

for her share of the household furniture and plate, in terms of the contract of marriage, was satisfied.—See MUTUAL CONTRACT. No 122.

Reporter. Lord Elphinstone, Act. Lockhart. Alt. Graham, sen. Kilpatrick, Clerk.

Fol. Dec. v. 3. p. 282. D. Falconer, v. 1. p. 24.

SECT. VI.

Mourning.—Funeral Expenses.—Expense of a Posthumous Child.

1664. November 12.

NICOLAS MURRAY, Lady CRAIGCAFFIE, against CORNELIUS NEILSON.

NICOLAS MURRAY pursues a reduction of a decret of the Bailies of Edinburgh, obtained against her, at the instance of Cornelius Neilson, upon this reason, that she being pursued for the mournings for herself and family, to her husband's funerals, which mournings were delivered to her by the said Cornelius, and were bought by her from him, or by her order sent to her; which was referred to her oath, and she deponed, that Cornelius had promised to his father, to give necessaries for his funerals out of his shop, and according to that promise, had sent unto her.

The Bailies found, that this quality adjected in the oath, that the furniture was upon Cornelius's promise to his father, resulted in an exception, which they found probable by writ, or oath of Cornelius; who having deponed, denied any such promise, and therefore they decerned the Lady to pay; against which her reason of reduction is, that she ought to have been assoilzied by the Bailies, because her oath did not prove the libel, viz. that she bought the ware from Cornelius, or made herself debtor therefor, but only that she received the same from him without any contract, or engagement, which would never make her debtor; for a wife, or a bairn in family are not liable for their cloaths, unless they promise payment, but only the father; and in the same manner, the mournings for the funerals of the husband are not the wife's debt, but the husband's executors. The defender *answered*, That the reason was noways relevant, seeing the pursuer's oath proved the receipt of the goods which was sufficient *ad victoriam causæ*; the quality being justly taken away; for albeit the husband or his executors were liable for the relict's mournings, yet a merchant that gives off the same to the relict, is not obliged to dispute that, but may take himself to the relict, who received the same without either protestation, or agreement not to be liable. The pursuer *answered*, That whatever favour might be pleaded for a merchant stranger, yet this furniture being given

No 123.
The husband's representatives are liable for the relict's mournings.

No 123. by the defunct's own son to his relict, could not oblige her, the son being the father's ordinary merchant.

THE LORDS found, that the oath before the Bailies proved not the libel, and that the accepting of the mournings did not oblige the relict, but the executors, seeing the defunct was a person of their quality, thas his relict required mourning, and therefore reduced.

Fol. Dic. v. i. p. 396. Stair, v. i. p. 224.

* * * Newbyth reports the same case :

CORNELIUS NEILSON having given bond to Gilbert Neilson of Carrathie, his father, to satisfy what tack-duty his elder brother should be found liable to for the lands of Carrathie, upon provision that the said Cornelius should have retention in his own hands for what he should pay for his father's funerals ; after his decease, the said Cornelius did send to the relict mournings for herself, her children, and other funeral furnitures, whereupon there is a pursuit intended, at his instance, against Nicolas Murray the relict, and Mr Kenneth Mackenzie her husband, for payment to him of L. 152, as the price of the furniture, before the Bailies of Edinburgh, and decret given therefor ; which being suspended upon this reason, that the decret could not be given against the husband for constituting a debt against him, upon his wife's oath ; and that the libel was not relevant whereupon the decret proceeded, in so far as, albeit a relict had sent up to a defunct's own son for mournings, in payment whereof the defunct's executors are only liable, seeing a naked sending could not in law oblige her, except she had obliged herself to repay the same, neither could she be obliged *ex in rem verso*, seeing that furniture, being payable by the executors *ex sua natura*, it was only *in rem versum* to them, and not to the relict ; and 3^{tho}, That it was not proved by the relict's oath, that she had sent for the furnishing, but that it was sent to her upon the executor's account, and upon the account of the former bond. THE LORDS found all and every one of the reasons relevant for suspending the letters ; and found the decret before the Bailies intrinsically null, notwithstanding it was alleged they were all competent and omitted, which the Losds found could not be respected *in hoc casu*, the reasons being all *in jure*.

Newbyth, MS. p. 1.

1671. November 10.

BARBARA KERR and THOMAS HASTIE Her Son *against* WILLIAM HASTIE.

No 124.
A relict is
entitled, a-
gainst her
husband's re-

IN an action for aliment pursued at the instance of the said Thomas, against William Hastie his elder brother, as heir to his father, at least successor *titulo lucrativo*, upon this ground, That the father having made a disposition of his