Case 11.
Fountainhall, 21 Jan. 16 Nov. 1708. 15 Jan. 9 & 18 Feb. 11 & 17 Nov. 1709. 11 Jan. 3 July, and 8 Dec. 1711. 5 & 16 Feb. 1712. Forbes, 21 Jan. 1708. 21 Jan. 11 Nov. 6 & 14 Dec. 1708. 15 Dec. 1710. 17 Jan. and 8 Nov. 1711.

Adam Cockburn of Ormiſton, one of the Senators of the Court of Juſtice, and Dame Ann his Wife, - - *Appellants;*

John Hamilton of Bangour, a Minor, by his Curators, - - - - *Reſpondents.*

28th *March* 1712.

Lis finita.—After extracting a decreet, with a reſervation therein of ſeveral point, the objection of *Lis finita* and that theſe points were not contained in the original ſummons, is ſuſtained by the Court, but reverſed upon appeal.

Funeral expences.—In a queſtion between the heir and the aſſignee of the executrix of a Lord Juſtice Clerk, 250*l.*, being modified, as ſufficient for funeral expences, the judgment is reverſed.

Preſcription.—Furniſhing to the funeral did not form ſuch a continuation of accounts as to bar the triennial preſcription of accounts incurred before the death of the deceaſed.

Confirmation.—The Court having refuſed to allow to the aſſignee of an executrix in a queſtion with an heir ſerved *cum beneficio*, the expences of an action before them relative to the right of confirmation between the executrix and the father of the heir ſerved *cum beneficio*, the judgment is reverſed.

SIR William Hamilton of Whitelaw, Lord Juſtice Clerk, the appellant Ann's firſt huſband, in 1703 executed a bond in her favour for 7000*l.* ſterling, payable at *Whitſunday* or *Martinmas* next after his death. This bond was made a burthen upon his whole eſtate, real and perſonal, but not to affect the heirs of his own body. Sir William having died without iſſue, was buried with great pomp. His ſiſter, Chriſtian Dunlop, was confirmed his executrix; and the perſonal eſtate being inſufficient to ſatisfy the claims of the widow, the executrix aſſigned to her the whole executry, the widow becoming bound to relieve her of the debts, funeral expences, and charges of confirmation, which laſt amounted to a conſiderable ſum, a litigation having been carried on firſt before the commiſſaries, and afterwards before the Court of Seſſion, with regard to the ſame, between Chriſtian, Sir William's ſiſter, and the father of the reſpondent, who was alive at Sir William's death, and his nephew and apparent heir. The reſpondent's father having died, the reſpondent was ſerved heir to Sir William *cum beneficio inventarii.*

The appellants brought an action before the Court of Seſſion againſt the reſpondent for what was due on the ſaid bond, after application of the free perſonal eſtate in part payment thereof, firſt repaying out of ſuch perſonal eſtate, to the appellant Ann, what ſhe had paid to ſundry creditors of the deceaſed, the funeral expences and expences of confirmation.

For thoſe payments the appellants alſo brought an action againſt the executrix, in which laſt action the reſpondent appeared for his intereſt.

A point of law aroſe upon what the appellant Ann had paid to Sir Robert Blackwood and others for furniſhing of goods to the deceaſed before his death, and alſo for furniſhing to his funeral:

the reſpondent contended that theſe furniſhings to the deceaſed were preſcribed, three years having elapſed before they were paid: and the appellants urged, that the ſame parties having furniſhed goods to the funeral of Sir William, this prevented the running of the preſcription by a continuation of accounts. The Court on the 10th of November 1709 found, "that the furniſh-"ing to the funeral of the deceaſed was no continuation of the "currency; and therefore ſuſtained the preſcription as to the "articles furniſhed preceding his deceaſe."

The action proceeding as to the other points, an account of the funeral expences was given in amounting to 421*l.* 8*s.* 7*d.* to this the reſpondent objected as extravagant, and the Court by interlocutor on the 14th of December 1709, "reduced the ſame "to 250*l.*" An account of the expences of confirmation was alſo given in amounting to 100*l.*, which being objected to, the Court by interlocutor on the 15th of December 1710, "re-"fuſed to allow the expences occaſioned by the action before "the Court of Seſſion, relative to the confirmation amounting "to 34*l.*"

Upon thoſe two points the appellants repreſented to the Court, that the extraordinary expences of the funeral, as well as of the confirmation had been occaſioned by the reſpondent's father, then apparent heir of the deceaſed; and of this ſhe offered to make proof, and the Court allowed a proof to both parties.

