

No 5.

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