

executor, but also against all representing him, so long as the inventory was not exhausted by payment made before citation upon the privileged debt.

THE LORDS found the funeral expenses to be a privileged debt, preferable to all others the defunct's creditors; and that the possession taken by Kelhead, after the Lady's death, was not effectual, and therefore preferred Irving to him: And likewise found, that James Borthwick's account of the drugs furnished to the defunct while he was on death-bed, had the same effect as funeral expenses; but would not allow his prior bond, though he alleged it was for drugs furnished upon former occasions.

As to which it was further *alleged* for Borthwick, That his prior bond is yet preferable to Kelhead, to this effect, that he may thereby affect such of the moveables as had been my Lord her husband, his debtors; because, in competitions betwixt the creditors of defuncts, and the other creditors of executors, for the executor's proper debt, the defunct's creditors are always preferable, when both of them do affect either the goods or debts of the defunct; *2do*, Borthwick's debt being anterior to the Countess's bond to Kelhead, the same is null by the act of Parliament 1621, against fraudulent alienations amongst conjunct persons; for the cause of the bond being acknowledged to be a prior bond granted by the Countess for an additional tocher with her daughter, privately granted, besides the contract of marriage, it was null as being a wife's bond, *stante matrimonio*; and albeit it be renewed in her viduity, yet being posterior to the pursuer's bond, and for an anterior cause not obligatory, the same is null by exception or reply, conform to the said act, it being no real right.

THE LORDS found Borthwick, as the defunct's creditor, preferable to Kelhead, who was only the creditor of the executrix as to such moveables belonging to the executrix at her death, which were the defunct Earls; and found also, that Kelhead's bond being posterior to this debt, without an anterior onerous cause, might be annulled by the act of Parliament without reduction. See PRIVILEGED DEBT.

*Fol. Dic. v. 1. p. 205. Stair, v. 2. p. 293.*

1675. July 29.

JOHN HALL, late Bailie of Edinburgh, and other CREDITORS of the Relict of JAMES MASTERTON, *against* MARGARET THOMSON, and Other CREDITORS of the said JAMES MASTERTON.

IN a double poinding, raised at the instance of Stennismiln, in whose hands the whole goods and in-sight plenishing which were in the house, and possessed by Alice Thin, relict of the said James Masterton, were sequestrate, 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 favours of the said Alice, his relict,

No 4.  
Found as  
above.

No 4. with 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 her's, and she might dispose thereof; likeas she did dispose of the same in favours 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 her 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 practick in the case of Ley, No 1. p. 3123. where the LORDS did ordain it to be a practick, that the creditor of the defunct should be preferred to the creditors of the executrix 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 had never done any diligence to affect the same, nor had recovered decret against the relict as executrix, to constitute her debtor during her lifetime.

*Fol. Dic. v. 1. p. 206. Gosford, MS. No 796.*

1678. December 19. PATERSON *against* BRUCE.

No 5.  
The Lords found, that the axiom *contra non valentem agere, non currit prescriptio*, takes no place in the short prescriptions; and that the three years are not to be understood of *anni utiles*, but *continui*; and therefore, that the act cannot be extended to this case, where the term of payment full sometime after the defunct's death,

IN a competition betwixt Captain Paterson and David Bruce, both having apprised the lands of Thomas Tweedie, from his apparent heirs;—it is *alleged* for Paterson, That he ought to be preferred, because he has the first apprising and infestment.—It was *answered* for Bruce, That his apprising, though posterior, is upon the defunct's debt, and Paterson's is upon a bond granted by the apparent heir; and therefore, by the act of Parliament preferring the diligences for the defunct's debts, before the apparent heir's, the said diligences being done within three years, are preferable.—It was *replied*, That the foresaid act prefers only diligences for the defunct's debt, being done within three years after the defunct's death.—It was *duplicated* for Bruce, That these three years must be *annuitiles*; but here Bruce could use no diligence, because the term of payment of his debt was not come; and the narrative of that act bears, 'That the defunct's creditors either did not know, could not, nor used no diligence;' and there can be no case more favourable than this, where Paterson's right is upon a fraudulent gratuitous bond of the apparent heir's.—It was *triplicated*, That this statute being correctory of the former law, which did not distinguish the defunct's debt, from the heir's debt, cannot be extended beyond the terms expressed, of diligences done within three years after the defunct's death, and if it were otherwise extended to bonds conditional, or whereof the terms were not come, that