1706. *February* 19. MUIRHEAD'S RELICT *against* Her FATHER-IN-LAW.

No 130.
Found in conformity with Hasty against HastyNo 124. p. 5922; that a relict is entitled, against her husband's representatives, to the expense incurred by the birth of a posthumous child.

ROSE FINCHAM, relict of James Muirhead of Braidisholm younger, against her father-in-law, Braidisholm elder, for modifying an aliment to herself and her children, during the dependence of a declarator she has for a terce, in respect her husband was once infeft, though the sasine be now abstracted. THE LORDS refused to modify any aliment for the children, in regard the goodsire offered to take them home to his own house, and to aliment them as he does his other children; for though infants are not to be taken from their mother during her viduity and their infancy, if she offers to keep them *gratis*; yet if she seek aliment for them, the grandfather may stop it by accepting them into his own family. But the LORDS found she ought to have an allowance for her expense of in-lying, and bringing forth the posthumous child, and for the nursing it; and referred the modification to the Ordinary.

On the 28th current the Lady Braidisholm entered an appeal against this interlocutor. *See* APPENDIX.

Fol. Dic. v. 1. *p.* 396. *Fountainhall, v.* 2. *p.* 328.

*** See Forbes's report of this case, *voce* TUTOR and PUPIL.

1708. *June* 19. A. *against* B.

No 131.
The relict's part must bear a share of the husband's funeral expenses, as well as the dead's part.

IN a process between the relict and children of the following points came to be advised, viz. 1*mo*, The executors confirmed craved allowance and deduction for the moveable heirship, as the best of each species of the plenishing which the heir would have right to, but had not yet claimed. *Answered*, There could be no separation on that account, because *non constat* what he could elect, and therefore, you must pay in to me the whole. THE LORDS found the whole was to be accounted for, but ordained the receiver to find caution to warrant them against the heir, when he appears, to make his share forthcoming to him. 2*do*, Deduction being craved for the funeral expense, the relict *objected*, That could never affect nor diminish any part of her share of the moveables, because the communion of goods can be burdened with no debts, but what were contracted during the standing of the society; but *ita est* the funeral charges is a debt arising and existing after the dissolution of the marriage, and so can only affect the dead's part, and not the relict; and that my Lord Dirleton, who was long a commissary, and much versed in consistorial cases, is of this opinion, *voce* FUNERAL CHARGES. *Answered*, Burying her husband is one of the most privileged debts, and one of the laws of nature, *et debitum humanitatis, ne cadavera maneant insepulta*; and it is as reasonable that the relict bear a share of the burden as his children; and what-

No 131. 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. *Fountainhall, 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