In the mean time the appellants with conſent of the reſpondent petitioned the Court that after extinction of the bond debt *pro tanto* by the perſonal eſtate, which had come to the hands of the appellant Ann, decree might paſs againſt the reſpondent as heir ſerved to the deceaſed, for thoſe parts of her claims which were wholly uncontroverted, not including any part of the funeral expences; or expences of confirmation; and decree was accordingly paſſed for 2818*l.* 13*s.* 4*d.*, with a reſervation in theſe terms, "reſerving always to the purſuers, to inſiſt for the funeral ex-"pences, and confirmation of the teſtament and other points "not thereby determined as accords," and in theſe terms decree was extracted in September, 1710.

The proofs before mentioned being afterwards finiſhed and reported, the Court by interlocutor in November 1710, "found "that no action of the defender's father, to whom he was "not ſerved heir could affect him."

The reſpondent however when the action had proceeded thus far took up a new defence namely that there was no concluſion in the original libel againſt the reſpondent upon theſe points, and that by extracting the decree before mentioned *lis erat finita*; and the Court on the 29th of June 1711, "found that by the "decree extracted *lis erat finita* notwithſtanding of the reſerva-"tion contained therein."

And afterwards on a petition for the reſpondents the Court on the 28th of November 1711, "allowed him to retain 250*l.* for "his expences out of the heritable eſtate of the deceaſed, ſubject "nevertheleſs to a proportional defalcation in caſe the heritage

" be not *solvendo*, both for debt and expences, and likewise re-
" serving to be determined what expences are necessary and profit-
" able in that event."

Entered 22 Jan. 1711-12.

The appeal was brought from " several decrees orders and " interlocutory sentences made by the Lords of Session, and par-" ticularly from the decree or sentence of the 29th June 1711."

Heads of the Appellants' Argument.

By the said extracted decree, the right of the appellants as to the funeral charges and expences of confirmation was expresly reserved to them; and this reservation, with the long acquiescence of the respondent, and the appellants, examining witnesses by order of the Court on these points, were a sufficient answer to the objection of *Lis finita*.

But further the appellants brought an action against the executrix of Sir William Hamilton, and her representatives after her decease, and the claims for funeral charges and expences of confirmation were a part of the process against the executrix to which the respondent made himself a party by appearing to it, and that action is not *Lis finita*.

With regard to the merchants' accounts found to be prescribed by the Court, these accounts were not only justly due by the deceased, but the same merchants having furnished goods to the funeral, within three years of the next preceeding articles in their respective accounts, it made such a currency as prevented their being cut off by the act of parliament founded on by the respondent.

With regard to the expences of the funeral: Sir William Hamilton from a small fortune, (being his father's fourth son) acquired a considerable estate; and he died not only in the character of a Lord of Session, but also of an Officer of State, as Lord Justice Clerk, leaving a competent estate and no issue, and he himself caused a former wife to be interred in the same manner except heralds before he was an Officer of State. The respondent's father, too, then living, and Sir William's apparent heir, approved of and ordered the funeral, and all the particulars claimed were paid by the appellant Anne: For these reasons the Court ought not to have restricted the funeral expences.

The expences of confirmation were all necessarily spent by the executrix in defence of her right, against the respondent's father, who first in the Commissary Court opposed the granting thereof, and not prevailing there carried the matter before the Court of Session, where after a long and chargeable contest he was forced to submit. And the appellant Anne actually paid these expences of confirmation.

The Court of Session has not only deprived the appellants of their charges and expences, but has on the contrary allowed the respondent 250*l.* for costs or expences out of the heritable estate, which was unreasonable, before the whole claims of the appellants were satisfied.

Heads

Heads of the Reſpondent's Argument.

