference for such cloaths and apparel as the defunct's rank would have made proper for them, if he had left effects for that purpose; formalities of this kind cannot come in competition with the justice which is due to creditors; the funeral expenses are indeed privileged; but these go no farther than is necessary for performance of the funerals, *ne insepulta cadavera jacerent*, and cannot be extended to furnish those who are connected with the defunct with every thing that may be requisite for their appearing suitably to his rank in the world after his decease; and in estimating funeral expenses, regard must be had to the defunct's estate, as well as to his rank and station, *l. 14. § 6. ff. de re relig. et sumpt. funerum*. Besides, the accounts contain several articles of mournings which would not be used at the funeral; the widow was in the country; and though she had been in town where her husband died, by the custom of this country, would not have attended the funeral.

Observed from the Bench; That the expenses of hanging the room, where the corps lay, with black, is certainly part of the funeral expenses, and *multo magis* the mournings for the children and servants, who are to bear a part at the funeral; but mournings to the relict, or such children who are not present at the funeral, make no part of these expenses.

'THE LORDS sustained the defence; reserving to the pursuer to be heard upon what of the articles in the accounts were not used at or before the interment.' See PRIVILEGED DEBT.

Act. *Ja. Ferguson.*Alt. *Craigie.*Clerk, *Pringle.**Fac. Col. No 57. p. 84.*

A BRIEF of division ought to be directed to the Sheriff of the shire where the lands lie, and not advocated to the macers. See JURISDICTION.

Compare FOREIGN.

See No 13. p. 2051.—See No 64. p. 4748.—See APPENDIX.