No 2. she behoved to be secluded from all, or have right thereto; and in this case the bairns being provided to the whole conquest, the LORDS found, that thereby the bairns had right not only to bonds and annualrents and all other heritable rights, but also to all moveable goods and gear whatsoever, excepting household plenishing; in respect that the defunct was a merchant, and his whole fortune did consist in trade and merchandize, which otherwise could not have been so found by our law and practick, which as to the interpretation of conquests, hath been variously decided.

Gosford, MS. No 319, 320, 321, *p.* 142.

1678. *June* 19. DICKSON and PATERSON *against* YOUNG.

No 3.
Found as above.

BY contract of marriage betwixt umquhile Thomas Young and Isobel Dickson, he was obliged to have ready in money L. 10,000, and to employ it on security and land for her liferent use, and all the moveables conquest during the marriage, are provided to the bairns of the marriage. The said Isobel and her second husband Robert Paterson pursue Thomas Young the only child of the first marriage, to fulfil the contract, in so far as was not fulfilled by contract in land, bearing to be in implement thereof *pro tanto*, and insisted for the superplus of the annualrent of L. 10,000 over and above the free rent of the land. The defender *alleged*, that the pursuer had intromitted with the moveables, which behoved to be employed in the first place, for making up the liferent, and so *intus habuit*. 2*do*, That seeing the pursuer liferented the defunct's whole estate, she ought to be liable to a modification to the defender, as apparent heir. The pursuer *answered*, that this employment being an heritable destination, it could not burden the moveables; for though a creditor might distress either heir or executor, yet the executor would have relief against the heir: And in this case, the defender being both heir and executor, the heritage must be first affected, so that the moveables must be free, and the pursuer will have the third of them, and cannot be liable in this process for any intromssion with them, much less for a modification to the heir. The defender *replied*, that the obligement to employ sums, has ever affected the moveables *primo loco*, and is a moveable debt *quoad debitorem*; neither can the pursuer claim a third, because the moveables acquired during the marriage, are provided to the heirs of the marriage; and as to the aliment to be modified to him, as apparent heir, he hath a process depending for it, which ought to be taken in *incidenter*, in this process.

THE LORDS, found the moveables to be liable *primo loco*; and found the relict to be excluded from the moveables conquest during the marriage, accounting these moveables only conquest, which exceeded the defunct's moveables before the marriage, and declared that they would modify an aliment, according as the condition of the estate should be proven. *See* HERITABLE AND MOVEABLE.

Fol. Dic. v. 1. *p.* 280. *Stair, v.* 2, *p.* 622.

*** Fountainhall reports the same case:

No 3.

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 allegeance, 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.

No 4.

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

Fol. Dic. v. 1. *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.

No 5.

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.

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, 1*mo*, 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-