*** Sir P. Home reports this case:

1686. *February.*—IN an action at the instance of Duff of Bracco against Innes of Auchluncart, for payment of a sum, as representing his father, who did represent his grandfather, the LORDS found it relevant to be proven by witnesses, that the defender's father did intromit with the moveable heirship, and mails and duties of the lands belonging to Walter Innes, the defender's grandfather, the pursuer's debtor; as also, that the defender's father did accept from the said debtor, to whom he was apparent heir, and when he was *in familia*, of a disposition to the lands of Balvenny, formerly disposed to the pursuer's debtor by Balvenny, for relief of his cautionry for the said Balvenny, and did make use thereof after the grandfather the pursuer's debtor's decease, by intromission with the mails and duties thereof, or by disponing, or obliging himself to dispone the same, or consenting to disposition or alienation of the saids land. No 24.

Sir P. Home, MS. v. 2. No 783.

*** A similar decision was pronounced, Henderson against Wilson, 17th January 1717, No 118. p. 9784. PASSIVE TITLE.

1693. *January* 25.
M'KENZIE of Rosehaugh *against* The MARQUIS of MONTROSE. No 25.

GEORGE M'KENZIE of Rosehaugh against the Marquis of Montrose, on a bond of pension of L 7 Sterling yearly, during Sir George M'Kenzie's abode at Edinburgh:—THE LORDS found, seeing the bond did not mention the Marquis's heirs, it terminated and expired with the granter, and did not last during the receiver's life, being personal, like those *feuda de cavena et camera* that Craig speaks of, *lib.* 1. *feud.*

Fol. Dic. v. 2. p. 73. Fountainhall, v. 1. p. 550.

1711. *January* 19. LADY ORMISTON *against* HAMILTON of Bangour.

No 26.
An action *ex delicto*, tho' *rei persecutoria* only, found not to go against heirs.

IN the cause often mentioned, betwixt the Lady Ormiston and Hamilton of Bangour, (*see* APPENDIX.) some points came this day to be decided. The first was, how far the Lady could charge Bangour with the extraordinary expenses wared out in obtaining the Lady Houssil to be confirmed executrix to her brother, my Lord Whitlaw; it being *alleged*, That the same were occasioned by the deceased Bangour's influencing his nieces to oppose the same, and raise advocation of the edict, and so by his fault and means; and this having been found relevant, to give the Lady retention out of the executry, it was now *contended*, That he being minor, it was yet competent for him to allege, that

No 26. his father being only apparent heir to Whitlaw, his deeds could never burden his son, who was served heir to him, *cum beneficio inventarii.—Answered*, Though minors will be reponed against omissions, either *in facto* or *in jure*, yet where a point is *in jure* proponed for a minor and debated, and receives an interlocutor, he has no more restitution than a major; as was found betwixt Cochran of Kilmaronock and the late Marquis of Montrose, (*See* APPENDIX). THE LORDS found the necessary expense debursed by the executrix, by the late Bangour's opposing the confirmation, who was only heir apparent to Whitlaw, and never entered, could not give the executor allowance of these extraordinary expenses out of the executry, in prejudice of his son, now served heir to Whitlaw, his granduncle, *cum beneficio inventarii*. Then it was further *alleged*, That the Lady Ormiston could crave no retention for these expenses of the confirmation; because the Lady Houssil, the executrix, her assignation to the Lady Whitlaw did not contain the same. *Answered*, All the subject of the executry was conveyed; and, consequently, the expense of confirmation, as an accessory thereto; for either it was retained by the Lady Houssil, or disponed; but it was evident it was not reserved in the assignation; *ergo*, It is disponed. THE LORDS found this extrinsic expense was not conveyed, and so the Lady Ormiston could not retain on that head. 3*tio*, *Alleged* for Bangour, That this being a penal action, arising *ex delicto patris, non transit contra hæredes, nisi in quantum locupletiores facti sunt;* and this the learned Grotius, lib. 2. De Jure Belli et Pacis, cap. 21. enforces by many authorities; and particularly St Hierom, saying, *neque virtutes neque vitia parentum liberis imputantur*. And by the genius of our law, vitious intromission cannot be proved against a party after his death, *quia sapit naturam delicti*, and goes no further than simple restitution; for he might have reasons to purge the same, which his heir cannot know. *Answered*, The maxim, that *actiones pœnales non sunt transitoriæ in hæredes*, wants not exceptions; for a spuilzie is penal, yet, in so far as it is *rei persecutoria*, the heir will be liable in restitution and reparation of damages: So Spottiswood in his Practiques, *voce* EJECTION, and Vinnius, ad § 1. Inst. De Perpet. et Tempor. Act. with whom join Simon Van Leuven, in his Censura Forensis; Groneveguen, De Legibus Abrogatis; and Domat, in his Loix Civiles dans leur Ordre Naturelle, tom. 3 tit. 10. who admires why the Romans were so fond of a subtilty destitute of natural equity and reason, and that the heir must refund the civil interest and damage occasioned by his father's delict, whether *ad eum pervenit* or not, and though never litiscontested with the defunct.—THE LORDS seemed to incline that this penal action could not bind the heir, but had no need to decide it, being determined on the former grounds.—The next point debated was as to the funeral charges.—THE LORDS had allowed the decent and necessary expenses, lopping off sundry exorbitant articles, exceeding both his estate and quality. Then the question arose, By whose order and mandate they were furnished? And a conjunct probation being led, it appeared, that, as to some particulars, Bangour had given directions,

