FUNERAL CHARGES.

1697. *June* 5. BORTHWICK *against* RAMSAY.

No 1.
The Lords will not countenance exorbitant charges for funeral expenses.

IN the action pursued by Borthwick of Pilmor, as executor confirmed to the deceased William Borthwick, against Sir John Ramsay, Sir James Fleeming, and many others, debtors to him for drugs conform to the count book, some of them deponed, they believed most of the articles might be furnished, he being the ordinary they employed at that time, (though they could not mind every particular) yet he was owing them as much on another account. THE LORDS found this quality extrinsic, unless they instructed the ground of their debt otherwise than by their own oaths. The pursuer having led no probation as to the current price, some being unclear in their oaths, were ordained to be re-examined. Sir John Ramsay's account being partly made up of articles for eviscerating his Lady, for searcloath and odors thereto, the LORDS took notice, that the prices libelled at L. 224 were most exorbitant, and thought it unfit that by their decision they should countenance or sustain any such extortion, (though it be the usual practice of wrights for coffins, and all others who furnish any thing to burials in regard friends are unwilling to be heard at such a time) therefore they ordained the article huddled up *in cumulo* to be divided in a particular condescendence, that the same might be modified, and the lieges not abused by them. *See* QUALIFIED OATH.

Fol. Dic. v. 1. *p.* 338. *Fountainhall, v.* 1. *p.* 773.

1709. *February* 9. The LADY ORMISTON *against* HAMILTON of Bangour.

No 2.
Actio funeraria competent only for expenses that were necessary and decent, with regard to the defunct's quality, and

IN the count and reckoning betwixt the Lady Ormiston and Bangour, the Lady craves allowance of considerable sums paid to Sir Robert Blackwood, and others, for accounts furnished to the defunct. *Alleged*, No process for these, because prescribed by the 83d act 1579, not being pursued for within three years; and seeing they were not instructed by writ, and the defunct's oath not taken thereon, law now barred them from being proven by witnesses; so all

No 2.
estate descending to his heirs and executors; but where so much free effects do not come to them, as is sufficient to bury him, the expenses of his funeral, in so far as decent and necessary, should come off the legacies.

manner of probation perishing, they were wholly extinct. *Answered*, Merchant accounts prescribe from the last article of the furnishing, but *ita est*, the process was raised and executed within three years of the last articles; for, though the account was prescribed, if you reckon from the last article in my Lord Whitelaw's lifetime, yet that is not the method of calculation; for, after his decease, there were sundry articles furnished to his funerals and family, and the last of those articles is within the three years, and so not prescribed, seeing it must be reckoned still a current account what was furnished only on his account for his servants mournings, aud other funeral charges, though he was dead. *Replied*, His death certainly interrupted the currency of the account; for to make the account current in construction of law, it must be *inter easdem personas*, whereas the articles here founded on to preserve its currency, are, after his death, furnished to his relict, and by her order, and so begin a split new account; otherwise widows might prejudge their husband's heirs and executors in making them liable to accounts, which law had *præsumptione juris, et de jure*, extinguished by the triennial prescription; whereas, *factum cuique suum sibi nocere debet non alteri.* See 12th Feb. 1680, Ross *contra* Master of Salton, *voce* PRESCRIPTION; and this would shake a most excellent security given us by law against merchant accounts, that, after three years, they cannot be proven, otherwise than *scripto vel juramento;* and even the commencing the prescription from the last article is not from the statute, but by mere custom, and inconvenient enough; but to extend it further, where the account is finished by the death of the ontaker, that it shall be still current, is a most dangerous preparative, and overturns the very foundations of that good law. *Duplied*, What was furnished on the defunct's account was all one, as if furnished to himself, as the lawyers observe, *l.* 1. *D. de religios. qui propter funus aliquid impendit cum ipso defuncto contrahere videtur magis quam cum hærede*, and is reputed furnished in the last moments *quæ vitæ annumerantur*; and it is no strange thing in the analogy of law, that the currency is connected, though *inter diversas personas*; for, § 8. *instit. de usucap.* the possession *emptoris et venditoris continuatur* to make up the prescription; and, by our act of prescription 1617, more sasines either of heirs or singlar successors, are conjoined and connected together, though a considerable space (besides the *annus deliberandi*) intervene between them; and the presumption of three consecutive discharges, liberating from all preceedings, holds, though they be not all granted by one person; and so the Lord Whitelaw's death did not break off the currency of the accounts. THE LORDS thought the case new, and therefore ordered it to be argued in their own presence. *See* HUSBAND AND WIFE.—PRESCRIPTION.

