

* * * Fountainhall reports the same case :

ISOBEL DICKSON and Robert Paterson her husband against Young for paying bygones of her liferent and to keep her free of public burdens. *Alleged, Intus habet* for bygones, by intromission with the moveables. *Answered*, By law she had a third. *Replied*, There was more debt than all the moveables, and so no third due. THE LORDS sustained the allegiance, and found she could have no third, till her own provision were once fulfilled; but deducted funeral charges, servants fees, &c. from her intromission; as also, found her jointure behoved to be free of public burdens, and by way of exception summarily admitted her son's action for aliment against her.

Fountainhall, MS.

* * * The like was decided June 1729, Stewart against Hall, *See APPENDIX.*

1678. July 16.

MURRAY against MURRAYS.

A BOND of provision delivered in *liege poustic*, like other debts, comes off the whole head of the executry.

Fol. Dic. v. I. p. 280. Stair.

* * * *See* This case, No 9, p. 2372.

1713. June 20.

ISOBEL MONCRIEF and Her HUSBAND, against CATHARINE MONIPENNY; Relict of George Moncrief of Sauchop.

IN the action at the instance of Isobel Moncrief and her Husband, against the Lady Sauchop, mentioned 27th January 1713, *voce* HUSBAND AND WIFE, the defender claimed, *jure relictæ*, the half of all the defunct's moveables, free of the expenses of her husband's funeral, and the building a monument to him, and the confirmation of his testament, and her own mournings, and the aliment of the defunct's family till the next term after his decease, all which she *alleged* must affect the dead's part only, and could not lessen her legal share; because, *imo*, Nothing diminisheth the whole head, but what is due by the husband before his death, and he could not properly be debtor for his funeral charges before his decease, when these had no being, and there was not a creditor. Now, a relict hath right to her share of the husband's moveables at the moment of his death; not by any succession, but *jure proprio* by division of the goods that were in communion during the marriage, under the husband's administration; upon dissolution whereof, the wife acquires no new, but con-

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Funeral expenses, aliment of the defunct's family till the next term after his decease, the expense of confirming his testament, and the relict's mournings; do not affect the dead's part only, but come off the whole head of the executry; all these being considered as the defunct's debts.

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 by the charges of building a monument to the defunct, by warrant of his testamentary deed, come off the dead's part only.

tinues her former right *tanquam domina*, without necessity to confirm her share. And as she could claim no part of any thing that fell due to the husband at the minute of his death; so neither should she be burdened with debts to which his representative became liable by dissolution of the marriage. Sir John Nisbet, in his *Doubts and Questions*, tit. FUNERAL CHARGES, is clear of this opinion, That the funeral charges should affect only the dead's part, these not being a debt contracted during the communion. And therefore the husband's funeral charges must be paid out of the dead's part, as the expense of the wife's funerals would come off her own share. *2do*, The expense of building the monument falls to be considered and determined upon the same grounds of law with the funeral charges; the former having had no foundation till after dissolution of the marriage, and being of the nature of legacies or donations *mortis causa*, that are payable only out of the dead's part. *3tio*, The expense of confirming the defunct's testament can burden only his executors, because it was not a debt of the defunct; for, if it were a debt of the defunct, it would be due whether there were a testament or confirmation, or not, which cannot be pretended. Confirmation is a deed of the executor, whom law obligeth to confirm, before he can have a title: And the relict, who has right to her part without confirmation, cannot be burdened with making up the right of a third party. As she hath right to her terce of lands, and to her share of the moveables, without any burden of the expense of the heir's service, she can as little be burdened with the expense of the executor's confirmation, which is *aditio hæreditatis mobilium*. *4to*, The Lady's aliment to the term subsequent to her husband's death can affect only his executors, and the dead's part being due only by his representatives for the maintenance of his own family; seeing otherwise, the relict would be obliged, not only to maintain herself, but also her husband's whole family in that interval. My Lord Stair, in the close of his title, CONJUGAL OBLIGATIONS, says, 'Wives have not only a half or third of their husband's moveables, but have their aliment till the next term after their husband's death;' which is the same thing as if he had said, their aliment is not payable out of their own share of the moveables; seeing otherwise, they could not be said to have their aliment over and above that share. The origin of aliments due to relicts, seems to have proceeded from the same cause that obligeth a husband's successors to pay the expenses of child-bed to them; and, as the relicts themselves were never burdened with any part of the expense of the latter, neither can any part of the charges of the former lie upon them. *5to*, The relict's mournings burden the husband's executors, and not herself, Stair Inst. tit. CONJUG. OBLIG. § 10. November 12. 1664, Murray *contra* Neilson, *voce* HUSBAND AND WIFE, 7th July 1675, Wylie *contra* Morrison, *IBIDEM*; because, these were no debt due by the defunct when he died, and the relict's share of the moveables belongs to her from the moment of her husband's death, free of all subsequent debt. Nothing being ever claimed upon the account of mournings unless they be used and worn, shews that the