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and as to others, especially those within doors, the Lady Whitlaw, now Lady Ormiston, had ordered and prescribed the same. And the probation coming to be advised, it was *contended* for Bangour, That his father's mandate could not be now proved against him, after his death, by witnesses; 2*do*, *Esto* he had given mandate, the same cannot militate against his heir; 3*tio*, The Lady Ormiston having paid these funeral charges, without cognoscing them, or any judicial sentence, and not having protested *quo animo* she did, law presumes it was *ex pietate et affectione*, having received so vast a donative from her husband; and l. 14. § 7. De Religios. observes, that he qui sumptum in funis fecit non semper sumptum recuperat; oportet itaque testari quo animo funeravit, ne postea quæstionem patiatur: So the presumption arising from her voluntary payments, without a cognition or protestation, and upon discharges at first, without assignations, joined with the husband's liberality to her, and the smallness of the heritage left to the heir, do all import that she paid them *animo donandi*; and she cannot now *mutare consilium in hæredis injuriam*, l. 75. D. De Reg. Jur.—*Answered*, *Donatio vel sui jactatio nunquam præsumitur*; neither does this heir (who has created her much trouble and expense) deserve any such favour at her hands; and the protesting is but an advice and *cautela jurisconsultorum*, which may be followed or not, as the party pleases: And for mandates, they may be proved even after the mandant's death, by witnesses, as was found 21st July 1668, Thomson *contra* the Earl of Glencairn, *voce* PROOF; though decisions were brought to the contrary out of Durie, 24th November 1632, Turner *contra* Ker, IBID.; and 15th February 1634, A. against B. IBID. Besides, funeral charges have been always favoured as privileged debts, to be paid out of the first and readiest of the executry; 16th Dec. 1674, Douglas against Borthwick and Irvine, *voce* PRIVILEGED DEBT. And that she paid without a sentence was for the honour of her husband's memory, that it might not be tossed at several Courts.—THE LORDS, without dipping into that question, whether it was *ex pietate* or not, by plurality found the father's ordering to furnish (*esto* it were proved) could not bind this Bangour, his heir. As to the heir's being liable in penal actions, it was *urged*, That penalties provided in bonds or contracts, if incurred by the defunct's not performance of his obligation, they stand good against the heir who enjoys his estate. But it was *answered*, There is a vast difference; for the one arises plainly *ex contractu* and so very justly binds the heir; whereas, the present case is *ex delicto*. But it is to be noticed, that the heir is here made liable, not only on his predecessor's contract, but on his *quasi delictum*, by incurring the penalty through his not performance.

Fol. Dic. v. 2. *p.* 74. *Fountainhall, v.* 2. *p.* 628.