1709. *February* 18—The case mentioned *supra*, 9th current, between Bangour and the Lady Ormistoun, being this day advised, the LORDS, by plurality, found the account not prescribed, but that it only commenced from the last article, albeit it was furnished after my Lord Whitelaw's death to his funerals,

and neither to his heir nor executor, in which case there was more ground to plead the currency of the account, but only to his widow, seeing it was for defraying the funeral expences, which the LORDS reputed all one with my Lord's own debt. No 2.

1709. *November* 11.—THE LORDS, (*supra* at the 9th and 18th of February 1709,) found Sir Robert Blackwood's merchant accounts partly furnished to my Lord Whitelaw, and partly to his funerals after his death, not prescribed, though pursued without the three years; because the furnishing after his death kept these articles before it as current, and were to be connected together to make up one collective account. This interlocutor being reclaimed against, and a new hearing granted, it was *contended* for Bangour, that by the 83d act of Parliament 1579, there was no such currency or connection permitted, but every article, if neglected to be sought in for three years after, prescribed; and if a year or other large interval of time should intervene betwixt furnishings, the doctrine of that new article's preserving the rest from prescribing ruined families, and enervated the benefit of that excellent act; and the first time ever this currency was sustained, was fifty years after, viz. 2d July 1630, Herries *contra* Scott, *voce* PRESCRIPTION; but there it bears, in respect there was a counting within the three years, and that the defender had promised payment. The next case where it came to be sustained, was on the 16th December 1675, Somerville *contra* the Executors of Muirhead, marked both by Stair and Dirleton, *voce* PRESCRIPTION; but even there it was reserved to be considered, whether the account was current or not; and Dirleton marks that several of the Lords thought the decision not very consistent with the acts of Parliament. However, it seems now to be a fixed rule, that they only prescribe from the date of the last article. But what is now determined is far more strange, that articles furnished to the widow after Whitelaw's death shall be conjoined with the former to preserve it from prescribing, as if it were a continued count; whereas it is not so much as *inter easdem personas*, and is an *extensio extensionis*, and a *fictio fictionis* which is reprobated in all law. *Answered*, The last being funeral charges, it is the defunct's debt, and preferable to the debts of the heir, and so it is no absurdity to connect it with the former; and there is nothing more ordinary in law, than to draw acts of Parliament, though correctory, *de casu in casum, et persona in personam*, upon similitude, and parity of reason; and so the triennial prescription of spuilzies and ejections is extended to intrusions and succeeding in the vice; and the extension here is to the manifest advancement of trade and merchandizing. THE LORDS, by a plurality of six against five, altered their former interlocutor, and found the furnishing after my Lord Whitelaw's death could not be continued with the former, so as to hinder the articles which were before his death, and without the three years of the citation to prescribe.

No 2.

