No 5.

cerning the fund of payment. So it is an amusement to pretend, that if the dead's part be not sufficient, the wife must bury her husband out of her share; for that preferable debt falling first to be paid, if the dead's part come short, the wife can have nothing. Upon the whole, it may be noticed, That the learned *Joannes a Sande* says, *Quod apud Frisios Societas conjugalis non censetur continuata usque dum inventarium fuerit confectum, Senatusque noster hanc quæstionem definiendam existimavit ex jure Romano, L.* 59. *L.* 63. § 8. *L.* 65. § 9. *ff. pro Socio. secundum quam sententiam judicatum fuit in curia nostra,* 7th October 1618.

THE LORDS found, 1*mo*, That the funeral expense doth not affect the dead's part only, but comes off the whole head of the executry. 2*do*, THE LORDS found, that the building of the monument, being by warrant of a testamentary deed, the expense thereof comes off the dead's part. But they seemed in their reasoning to be of opinion, that a monument erected to a defunct, whose character and fortune deserved one, would be considered as a part of the funeral expenses; and so come off the whole head. 3*tio*, THE LORDS found, that the expense of the confirmation comes off the whole head. 4*to*, They found, that the expense of the aliment and mournings do also affect the whole head of the executry; because, they thought these to be debts of the defunct, for which the heir might be pursued, if there were no executry; and that the defunct was under an obligement for his wife's mournings, though the extent thereof was not known till after his death. *See* HUSBAND and WIFE.—QUOD POTUIT NON FECIT.—RECOMPENCE.—TESTAMENT.

Fol. Dic. v. 1. *p.* 280. *Forbes, p.* 682.

1744. *June* 2. M'KAY *against* FOWLER.

No 6.

A BOND of provision granted by William M'Quirth to his younger children, though found lying by him at his death, yet being executed in *liegie poustie*, and being a rational provision suitable to his circumstances, was found to affect the whole head of his executry, and not the dead's part only.

Fol. Dic. v. 3. *p.* 193. *Kilkerran* (EXECUTRY) *No* 1. *p.* 178.

1747. *February* 24. MARSHALL and Others *against* FINLAYS.

No 7.
The funeral-charges of the wife predeceasing, affect her own interest in the goods in communion; and

AGNES CALDER, in her viduity, executed a testament, wherein she appointed James Marshall and others her executors and universal legataries, and assigned them certain bonds, with the burden of her debts and funeral expense and of certain legacies: Thereafter she intermarried with David Finlay elder, also a widower, who had two children of a former marriage, David and John, without

making any contract of marriage; and she having predeceased her said second husband without children, or altering her foresaid testament, the same came to be her last will.

No 7. are a burden on her executry, and not on the whole head of the inventory, as the funeral-charges of the husband are.

Between the surviving husband and the executors of the predeceasing wife, some questions arose about the division of the moveables, and about the wife's funeral expense, which were brought before the Commissary of Glasgow. With regard to the division of the moveables, the Commissary 'Found the wife's executors entitled to an half of all the goods in communion,' on this ground, that David the eldest son was heir, and not entitled to any part of the moveable estate, and John the second was *forisfamiliate*, having accepted a provision in satisfaction.

David, the husband, thereafter dying during the dependence, his second son John to whom he had made over two-thirds of the goods in communion, as his share thereof, brought a bill of advocation, complaining of the foresaid interlocutor; and, by another interlocutor, the Commissary having 'Found that the wife's funeral expense, laid out by the husband, was to affect her own interest in the goods in communion,' a counter bill of advocation was brought by the executors complaining of that interlocutor.

Both bills being reported, THE LORDS 'Recommended to the Ordinary to remit with an instruction, to find the division *tripartite*, and the executors only entitled to a third of the goods in communion; and to refuse the other bill.'

As to the *first*, there was no doubt, it being a settled point, that the character of heir does not exclude a son from his legitim; nor were the LORDS less clear upon the other point, That the wife's funeral expense, as being her own proper debt, and becoming due after dissolution of the society, should only affect her own proper funds, agreeable to former decisions, the practice of other countries, where the communion of goods takes place, and the civil law, *L.* 16. *ff. De Relig.*

How the law stands with respect to funeral-charges of the husband predeceasing, is another question, which, though it fell not to be here determined, yet came into the argument. For it being argued for the wife, That in every case where the question had occured, the funeral expense of the husband had been found to come off the whole head of the inventory, June 19 1708, A. against B. by Fountainhall, *voce* HUSBAND AND WIFE; and June 20 1713, Moncrieff *contra* Monipenny, observed by Forbes, No 5, p. 3945; and that *a pari* the like should be given with respect to the funeral-charges of the wife; these decisions were by the procurators for Finlay admitted to be contrary to what they now contended for, but were argued to be wrong decisions; for that in the case of the husband, as well as of the wife, the same reason should hold, that the funeral-expense, not being a debt falling due during the communion, should, where the defunct has funds of his own, only affect these funds; though, where the defunct has no funds of his own, it may be a debt of humanity, as upon

No 7. the husband to bury the wife, so upon the wife to bury the husband. So Dirleton, *voce* FUNERAL-CHARGES, states the question If the funeral-charges of the husband should affect the whole moveable estate or the dead's part? and answers, That it should affect the dead's part, seeing it is not a debt contracted during the communion; and some of the LORDS seemed to lean to this opinion.

But the majority were clear, that these decisions in the case of the husband's predecease were just: For, how should the husband's funeral expense be preferable to all the other debts, which is a point undoubted, if his funeral expense did not come off the whole head? And that it was a wrong admission on the part of the lawyers for Finlay, that these decisions in the case of the husband were contrary to the judgement now given in the case of the wife, for, that the cases were not the same, and the decisions in both just. *Qui in funus impendit cum defuncto contrahere videtur* says Ulpian, *L.* 1. *D. De Religios.* It is a debt supposed to be contracted during the defunct's life, though it becomes not due till after the communion is dissolved; and every debt contracted by the husband affects the whole goods in communion, though not to take effect till after his death; but, a debt contracted by the wife, can only affect her own interest.

Fol. Dic. v. 3. *p.* 193. *Kilkerran* (EXECUTRY) *No* 2, *p.* 178.

*** This case is reported by D. Falconer, *voce* LEGITIM.

*** So long as executry funds are in *medio*, an interpellation at the instance of a creditor, entitles him to a *pari passu* preference with those who have obtained decree against the executor, even with the six months; *See* Russel against Simes, March 1790, in the APPENDIX.

What is reckoned executry with relation to the children; *See* HERITABLE and MOVEABLE.

What with relation to the wife; *See* HUSBAND and WIFE.

Partition of executry among wife, children, and dead's part; *See* LEGITIM.

See Act of Sederunt, 14th November 1679.

See APPENDIX.