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1710. *December* 15. *** Forbes reports this case.

IN the compt and reckoning at the instance of the Lady Ormiston, as executrix to the Lady Whitelaw, against John Hamilton of Bangour, as heir to him; the LORDS found, That the pursuer could not have allowance out of the executry of extraordinary expense, necessarily disbursed in expeding the confirmation, occasioned by the fault and means of the deceased Mr James Hamilton of Bangour, apparent heir to the defunct, in prejudice of the defender, who is served heir to him; albeit he the defender also represents the said Mr James Hamilton his father, against whom no action was brought upon that head in his lifetime.

1711. *January* 11.—THE LORDS 15th December last, having found, That the extraordinary expense necessarily disbursed by the fault and means of the deceased Bangour, apparent heir to the Lord Whitelaw, cannot procure to the executrix allowance thereof out of the executry, in prejudice of the defender the heir served, the pursuers reclaimed; whereupon the parties were allowed a hearing.

Alleged for the defender; He being called in this process as heir to the Lord Whitelaw, and not as heir to his father, he is not bound to answer as heir to his father. 2*do*, A process against him for such a penal conclusion, as representing his father, would appear to be extraordinary; actions *ex delicto* not being competent against the delinquent's heirs, nisi in quantum locupletiories, L. 5. D. de Calumniator. § 1. Instit. De Perpet. Vinnii Comment. Ibid. § 3. 4. Grot. de Jure Belli et Pacis, Lib. 2. Cap. 21. § 13. 19. 20. And vitious intromission, which is never competent against the intromitter's heirs, unless the passive title had been constituted against the intromitter himself, is a sufficient instance of the genius and opinion of our law in the matter. Again, *esto* the pursuers were creditors to the defender's father by bond, they behoved to apply Whitelaw's executry to extinguish his own debts before the debts of his apparent heir.

Replied for the pursuer; 1*mo*, The defender being served heir universally to his father, any objection that might have been made to his father, may be made to him; and *ita est*, that the father would have been obliged to allow deduction of the extraordinary expenses occasioned through his default. 2*do*, The laws concerning penal actions, cannot be extended to this case of a pursuit for the necessary expense of a process, which is as much a civil interest, as the subject of the plea itself. Actio pœnalis rei persecutoria lies against the heir, as well as any action ex contractu, Les Loix civiles, Tom. 3. Sect. 10. Des Engagemens del. Heretier a cause de crimes, &c. Spotswood, Pratt. Tit. Spuilzie, p. 88*. and the heirs of one that committed a spuilzie or was a vitious intromitter, may be convened for simple restitution, etsi nihil ad eos pervenit. Again,

* *See* APPENDIX.

penalties in contracts incurred by any person, are effectual against his heirs. *3tio*, Suppose the defender could not be pursued by way of action for such expenses, yet the executrix may retain in her own hand out of the executry, what was necessarily expended in defence of it; as many things in law will afford the benefit of exception and retention, that are not sufficient to found action; and this *jus retentionis* was equal to litiscontestation, seeing she having effects in her own hand, was under no necessity to pursue. No 26.

Duplied for the defender; It is *sine lege loqui*, to say, that this imaginary retention is as effectual to make the heir liable, as litiscontestation with the defunct. *2do*, The authority of the civil law, and of Grotius, far outweighs that of Mr Domat the author of *Les Loix civiles*. The citation out of Spottiswood's Practicks is of no great weight, seeing no decision is cited as voucher, and that book never received the author's last hand; besides, in that case, the defunct had intromission, whereas the late Bangour intromitted with nothing. *3tio*, Heirs are liable to penalties in contracts incurred by their predecessors, because these are not due *ex delicto*, but *ex contractu*.

THE LORDS adhered to their former interlocutor, finding that the Lady Ormiston hath no right to retain the expenses.