price thereof is not the defunct's debt, which must be certain and fixed at the moment of his death. Again, where there are no moveables, mournings are due by the heir, which demonstrates these to be a burden only upon the defunct's successor; and the relict draws her share without any passive title of representation. In fine, there being no civil obligation upon wives, children, or servants to wear mournings, and the same being used only *ex pietate*, out of deference to the defunct's memory, the burden ought to lie upon his successors, and not upon his relict.

Answered for the pursuer; *imo*, Albeit the expense of the funerals falls not due till after dissolution of the marriage, yet it is properly the defunct's debt. *Qui propter funus aliquid impendit, cum defuncto contrahere creditur, non cum hærede, L. 1. ff. de Religios. et Sumpt. Fun. and Momentum primum mortis annumeratur vitæ*: Therefore the defunct's whole moveables must be burdened with his funeral charges; in the same manner as with a bond whereof the term of payment fell due after his decease; especially considering, that funeral charges are a debt preferable to all other moveable debts: Nor can it be controverted, that, were not the dead's part sufficient to satisfy the funeral expense, whatever moveables are extant may be subjected to the payment thereof, before the heir can be reached. *2do*, Since the expense of the monument arose from the defunct's will in his lifetime, and the relict occasioned the same, there is very good reason for laying it upon the whole head. *3tio*, It is the universal practice of all the commissary courts in Scotland, to deduct the expense of confirmation off the whole head, founded on this good reason, because, though the wife needs not to confirm her share of the moveables for establishing a title thereto, yet it is impracticable to make the division till the subject be confirmed, and the whole moveables brought fairly in the testament, that creditors or others concerned be not injured. *4to*, There is the same reason for deducting the aliment and mournings off the whole head, as for deducting the funeral expenses; the former, as well as the latter, being a debt of the defunct. The question in the place cited out of the Lord Stair's Institutions for taking the relict's mournings off the dead's part, is not, Whether such debts shall come off the whole head of the executry, or the dead's part only; but whether, seeing the wife received the goods from the furnisher, she be liable for the same *proprio nomine*, or if the executry be affectable?

Replied for the defender; The *L. 1. ff. Relig.* makes nothing for the pursuer. For the position appears to be a fiction in law from the word *creditur*; and *qui contrahere creditur, de facto non contrahit*. This is further evident from the best gloss on that law, which adds, *Ab hærede tamen recipit, ut et a patre vel domino, L. 12. § 2. ff. eod.* And *datur hæc actio adversus eos ad quos funus pertinet, utputa adversus hæredem ceterosque successores*; whereas the relict draws not her share by succession, or *tanquam hæres*. That the funeral charges are a preferable debt, cannot be applied to this case, where there is a valuable executry, and the question is not concerning the preference thereof, but only con-

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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, *1mo*, That the funeral expense doth not affect the dead's part only, but comes off the whole head of the executry. *2do*, 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. *3tio*, THE LORDS found, that the expense of the confirmation comes off the whole head. *4to*, 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 obligation 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.

No 7.

The funeral-charges of the wife predeceasing, affect her own interest in the goods in communion ; and

1747. February 24.

MARSHALL and Others against FINLAYS.

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