1709. *Nov.* 17.—In the process depending betwixt the Lady Ormiston and Hamilton of Bangour, the Lady craving allowance out of her intromission with the executry, of the funeral charges in burying Lord Whitelaw, her last husband, extending to L. 5189 Scots, which she had paid to the furnishers, and taken assignations from them; and it being objected by the heir, that they were out of all measure extravagant, the LORD GRANGE ORDINARY found, that she could have only action for such funeral charges as were necessary and decent, according to the defunct's quality and estate, and not for such as were sumptuous and magnificent beyond necessity, and a suitable inevitable decorum; and having considered the particular articles, he found some of them wholly needless, such as the heralds, trumpeters, &c. others of them too high stated, as the mourning coach, dead linens, and black cloath for the servants, besides the pall, &c. Therefore he modified and restricted the account to L. 3000 Scots, which defalked about L. 2189 off the Lady's account. Against this interlocutor, the Lady gave in a reclaiming bill, complaining of the said modification, seeing the Lady was in the merchants and tradesmen's place; and if nothing could be abated of what they had truly furnished, no more could it be detained off her; and they were not concerned with the extravagancy and unsuitableness of the expense, if any was, which is denied; and as they were actually furnished, so she did as truly pay them; and they were not exorbitant, considering either his fortune, or character, as Justice-clerk, and so an officer of State; and therefore was no pomp nor solemnity here, but what my Lord Philiphaugh as Clerk Register had, in July 1708, at his burial. *Answered*, That my Lady having got so large a donative as L. 7000 Sterling from her husband, law and reason presume that she did it *ex pietate*, and noways *animo repetendi*, unless she had protested and declared at the time that she intended to seek repayment, as the *l.* 14. § 7. *D. de religios.* requires; and though she was liable to the furnishers *actione mandati et quod jussu*, yet that can never afford her an action to recur upon the heir, who had little or no benefit by the succession. For the Roman law not only considered, in the funerary action, what the dignity of him *qui funeratus est* required, *ex causa, tempore et bona fide*; but likewise that all which was expended, was not to be allowed, *si immodice facti essent sumptus*; but that respect was to be had *ad ejus facultates et illius substantiam, quæ ultram modum sine causa consumebatur, dict l.* 14. § 6. *D. de religios.* And humanity being the foundation of this funerary action, it ought to go no farther than decency, and not to idle pomp and ostentation, which is very much restrained by the act of Parliament 1681; and such vanity is not to be encouraged by the Lords decisions. It was first stated, whether the Lady's payment of these accounts without a decreet, or seeking an abatement where extravagant, was so *bona fide* made, as to preclude any objection against the exorbitancy of the prices; and the LORDS, by plurality, found it was yet entire to quarrel the prices, where unreasonable? The next vote was, that *esto* the whole

furnishing and pomp was, what my Lord Whitlaw's quality might bear, yet, if his relict might go to the utmost extent of what he might have had by custom, considering how small a part of his fortune devolved to his heir, the rest being absorbed and swallowed up by her vast donative; for, suppose my Lord Whitelaw had left L. 8000 Sterling of estate, whereof only L. 1000 Sterling came to the heir, and all the rest to his relict, shall L. 400 or L. 500 Sterling of funeral charges exhaust his small remnant, and the widow go free: THE LORDS found, by plurality, that the funeral expenses must be allowed to the utmost of what his character and quality would admit, without regard to what small part of his fortune came to his heir, seeing they were by the collateral line. and the estate was of his own purchasing and acquiring; though the law says, that, in modifying the funeral expenses, *ratio facultatum defuncti* is mainly to be noticed. There was another point touched, viz. that the heir could not quarrel these accounts, because he was present at the burial, as the chief mourner, and no ways reclaimed, but was silent and acquiesced; but the LORDS did not determine this at this time. No 2.

THE LORDS, on a reclaiming bill, altered this interlocutor, 14th December 1709, and allowed only decent and necessary expenses. *See* HUSBAND AND WIFE.—PRESCRIPTION.

Fol. Dic. v. 1. *p.* 338. *Fountainhall, v.* 2. *p.* 489. 495. 525. & 527.

*** Forbes reports the same case:

1709. *November* 11.—IN the process at the instance of the Lady Ormiston and the Lord Justice Clerk, her present husband, against John Hamilton of Bangour, as heir to the Lord Whitelaw, the Lady's former husband, for payment of some merchant accounts due by the defunct, and assigned to the Lady,

THE LORDS found the accounts are not continued by articles advanced to the defunct's relict, for his funerals, maintenance of the family, and their mournings, by the same persons to whom the former accounts were due, in respect the Lady did nowise represent her last husband. And therefore sustained prescription of these accounts *quoad modum probandi*, not being pursued within three years after the husband's decease.

