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ever might be the practice when Sir John Nisbet was commissary, now more than 40 years ago, yet the practice since hath currently gone in the contrary. THE LORDS found the relict's part behoved to bear a share of the funerals, as well as the dead's part belonging to the nearest of kin. See *JUS TERTII*.

Fol. Dic. v. 1. p. 396. Fountainball, v. 2. p. 444.

* * * In like manner was decided the case Moncrieff against Monypenny,
No 5. p. 3945.

1747. February 24. FINLAYS against EXECUTORS of AGNES CALDER.

No 132.

A wife's funeral expenses must come out of her own fund. See the reverse of this No 129. *supra*. See the note below that case.

A MARRIAGE being dissolved by the predecease of the wife, which entitled her executors to a third of the goods in communion, and the husband having died soon after, a question occurred between the husband's children of a former marriage and the executors of the wife, Whether her funeral expenses must come off the whole head of the moveables in communion, or only off her own legal third? The decisions of the Court differing about this point, there was a necessity to recur to principles. The executors of the husband yielded, that, in the case of insolvency, humanity obliges a husband to bury his wife, and a wife to bury her husband; but the wife had here a fund of her own, viz. her legal third, sufficient to answer the expense of her funerals; and whether this fund ought to be so applied must depend on the following point, Whether the society betwixt husband and wife be dissolved by death, or whether it subsists till the interment of the person who dies first? Supposing the latter, the funeral expenses of the predeceasing husband or wife must come off the whole head. But there does not appear from the nature of that society, nor from utility, any reason for prolonging this society beyond the time of other societies, which finish by death, unless the contrary be provided. Nor doth the law of Scotland prolong this society beyond life; for debts contracted by the husband between his wife's death and her funerals, do not affect the goods in communion, not even debts contracted for house-keeping. This reasoning is supported by the authority of the Roman law, *l. 16. D. De Relig.* 'Æquissimum enim visum est veteribus, mulieres, quasi de patrimoniis suis, ita de dotibus, funerari.' And, *l. 13. Cod. de Negot. gest.* 'Quod in uxorem tuam ægram erogasti, non a socero repetere, sed affectioni tuæ debes expendere. In funus sane ejus, si quid eo nomine quasi recepturus erogasti, patrem, ad quem dos rediit, jure convenis.' It was observed, That all nations, France, Holland, Germany, &c. where the communion of goods takes place, follow the same rule without one dissonant voice; so that we shall be singular if the practice be established among us of making the funeral expenses a burden upon the whole head. And, to conclude with a very considerable authority at home, Dirleton is of the same opinion, *voce FUNERAL CHARGES.* 'If the funeral

' charges for burying the husband should affect the whole moveable estate, or the dead's part? *Answer*, It should affect the dead's part, seeing it is not a debt contracted during the communion.'

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" Found, That the wife's funeral expenses must be defrayed out of her own fund."

Rem. Dec. v. 2. No 80. p. 125.

* * This case is reported by D. Falconer :

DAVID FINLAY of Bogside married Agnes Calder, relict of James Moor, portioner of Birdstone, who, during her viduity, had executed a testament, naming for her executors James Marshall of Watshod, James Calder portioner of Birdstone, and William Graham portioner of Glasgow, which proved to be her latter will and testament:

The marriage dissolved by the predecease of the wife, at which time the husband had two sons of a former marriage, the youngest of whom was foris-familiated.

Two questions arose between the husband and the wife's executor, *1st*, Whether the division of moveables should be tripartite or bipartite, reckoning that there were no children, as the eldest was the father's presumptive heir? *2dly*, Whether the wife's funeral charges should affect the whole goods in communion, or only her own share?

The Commissary of Glasgow found the division ought to be bipartite, and that the funeral charges behoved to come off the wife's share.

Pleaded for the husband, That a single child, though heir, has right to a legitim, as was found 10th November 1737, Justice against his Father's Disponees, *voce* LEGITUM.

Pleaded for the executors, This decision can only be a precedent where there is a single child; but where there are more, the whole bairns' part belongs to the youngest; and if they have got satisfaction for it, their renunciation ought not to benefit the heir, but the father, who has paid them the equivalent.

Pleaded on the *second* point for the husband, That his deceased wife having left effects of her own, the burden of interring her ought to be laid on them, *l. 16. D: De religiosis, l. 13. Cod. De neg. gest.*; Gordon against Inglis, No 126. p. 5924, Monteith against His Sister in-law, No 129. p. 5926.; Dicks against Massy, No 45. p. 5821.; Aitken against Guidlet, No 16. p. 2562.

Pleaded for the executors, By practice the funeral charges of the husband predeceasing are taken off the whole head, and therefore so ought those of the wife, Moncrief against Monypenny, No 5. p. 3845.

Observed upon the report of a bill of advocation, That the laying the husband's funeral charges upon the whole of the executry, was founded on a fiction that the funerator had contracted with him, and he having been administrator of the goods in communion, his contracts affected the whole; but the

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burier of the wife, by this fiction, being supposed to have contracted with her the debt could only affect her own interest.

THE LORDS remitted with instructions to find the division tripartite, and that the funeral charges affected the wife's share. See LEGITIM.

Reporter, *Tinwald.*For the Executor, *H. Home.*Alt. *Maddowal.**D. Falconer, v. I. No 173. p. 231.*

* * See Kilkerran's report of this case, No 7. p. 3948.

1762. November 18. AGENT for MRS M'ALISTER against Her HUSBAND.

No 133.

A WOMAN having prevailed in a declarator of marriage, and the LORDS having given her a certain sum in name of costs, her agent, who had expended L. 104 over and above the sum for costs, pursued her husband for re-payment.—He urged, That he could not be liable for a debt contracted against his consent, and in prosecuting himself; and besides insisted, That the sum allowed by the Court was taxative, and excluded higher costs.—THE LORDS found the husband liable.

Fol. Dic. v. 3. p. 286. Fac. Col.

* * See this case, No 19. p. 4036.

DIVISION IV.

The Husband's powers with regard to the management of the common stock, and of the Children.

No 134.

The second husband of a liferenter, with her consent put the fiar in possession. She was barred from again removing him.

1623. December 10. IRVINE against ———.

ONE ——— Irvine being infeft, conform to a contract of marriage, by her husband, in certain lands to be held of himself, and thereafter, she coming in actual possession of the same, really, by labouring thereof, by the space of many years after her husband's decease, thereafter, married a second husband, in whose time, her husband, with her consent, as was alleged by the defender, put the said liferenter's son, who was fiar of the same land, in possession thereof, who became, and remained in the possession thereof, for the space of two years; and which son sells the same lands to a stranger, who also receives the possession from the son, disponer thereof, by the space of