The appellants having brought their action for payment of 7000*l.* 200*l.* of annuity, and 200*l.* for the maintenance of the family (nothing elſe being demanded), judgment was given on all theſe points; and the appellants having poſſeſſed themſelves of all Sir William Hamilton's perſonal eſtate, they gave in an account of the amount thereof, and demanded that the ſame might be entirely imputed towards ſatisfaction of part of the ſaid bond, and that judgment might be given againſt the reſpondent for the remainder. The Court agreed to this, and gave judgment for 2820*l.* 15*s.* againſt the reſpondent, and the decree was extracted: it only reſerved a liberty to inſiſt for funeral expences *as accords*. But this reſervation can import no more, than that what is ſo reſerved, is not deſerted, and may ſtill be ſued for in due and ordinary form. This, however, can never be preſumed to extend the appellants' claim, further than was contained in the action brought by them, or to entitle them to inſiſt upon the former libel and proceſs, wherein decree was extracted, which put an end to that ſuit. It might, otherwiſe, be in the power of a perſon to bring an action for one thing and after having judgment in that to *reſerve* a liberty to aſk another without a new libel, which would be deſtructive of all juſtice as well as form. Though there were afterwards ſeveral debates upon the ſubject of the funerals, yet theſe proceeded only upon the erroneous ſuppoſition, that the appellants had claimed the ſame in their libel againſt the reſpondent; and as ſoon as this was diſcovered to be a miſtake it was proper to go no further.

The action againſt the executrix was merely colluſive, and it is impoſſible that any ſentence can paſs upon that action againſt the reſpondent, becauſe he was not cited or called to it, and his appearance to prevent colluſion does not make him a party. Neither has that ſuit any connection with this, and therefore it can be no part of the action at the inſtance of the appellants againſt the reſpondent. The expences of confirmation could not regularly be brought into that action, becauſe they were laid out by the executrix herſelf, and were not aſſigned by her to the appellant Anne, and therefore the executrix could not be ſued for them. As to the funeral charges they were not in the original libel, either againſt the reſpondent or the executrix, nor could they be ſo, becauſe the appellant had not paid them, (at leaſt for the greateſt part) till long after the commencement of the ſaid actions.

By the act of parliament 1579. c. 83. it is enacted that, "all "actions of debt, for houſemails, &c. be purſued within three "years, otherwiſe the creditor ſhall have no action except he "either prove by writ, or by oath of his party." This law is very poſitive and plain, and howſoever it has been extended in ſome caſes by the Court of Seſſion, yet it never was interpreted ſo, as contended for by the appellants, that the furniſhing to the funeral ſhould ſtop the preſcription eſtabliſhed by this act eſpecially when theſe furniſhings were neither by order of the heir or executrix. 1579. c. 83.

With regard to the expences allowed to the reſpondent,—by the ancient law of Scotland, an heir was obliged in payment of all his predeceſſor's debts, though ten times more than the eſtate deſcending to him; though executors were only liable ſo far as they had *aſſets*, provided they gave up an exact inventory of all the goods and effects of the deceaſed. This privilege, the parliament of Scotland in 1695 likewiſe extended to heirs: and the heir in this caſe was called *heres cum beneficio inventarii*, and in theſe terms was the reſpondent heir to Sir William Hamilton. The appellants having obtained judgment for 2820*l.* ſterling, ſued it to execution upon Sir William's heritable eſtate, and the reſpondent thereupon repreſented to the Court, that he being heir *cum beneficio inventarii*, was only accountable for what he had received; that he was willing to aſſign Sir William's whole eſtate for ſatisfaction of the appellant's demand, reſerving to him ſo much of the ſaid eſtate as would anſwer the expences laid out by him in managing and defending the eſtate. As executors had certainly an allowance for their neceſſary expences, and as heirs were by the ſaid act in the ſame condition with them, they ought to have the ſame privilege; otherwiſe, neither heirs nor executors would put themſelves to any expence to manage and defend an eſtate from unjuſt claims.

1695, c. 24.

Though this claim was ſo reaſonable, yet there never having been any adjudged caſe upon the point, the Court of Seſſion proceeded very cautiouſly, and did not preciſely determine the queſtion of the reſpondent's expences, but only reſerved the ſum of 250*l.* proviſionally as a fund for them, out of which they might allow the heir his neceſſary expences, if they ſhould think that in law they ought to be allowed, and ſtill left themſelves at liberty to determine what expences were neceſſary; but in all probability the caſe will never exiſt, becauſe the eſtate will amount to more than ſufficient to pay the debts; and it was therefore unreaſonable in the appellants to bring their appeal againſt a ſentence which is not final, and does not determine the queſtion between the parties, but is ſtill ſubject to review.