Albeit it was *alleged* for the pursuer, That seeing the articles furnished after Whitelaw's death affect his means, they should be reckoned in the same class with what was furnished before, though not made by order of the heir or executor: *Nam qui propter funus aliquid impendit, cum defuncto contrahere videtur, non cum hærede. L.* 1. *ff. de Religiosis et Sumptibus Funerum.*

In respect it was *answered* for the defender, That any accounts taken on after Whitelaw's decease by the relict, who was neither his heir nor executor, cannot be conjoined with the accounts owing in his lifetime, to stop prescription thereof. For it cannot be understood a current account, but what is con-

No 2. tinued betwixt the same persons; seeing the reason for computing the three years prescription from the last article of a merchant's running account is, partly, because a person who gets new articles trusted to him before the former are paid, ought not to object the merchant's forbearance and discretion, to his prejudice; partly, because the receiving of the last article is a tacit passing from prescription of the former, which reason cannot take place, where the last articles are not taken on by the same person to whom the first were given off, or by his representative. For any other indifferent *negotiorum gestor* could not expresly renounce the defence of prescription competent to the defunct's heirs; and far less could he do it tacitly by innuendos. So tacit relocation (of which the currency of accounts is a kind) can never take place, save betwixt the same parties, or their representatives; and three consecutive discharges do not import a discharge of all bygones, where the first or last of these discharges is granted only by a chamberlain.

1709. *December* 14.—In the count and reckoning at the instance of the Lord Justice Clerk and his Lady, against John Hamilton of Bangour, the pursuers having claimed allowance of articles extending to L. 5189 : 9s. Scots, as the expense of the Lord Whitelaw's funerals; the defender *objected* against several of these articles, That they could not be allowed, because extravagantly sumptuous and magnificent; *actio funeraria* being only competent for such funerary charges as were necessary and decent, according to the defunct's quality and estate. For, 1*mo*, By the act 14. Parliament 1681, funerals are to be gone about in sober and decent manner, and particularly the use of mourning cloaks is restrained; because of the prejudice arising from the superfluous expenses of burials, both to the public, *cujus interest ne quis re sua male utatur*; and to the private fortune of heirs; and to the defunct's common creditors, who are postponed to those who claim the funerary expenses. 2*do*, Advances of funerary expenses are said *negotium gerere*, *L.* 14. §. 9 *ff. de religiosis et Sumpt. Fun.* And by the nature of *actio negotiorum gestorum*, nothing can be repeated but what was *utiliter impensum*, *L.* 10. §. 1. *ff. de Neg. Gest. habita Ratione facultatum ejus in quem factum est*, *D. L.* 14. §. 6. 3*tio*, In so far as the expenses exceeded the condition of the defunct's fortune, they are supposed to be bestowed *ex pietate et affectione*. 4*to*, The means of the defunct are considered as the rule of his funeral expenses, albeit he should order by his will to exceed what was suitable. *d.* § 6.

Replied for the pursuer; 1*mo*, The rule to judge in this case, is the quality of the defunct, and the condition of his estate in his lifetime, *L.* 12. § 5. *ff. Eodem*, without respect to what he left to his heir; especially considering, that Whitelaw had no children of his own body, and was under no obligation to leave his fortune to a collateral heir. 2*do*, The act 1681, is in desuetude; yea, never was observed, except in so far as it prohibits mourning cloaks; which

