No 309. lars expressed in the statute were reducible to sale or location, the same were not to be extended to *negotiorum gestio*.

Kilkerran, (Prescription.) *No* 7. *p.* 418.

*** Clerk Home's report of this case is No 71. p. 5858.; *voce* Husband and Wife.

1741. *June* 23. Kennedy *against* M'Dougal.

No 310. The triennial prescription of an accompt of particulars furnished to a defunct, found not to be interrupted by continuation of furnished to the heir; for as every merchant begins a new accompt with the heir, so by the same argument that furnishings to the heir should be considered to continue a currency of the defunct's accompt, furnishing to one of a dozen executors should have the same effect.

Kilkerran, (Prescription.) *No* 8. *p.* 419.

*** C. Home reports this case:

Mr Kennedy brought a process before the Sheriffs of Edinburgh, against Mr Charles M'Dougal advocate, for payment of an apothecary's accompt of furnishings of drugs to his deceased father, Patrick M'Dougal of Crichen. To which it was *objected*, That the same was prescribed by the lapse of more than three years from Crichen's death.

Answered; That the defence was taken off by the currency of the accompt, by furnishings made to his representative, Mr Charles.

Replied; He was only an heir *cum beneficio*, and an executor confirmed, and that these not being universal passive titles, the doctrine, though it were true, could not apply in this case. The Sheriffs sustained the defence, and, upon a proof of the furnishing, pronounced decreet. Upon this decreet, Mr Kennedy craved to be ranked amongst the personal creditors of Crichen, and to draw a share of his lands and moveables. To which the other creditors renewed the objection of prescription.

Answered; That it could not be denied, that a merchant's, surgeon's, or any other accompt of the like kind, furnished to a defunct, is continued by furnishings to his representative; the only question that remains is, whether it alters the case, that the heir or executor is only liable to a limited effect, viz. to the extent of the inventories only?

As to which, it was *observed*, That there could be no difference; for, if the continuance of the accompt in the person's own right, is sufficient to save it against prescription, even in a question with prior competing creditors, it is plain, that a deficiency of the fund of payment falling to the heir, cannot pre-

vent currency. The case is the same in both, an heir or executor is understood to be *eadem persona* with the defunct; and therefore, where the funds do not answer, it can be no objection to the currency of the accompt, and thereupon to the admission of a proof by witnesses, more than where the funds belonging to the original debtor fall short in payment to his creditors; and that, as personal creditors cannot plead otherwise than in the right of their debtor, and since the debtor could not object to a proof by witnesses, on account of the currency, so neither can they. No 310.

Replied for the other Creditors of Crichen, That they could not admit the continuance of furnishing, even to an universal representative of a defunct, keeps the accompt with the defunct current, so as to save it from the prescription upon the act 1579, and that it would be a very great hardship, if it were so constructed; the act says, 'The creditor shall have no action, except he either prove by writ, or by oath of his party;' whereby it is certainly meant an oath of verity, for an oath of knowledge can never be meant. The person to whom the furnishings were made, must know both that the goods were furnished, and that they were not paid, which is a proper oath of verity; but his representative, though it may consist with his knowledge, that the goods were furnished, (which is in so far swearing to the verity), yet, when he swears that they were not paid, that is no other than an oath of opinion or credulity; so that it is impossible to connect the accompt of the defunct, and the accompt of the representatives, as one accompt-current in the sense of this law. If it were otherwise, numberless inconveniencies would ensue; a man has perhaps paid his accompts, and dies suddenly; but his representative continues to be furnished from the same person, and dies, perhaps at the distance of a dozen of years; his heir may be pursued within three years from the last article of his accompt, which perhaps is the day of his death, for the accompt of the remote predecessor. This surely was never the design of the law; all our negative prescriptions operate as so many presumed discharges; and it is for that reason, that the law allows this defence to be taken off by the oath of party; that is, by the oaths of such person as can be able, and therefore are obliged to swear from their proper knowledge to this negative, which takes off the presumption, viz. that the debt is not paid.

As to the currency of the accompt, it is hard to assign a period when a man's accompt closes, if it does not close by his death; an heir, it is true, is, by fiction *eadem persona*, &c.; but it would be carrying the fiction a great deal too far, to make furnishings to the heir be deemed furnishings to the defunct; when a man dies, his creditors cease to follow his faith, neither do they follow the faith of his successor for prior contractions, for these the law will force him to answer, whether he will or not; and as to furnishings to himself, there must be a new accompt instituted, because there is a new faith followed. Further, no man furnishes to another, because he has a title to represent his predecessor, for the creditor cannot know whether he will choose to represent by actual a-

No 310. dition, or immixtion, or not. But supposing Mr Kennedy's doctrine true, it will never hold in the case of partial passive titles, subjecting the representatives only *in valorem*, and the reason is, because the rule *hæres est eadem*, &c. only applies to the case of universal successions.

The Lords sustained the objection of prescription.

C. Home, No 172. p. 289.

1753. *February* 14.

Executrix of Dr Matthew Wright *against* David Dickson.

No 311.
Prescription of an account found to run from the last article.

In the year 1731, Baillie of Walston was, by an inquest in England, found lunatic, and the custody of his person was, by a grant under the Great Seal, committed to Dr Matthew Wright.

The Executrix of Wright pursued Dickson, as representing Walston, for payment of certain sums, said to have been expended for the use of Walston by Wright, as having the custody of his person.

Objected by Dickson; The statute of limitation, 21st James I. provides, 'That all actions of account, other than what concern merchandize between 'merchant and merchant, shall be commenced within six years after the cause 'of action, and not after.' Now, the account in question does not concern merchandize between merchant and merchant; and, although it commences in October 1731, yet was not pursued for until October 1738; and, therefore, as much of it as is not within six years of the date of the summons is, by the law of England, prescribed, and cannot be the ground of action.

Answered for the pursuer; An account is a claim composed of different articles, and the prescription of accounts has, with us, been found to run from the last article; were the prescription to run from every single article, every such article would be an account by itself, which is contrary to the nature of an account as here described; and as the Court has so explained the prescription of accounts in our law, so also ought the prescription provided in the statute of limitation to be understood.

"The Lords found, that, by the statute of limitation, the account pursued on, prescribed only from the last article thereof."

Act. *R. Dundas & Haldane.* Alt. *Macintosh.* Clerk, *Justice.*

D. *Fol. Dic. v. 4. p. 108. Fac. Col. No 65. p. 100.*