

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.

No 3.
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,

No 4.

No 4. 3d February 1750; but having claimed annualrent, the Lord Ordinary, by the same interlocutor, found none due.

Pleaded in a reclaiming bill, interest is due to him as a mandatar upon money laid out, l. 12. § 9. *Mandati*. December 1736, Aubray and Cullen against Executors of Ross, No. 68. p. 528. And as the sum allowed for pains was no more than a reasonable gratification, if paid at the time, it follows, that interest is due thereon, after so long a delay of payment.

The LORDS refused the bill.

Per H. Home.

D. Falconer, v. 2. No. 141. p. 165.

* * * Kilkerran's report of this case is No. 70. p. 532. *voce* ANNUALRENT.

No 5.
Where one is by his commission enjoined to insure, and omits it, he becomes insurer himself.

1752. January 7.

VAN WYN GARDEN *against* DRUMMOND.

PATRICK DRUMMOND gave commission to Henricus Van Wyn Garden in these terms, 'Sir, You'll please order your brother (at Rotterdam) to ship on board of John Ferguson's ship 30 ankers good brandy, marked D. A, for account of Andrew Wilson and me, and cause insure for the value.' The brandy was accordingly shipped, and happened to fall into the hands of the officers of the revenue.

Van Wyn Garden having obtained decree before the Admiral for L. 38 Sterling against Drummond, as the price of the brandy and freight, Drummond presented a bill of suspension upon this ground, *inter alia*, That mandates are *strictissimi juris*, and to be executed *in forma specifica*; which had not been here done, in so far as the charger had been particularly ordered to insure the cargo, which yet was not done. It is true that the Admiral has disallowed the premium of insurance, (which, though not made, was stated as an article of the charger's claim in the process) in respect the policy was not produced; but that was not enough. He therefore insisted that these his instructions not having been observed, he could not be bound by his commission.

The bill of suspension was nevertheless "unanimously refused."

It occurred to the LORDS, That the Admiral had rather done wrong, even in disallowing the charger's claim for the premium of insurance, and of which they would have given him redress, had he complained of it. For where one is by his commission enjoined to insure, and omits it, he becomes insurer himself. And accordingly, by the practice of the Admiralty in the late Judge's time, the claim for insurance was always sustained, though the policy was not produced; for the reason just given, that if there was no insurance made, he was insurer himself.

Fol. Dic. v. 3. p. 397. Kilkerran, (MANDATE.) No 1. p. 341.