Judgment 2 March, 1712.

After hearing counſel, *it is ordered and adjudged, that the ſaid ſentence of the* 29th *of June* (1711), *declaring the ſuit to be* Lis finita *be reverſed; and it is further ordered and adjudged, that the appellants be at liberty to inſiſt or proſecute in the ſaid ſuit or proceſs for all the expences of the funeral, above the ſum of* 250l. *to which the ſame were reduced by the Lord Ordinary, as well as for the ſaid ſum of* 250l., *and as well for the extraordinary as for the ordinary coſts and expences touching the adminiſtration or confirmation of the teſtament of the deceaſed, and that ſuch ſeveral ſums as ſhall appear juſt to have been allowed or deducted out of the perſonal eſtate for ſuch funeral expences, and for ſuch ordinary and extraordinary coſts and expences touching the adminiſtration or confirmation of the ſaid teſtament ſhall be taken as remaining due upon the bond bearing date the* 5th *day of March* 1703, *and be computed with intereſt from ſuch time as the money ſecured by the ſaid bond became payable until the payment thereof,*

and

and ſtand as a charge upon the heritable eſtate; but as to the interlocutory ſentence in November 1709, *for ſuſtaining the bar of preſcription, whereby the appellants were not allowed to make any deduction out of the perſonal eſtate for ſeveral of the deceaſed's debts paid by the appellants to Sir Robert Blackwood and others, ſuch debts being merchants accounts and adjudged barred or preſcribed by the ſtatute of King James the* 6th, *as not being ſued for in three years, the ſaid interlocutory ſentence is hereby affirmed: and as to the interlocutory order made the* 28th *of November laſt, touching the reſpondent's coſts, the ſame is hereby remitted to the Lords of Seſſion to reconſider the ſame, together with the ſaid demands of the appellants touching the funeral expences, and the ſaid coſts and expences, touching the adminiſtration or confirmation of the ſaid teſtament, and determine thereupon as ſhall be juſt.*

For Appellants, *Tho. Powys. Rob. Raymond.*
For Reſpondent, *David Dalrymple. Sam. Dodd.*

Part of the Judgments here reverſed, are founded on as exiſting cases in the Dictionary vol. I. voc. *Funeral Charges*, p. 338. and vol. II. voc. *Perſonal and tranſmiſſible*, p. 74.

John Hamilton, of Pumpherſton, Eſq. - *Appellant*; Caſe 12.
Katherine Lady Cardroſs, - - - *Reſpondent.* Fountainhall, 20 Feb. 1708. 2 January 1711. Forbes, 20 Feb. 1708.

8th *April* 1712.

Minor.—A tack ſuſtained, which, in the recital, bore to be gran'ed by a Minor with conſent of his Curators, but was ſigned by the landlord only.

Homologation.—In a reduction of a Tack on the ground of nullity, it being found that the receipt of the rent by the Grantor's heir for more than 30 years, imported no homologation, the Judgment is reverſed.

IN 1671, Sir William Stewart, of Kirkhill, the reſpondent's brother, let to Alexander Hamilton the appellant's father, then his factor or baillie, the lands of Strathbrock for the term of three 19 years, at the rent of about 50*l.* annually. The tack in the recital bore to be granted by the ſaid Sir William, with the conſent of his curators, but it was ſubſcribed only by himſelf.

Sir William died ſome time after the date of this tack, but the preciſe date of his death does not appear. The reſpondent, his ſiſter, ſucceeded to his eſtates; and the appellant's father and the appellant himſelf poſſeſſed their farm in virtue of the ſaid tack, without challenge for more than 30 years; and part of the rents had been paid, (as ſtated by the appellant) to Sir William before his death, and the remainder regularly to, or for the uſe of the reſpondent.

In 1706 the reſpondent commenced an action before the Court of Seſſion againſt the appellant, to remove him from the poſſeſſion of the ſaid lands, on the ground, that his tack was void being granted by Sir William Stewart when a minor, with-