were forborne, not so much upon the account of the act, as the uneasiness of the garb. True, it is not long since that statute was made; but there being no fixed time to determine desuetude with us, it must be collected from the generality of contrary acts, *Arg. L.* 32. *ff. de Legibus.* Again, that law was not made with any regard to private persons or families, or the benefit of heirs, but only to keep money in the nation, which was too much sent out for sumptuous apparel; nor doth it annul any bargains of furnishings, but only inflicts a penalty or fine upon the contravener applicable to the fisk. So that merchants who are not obliged to know the punctilios of decency, or what belonged to the defunct's character and estate, furnishing *bona fide* to his funerals, are sufficiently entitled to payment; and the pursuer, as assignee constituted by the merchant, comes in his place. It is not always true, that nothing can be repeated *ex causa negotii gesti*, save what is profitably expended, if we take profitably in its proper sense; for very few things in funerals can be said to be *utiliter impensa*, the greatest part being *dispendia.* But that ought to be allowed which was *bona fide* expended, according to the custom of the country; as in all other cases *actio negotiorum* is adapted in the nature of the thing, *L.* 14. § 13. *ff. de Religios.* 3*tio*, Albeit the rules of the Roman law are much observed in determining private rights, yet its political laws (and such are the funerary laws, as being part of the *jus sacrorum*) do not much influence our constitution; but *mos regionis* doth every where regulate the measure of funerary expenses; and other places are more expensive in their funeral solemnities than here. Our neighbours in England give gifts to the mourners; which ceremony doth in Holland and Germany run high enough, where long mourning cloaks are also used. Nay further, it appears from *L.* 37. *ff. Eod.* and what *Voet* thereon observes in his Commentary, that even the Romans were very expensive in their burials; *Sumptus funeris arbitrantur pro facultatibus, vel dignitate defuncti, L.* 12. § 5. *ff. Eodem*, where the disjunctive interjection *vel* implies, that a person may be buried either according to his means, or according to his quality, if there be so much gear as will defray the charges. As to the particular laws cited for the defender, they import only, that the common rule should not be transgressed; and the custom of the place must clear when that is done. No 2.

Duplied for the defender, Law regards the circumstances of things, as they are at the time when supposed to happen; now the funerary expenses take place only after the party's death, and the legal restraint upon them was made with respect to hurt and prejudice that might follow, which can only be understood of the heir's prejudice, the defunct being incapable of hurt; and *pro modo facultatum*, i. e. according to the extent of *bona defuncti*, which are understood *deductis debitis.* Although the defunct was under no obligation to leave his estate to a collateral heir, yet not having disposed of it, it may not be exhausted with superfluous and vain expenses against law; and if merchants or tradesmen did advance to the funeral, they did it upon their hazard, as any

No 2. other *negotiorum gestor* or furnisher. 2*do*, The pretence of the act of Parliament's being in desuetude, is groundless; and the *mos regionis* is of no authority against a contrary positive law. Yea, in these very places where some superfluous expense in burials is tolerated, that is done for reasons of state, to afford a revenue to the public; and ought not to be copied after here, where no such duties are imposed. 3*tio*, The particle *vel* is sometimes taken for *et*; and that in *L.* 12. § 5. it is used in a conjunctive sense, is sufficiently clear from *L.* 14. § 6. *L.* 21. *ff. Eod.*

THE LORDS found, That *actio funeraria* is only competent for expenses that were necessary and decent with regard to the defunct's quality and free estate, descending to his heir and executors. For one of the LORDS said, that to spend upon a person's funeral solemnity according to his quality, beyond what was suitable to the fortune left to his representatives, was to bury his estate with himself. Another Lord distinguished betwixt the declaratory and statutory parts of the act 1681; holding, that the funerary rites therein prescribed were statutory; but that it was declaratory in so far as concerned the burying in decent and sober manner, as to which it could not go in desuetude. But the LORDS were all clear, that, if so much of free estate did not descend to the defunct's representatives, as was sufficient to bury him, in that case the expenses of the burial, in so far as decent and necessary, would come off the legacies. *See* PRESCRIPTION.

Forbes, p. 352. & 367.

See HUSBAND AND WIFE.

PRIVILEGED DEBT.

No 5. p. 3945.

No 67. p. 4854.

APPENDIX.