

No 6.

THE LORDS did suspend the letters notwithstanding of the answer, in respect that the money was *bona fide* paid to the relict who was decerned, but died soon after, before she could be confirmed, and against whose preference in a double pointing, if she had been compearing, no reason could have been alleged.

Fol. Dic. v. 2. p. 176. Gosford, MS. No 519. p. 275.

*** Similar decisions were pronounced, 20th January 1631, Creditors of Brown, No 4. p. 2428, *voce* COLLUSION; and 9th February 1662, Crawford against Earl of Murray, No 63. p. 2613, *voce* COMPENSATION. See No 11. p. 1184.

1674. December 16.

Sir WILLIAM DOUGLAS of Kelhead *against* The CREDITORS of the deceased COUNTESS of QUEENSBERRY.

No 7.

Drugs furnished to a defunct, while on death-bed, and his funeral expences, are both privileged and preferable to his other debts.

IN a multiplepointing raised at the instance of the Earl of Queensberry, as executor to the Lady, his mother, against several of her Creditors, compearance was made for Kelhead, who *alleged*, That he ought to be preferred to all other creditors, because not only the deceased Countess was debtor to him by a bond for a most onerous cause, but likewise she disposed to him her whole goods and gear for security, in case she should not pay the same during her lifetime; and accordingly Kelhead did arrest the said moveables in the Countess's hands, and immediately after her decease, entered to the possession by way of instrument, and offered to confirm himself executor-creditor. Compearance was likewise made for James Borthwick, apothecary, who produced a bond granted to him by the deceased Earl and Countess of Queensberry, as likewise an account for drugs furnished at the time of their sickness; as also, compearance was made for one Irvine, who produced a bond granted by the Countess for furnishing sold by him to the Countess for the Earl's funerals, and thereupon they both craved to be preferred to Kelhead, not only because their debts were privileged, but because they had done diligence, and recovered decreets against this Earl of Queensberry. It was *answered* for Kelhead, That he ought to be preferred notwithstanding of these allegeances, because he was not only a creditor, but had a disposition of the whole moveables in question, and had not affected them by arrestment, but had taken possession by way of instrument before any of them had done diligence; neither will James Borthwick pretend any privilege for the sums contained in his bond, because it did bear borrowed money, and was lent long before the Earl took the sickness whereof he died; and as to any account or bond for furnishing drugs, and for funeral charges upon the Earl's account, albeit they might pretend privilege if they were pursuing his executors, yet where the competition is in a pursuit against this Earl

of Queensberry, as executor to his mother, any privilege of preference being only competent to the creditors of the deceased Earl, if the creditors had done diligence against the Countess, as his executrix, during her lifetime, the said privilege can never be extended in the case where the Earl of Queensberry, as executor to his mother, and having intromitted with her proper goods and debts, ought to be liable to his creditors according to their diligences and rights, and none can pretend to privileges but such of her creditors as could instruct that their debts were for drugs and other things furnished at her funerals. THE LORDS did prefer James Borthwick and Irvine for drugs to the deceased Earl when he was on death-bed, and other necessaries at his funerals; and found, that these being privileged creditors as to these, the said privilege did continue to prefer them in pursuits against this Earl, as executor to his mother, who was executrix to the deceased Earl, seeing he did represent her; and if the competition had been debated in her time, undoubtedly they would have been preferred. *2do*; They did prefer upon this reason, that the executrix having only *nudum officium*, and the whole inventory of the testament belonging to creditors and the nearest of kin, in so far as the inventory of the Countess's testament did not exceed the inventory of the deceased Earl her husband, his creditors either according to their privilege or diligence ought to be preferred, and are not taken away by her death; but as to any thing that did belong to the Countess, and did exceed the inventory of her husband's testament, Kelhead, as being her proper creditor, and as having right by disposition and arrestment, might insist upon that ground wherein it is like he will be preferred.

Fol. Dic. v. 2. p. 176. Gosford, MS. No 724. p. 439.

* * * Dirleton reports this case :

JOHN IRVINE, merchant in Dumfries, having furnished mournings, winding-sheet, and others necessary for the funerals of the deceased Earl of Queensberry, did take a bond for the sum of 1424 merks from the Countess Dowager, relict of the said Earl; which, though it bore only that narrative, that the Lady was addebted to the said John, without relation to the cause foresaid, yet it appeared it was for that cause; in so far as the said Countess being confirmed executrix to her husband had obtained an exoneration, and the foresaid debt, contracted for the funerals, was one of the articles of the same.

The said Countess having deceased, the Earl of Queensberry her son was confirmed executor to her; and a decret being obtained against him at the instance of the said John Irvine, for the foresaid debt, he suspended upon multiplepinding against the said John Irvine, and the Laird of Kelhead, and James Borthwick, and certain other creditors.

The said Laird of Kelhead *alleged*, That he ought to be preferred as to the goods confirmed by the said Earl, as executor to the said Countess, because the

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said Countess was his debtor in the sum of 5000 merks; and to the effect he might be satisfied of the said debt, had disposed to him her moveables if he should not be satisfied in her own lifetime; and that he had done diligence upon the disposition of the said moveables by arrestment, and by taking possession after the Lady's decease, and thereby had right to the moveables confirmed by the Earl, and thereupon ought to be preferred.

Whereunto it was *answered*, That the said disposition did not give right to Kelhead, unless tradition had followed upon the same in the Lady's lifetime; and the Lady had not only retained possession, but by the conception and nature of the right, Kelhead could not have possession, seeing he was to have right to the moveables after the Lady's decease, if he were not satisfied during her lifetime; so that he was in the case only of other personal creditors, and must come in according to his diligence; and Irvine and Borthwick were not only prior in diligence, having obtained decreets, but were privileged and preferable before all other creditors, in respect the said Irvine's debt was of the nature foresaid, for the defraying of the funerals, and James Borthwick's debt was for drugs.

It was *duplicated* for Kelhead, as to Irving, that any privilege he pretended to, did cease, in so far as the debt was innovated, and was not a debt upon the executry of the Earl of Queensberry, but became a debt of the Countess herself, who had given bond (as said is) without any relation to the cause foresaid; and as to James Borthwick, there being two debts due to him, one by bond, and the other by an account, the bond did bear borrowed money and annualrent, and was not a privileged debt.

THE LORDS found, That Kelhead had no right to the moveables foresaid, and was only a personal creditor; whereupon they found also, that debts of the nature foresaid, upon the account of funerals, and drugs furnished the time of the defunct's sickness, are privileged; so that the creditors, though they be not *creditores hypothecarii*, are *privilegiati*, and preferable to other personal creditors.

They found also, That Irvine's debt was still privileged, notwithstanding that the Countess had given bond for the same; seeing it did not bear borrowed money, but only that she was addebted; and it appears by the testament and exoneration, that she was addebted upon no other account, but for the cause foresaid.

They also did find, That the foresaid debts being privileged, as to the Countess, they are privileged also as to her executor; and that James Borthwick should come in with the said Irvine, as to his account, but not as to his bond; and as to it, was to come in with the rest of the creditors.

Reporter, *Craigie*.Clerk, *Gibson*.*Dirleton, No 206, p. 92.*

* * Stair's report of this case is, No 2. p. 3124, *voce* CREDITORS of a DEFUNCT.