

No 135. there being no other deed libelled of any other intromission with any goods of his wife's *de novo*, after her decease, besides that which he had in his marriage, it could not make him vitious possessor, nor produce this action against him, as against a wrongous intrommitter; but the pursuers might cause confirm the wife's testament, and cause charge the defender to do the same, whereby they would evict the dead's part, and it would be made liable to them, for any thing they might evict against the defunct, for her intromission with the said omitted goods, out of her first husband's testament. See PASSESIVE TITLE.

Act. Gibson.

Alt. Hart.

Clerk, Gibson.

Durie, p. 327.

1629. February 27.

BROWN against DALMAHOY.

No 136. JAMES BROWN having left his wife, N. Nasmith, and N. Brown, his daughter, co-executors to him, his wife afterwards married James Dalmahoy, and the daughter having recovered decret against her mother, and James Dalmahoy for his interest, to make her pay off L. 1100, as the just half of the free goods contained in her father's testament;—after her mother's decease, she convenes James Dalmahoy, as intrommitter with his wife's goods and gear, to make payment to her of that sum contained in the former decret. But the LORDS would not sustain it, to make him universal intrommitter, but only for making forthcoming of what particulars the pursuer could prove he had intromitted with appertaining to his wife.

Spotiswood, (HUSBAND and WIFE.) p. 155.

. Durie reports the same case.

AGNES BROWN, the only bairn procreated betwixt umquhile Brown her father, and Naismith her mother, being executrix confirmed to her said umquhile father, obtained decree against her mother, who was executrix confirmed with her, and against James Dalmahoy her second husband, for his interest, for payment of the equal half of the inventory of the goods confirmed, contained in the said testament; and the said relict thereafter dying, after her decease, the second husband is pursued by the said Agnes Brown, and her tutor, as intrommitter with the goods and gear of his said spouse, *hoc nomine* to make payment to the pupil, of the particular sums contained in that sentence, obtained against his wife, and himself for his interest; wherein the LORDS found, that albeit sentence was recovered against his wife before her decease, and against himself for his interest, yet that he could not be convened *hoc nomine*, as vitious intrommitter with her goods, to pay her debts, he being her husband, and so *dominus omnium ejus bonorum*, and continuing only in that

possession after her decease, which he once, as husband, had lawfully acquired, and so thereby he could not be convened as universal intromitter, to make him a vitious intromitter, and liable to her debts; but the pursuer might convene him to make forthcoming the particulars intromitted with by him, pertaining to his wife, for payment of that debt, or might confirm herself executrix, as creditrix to her, that she might be paid off her debt, for the which they found the process might be sustained. See PASSIVE TITLE.

No 136.

Act. Burnet.

Durie, p. 422.

1634. July 19.

HUMBIE against HUME.

HUMBIE being charged to pay to Helen Cockburn, sometime good-wife of Humbie, and to Laurence Hume, her spouse, the sum of 2000 merks, contained in a bond granted by him to them thereupon, at a certain term mentioned in the bond, and to pay annualrent therefor, so long as he retained the sum after the term of payment; and their being one clause subjoined to the end of the bond, whereby it was provided, that it should not be leisum to Laurence Hume, the husband, to seek the principal sum, nor uplift the same during his wife's lifetime, but only the annualrent thereof; in respect of the which provision, the said debtor suspended the said charges execute at the husband's instance, for the said principal sum; whereto the husband *answered*, that that clause was conceived in his wife's favours, and not in favours of the debtor; likeas his wife consented to the charge, and uplifting of the money, and offered to compear judicially, and consent most solemnly thereto.—THE LORDS nevertheless suspended the charge for the principal sum, in respect of the said clause; for they found, that the debtor could not be compelled to pay the same, albeit the wife consented, except that he pleased himself to pay it, so long as the wife lived; for it was found, that the clause was in the debtor's favours, if he liked to make use of it.

No 137.
A bond bore, that it should not be lawful for the husband of the creditor to uplift the principal sum. Altho' the lady consented, the debtor found not obliged to pay.

Clerk, Hay.

Durie, p. 729.

1637. March 2.

KEITH against SIMSON.

ONE Geills Keith being infeft with her husband in conjunct-fee of the lands of ———. and after his decease, pursuing Simpson to pay the ordinary duties of the lands two or three years bypast, since the time of her husband's decease, and he *alleging*, That he was heritably infeft in the lands by the L. Dalgety, who was heritably infeft therein by her husband, and by virtue whereof

No 138.
A wife infeft in conjunct-fee, cannot be prejudiced by an infeftment to a third party flowing from her husband.