THE LORDS, 14th December 1709, in the compt and reckoning aforesaid, at the instance of the Lady Ormiston, and her husband then Lord Justice-Clerk, against John Hamilton of Bangour, having found *actio funeraria* is only competent for expenses that were necessary and decent with regard to the defunct's quality, and the free estate descending to his heirs and executors; the defender now *alleged*, That the pursuers can get no allowance of these expenses; because, *1st*, law presumes they were advanced by the Lady Ormiston *animo donandi*, L. 14. § 7. 8. 9. D. de Religios. et Sumpt. Fun. L. 47. D. de Donat. inter. Vir. et. Ux. L. 33. § 2. D. de Leg. 3. L. 44. D. de Negot. Gest. L. 12. § 8. D. Mandati, L. 53. D. de Reg. Jur.; in so far as, *1mo*, She having got a donative from the defunct so extraordinary in this place of the world, and disproportioned to his condition and fortune; it had been high ingratitude and injustice in her to have suffered so great expenses to be laid out upon the funeral to the exhausting the estate, and prejudice of the heir of so well deserving a husband: *2do*, The manner of the expense had the appearance of liberality; for she paid it without the usual cognition of the commissaries *nullo jure cogente*; yea, several payments were made before confirmation of Whitelaw's testament, and in many cases she took discharges to the heirs and executors of the Lord Whitelaw, which clears that it was *consulto datum*; nay, further, she paid the accompts ultroneously, without any protestation, whereof some were stated and given up to her as her own debt: And it is hoped upon serious reflection, she will never repent the good she once intended to her husband's memory; and if she should, her repentance will not avail her, to ascribe what was done by way of donation, to any other cause, L. 31. § 1. D. de Donat.

No 26.

L. 75. D. de Reg. Jur.: 3*tio*, The executrix cannot have allowance of the extraordinary expense of the funeral; for that, if occasioned by the fact and deed of the apparent heir, can be no more privileged than a debt of the apparent heir, which is not deducible out of the Lord Whitelaw's executry, but only reserved as accords to be pursued by way of action against the defender as heir to his father.

Replied for the pursuer: Can it be in any sense inferred, That the Lady Ormiston was to have been at the charge of her last husband's funeral, from his giving her a considerable addition to the provision in her contract of marriage; and the argument drawn from her paying the furnishers is no better; especially considering, that the payment was not made immediately, but some months after Whitelaw's death, to stop their craving, who grudged to lie out of their money; this any person might have safely done, the executry being sufficient; and the funeral expenses a privileged debt, Kelhead *contra* Irving and Borthwick, *voce* PRIVILEGED DEBT. 2*do*, The L. 14. §. 7. in fin, de Relig, et Sumptib. Fun. requires not that one should always necessarily protest to take away the presumption of expending *donandi animo*, but only adviseth to do it in some dubious cases, *ne postea patiatur quæstionem.*

THE LORDS found, that the pursuer hath no right to retain the extraordinary expense of the funeral in this process, suppose the same were furnished by order of the deceased Bangour, apparent heir to the Lord Whitelaw, in prejudice of the defender, heir served to him *cum beneficio inventarii*, and universal heir to his father.

Forbes, p. 478.

1711. *July* 5. JOHN LEWARS *against* DANIEL CARMICHAEL.

No 27.
The defender in a spuilzie and ejection having died after the summons had been called, returned and enrolled but before litis-contestation, and the pursuer having proved the spuilzie after the action was transferred against the defunct's heir, the pursuer was not allowed to

IN the process of spuilzie and ejection at the instance of John Lewars against the Laird of Mauldslie, the defender having died after the summons was called, seen, returned, and enrolled, the pursuer transferred the action against Daniel Carmichael now of Mauldslie, and having proved the spuilzie and ejection, craved to be admitted to depone *in litem* upon his damages.

Answered for the defender; The process of spuilzie not having been litiscontestate against the spuilzier in his lifetime, the pursuer could not be allowed to give his oath *in litem*, which hath a penal consequence against the defender, who is heir to the spuilzier; Tit. Cod. Ex delictis defuncti in quant. hæred. for delicta suos tenent auctores.

Replied for the pursuer; An action of spuilzie and ejection, with all the privileges of an oath *in litem*, and violent profits attending it, is competent not only against the principal offender, but also against his heirs, though *lis* was not *contestata* with the defunct. 1*mo*, Albeit Actio ex delicto pœnalis non