

## No 2.

person by order of the creditor, had subscribed for a share in a company, by which the debt was diminished. The mandate was not found sufficiently clear to have that effect.

second son, and Helen, his daughter; and Henry having assigned his portion to Robert Walwood, the father's brother, he transferred it under trust to John Liberton, merchant in Edinburgh, who adjudged William's estate.

In the ranking of William Walwood's Creditors, it was *alleged* for George Home, one of the town-clerks of Edinburgh, that the adjudication at the instance of John Liberton is null; at least ought to be restricted, as being led for more than was due, in so far as Henry Walwood was debtor to his brother in L. 250 Sterling subscribed for him in the African Company, which should have been deducted off the adjudication, at least must be allowed to restrict the same; for clearing of which ground of debt, three letters from Henry to his brother William are produced, in one whereof he desires William to subscribe for him two or three hundred pounds Sterling in the African Company: In another he writes, That William had informed him he had subscribed for L. 500 Sterling, and desires him to place L. 250 to his account: And in a third letter, after the Company broke, he desired William to do for his share of the stock, as he was to do for his own. From which commission to sign, acquiescence in what was done, and mandate to negotiate his proportion of the stock, Henry appears to be debtor to William in the half of the subscription money.

*Answered,* The not allowing compensation, though Henry Walwood had been debtor to his brother for the L. 250 is no nullity in the adjudication; since a ground of compensation needs not to be noticed, unless it be proposed, and is not receivable after decret. *2do,* The desire of Henry's letters was never performed, nor complied with by William; since he subscribed the L. 500 for himself before receiving his brother's letter; and did not state the L. 250 to his account, nor yet made or obliged himself to make any transfer of the share to Henry, while the Company's circumstances were entire; and now when *res non est integra* with the Company, neither William, if he were alive, nor his creditors, can transfer.

THE LORDS repelled the allegiance of extinction and compensation founded on William Walwood's subscription in the books of the African Company; and found the said allegiance not instructed by the writs produced.

*Forbes, p. 4.*

1725. January 7.

Sir WILLIAM JOHNSTON of Westerhall *against* JAMES, Marquis of Annandale.

## No 3.

A party received a mandate to raise money for the expenses of a funeral. Found; that

Sir WILLIAM was prevailed upon, at the request of the Marchioness of Annandale, and other friends of the family, to undertake the management of the late Marquis his funerals, and received from the Marchioness (who was the executor nominate) a mandate authorizing him to raise what money should be

necessary for defraying the charges of the funerals, and she thereby promised to indemnify him for the same.

In consequence of this mandate, Sir William drew bills on the factors on the estate in Scotland, who advanced sums for the said purpose out of the by-gone rents then in their hands.

The present Marquis being confirmed executor-creditor to his father in Scotland, pursued the factors and Sir William to account for said sums; and Sir William insisted in a counter-process, for constituting the funeral expense, and for having it declared, That the sums advanced by the factors should be sustained as articles of discharge to them, in regard of the privilege due by law to funeral debts, in preference to all other personal debts.

It was *pleaded* for the Marquis, That however a *funerator* was privileged by law for his claim of what is impended on the funerals of a defunct when he trusts to that privilege, yet when the *funerator* takes himself to another security, and does not rely upon that of the law, as, in this case, where he accepts of a mandate from another, though the mandant may have the privileged action, yet the acceptor of the mandate has no title to it; and if Sir William does insist in the right of the Marchioness his constituent, he can be in no better case than if she were pursuing, against whom the defence would be good, that *intus habet* by a large and free executry which she intromitted with in England.

*Answered* for Sir William, That though by the principles of the civil law he might not have the personal action *ex negotio gesto*, against those who were obliged to funerate, yet as to the real security in the defunct's effects, and *ius prælationis* on them, that being *privilegium rei* without any transmission by the mandant, it was competent to him, as furnisher towards the funerals; and his taking a mandate by way of a collateral security, could never deprive him of the preference he had by law in the defunct's effects, *Voet, Tit. De religiosis et sumptibus funer.* § 10.

THE LORDS found, That Sir William having accepted of a mandate from the Marchioness, could be in no better case than if she were a party.

Reporter, Lord Dun.

Act. H. Dalrymple, sen. & Ja. Johnston.  
Clerk, Mackenzie.

Alt. Ch. Erskine.

*Fol. Dic. v. 3. p. 397. Edgar, p. 144.*

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his claim for reimbursement out of the executry was no better or more privileged than it would have been in the person of the mandant, against whom there might have been exceptions.

1750. June 22.

MUIRHEAD against The TOWN of HADDINGTON.

JOHN MUIRHEAD of Breadisholm, executor to his brother George, who had been agent for the town of Haddington, pursued them for his account, made up of monies laid out in their business, by order of the Magistrates, and a consideration for his pains, ending in 1731, and obtained a liquidation thereof,

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