

seven or eight years, the wife and her husband living together all this time; after which, the liferenter's second husband foresaid dies, and the relict pursues the acquirer of the right from her son as said is, to remove from the land by virtue of her liferent-right and infeftment foresaid. Which action was not sustained, for the LORDS found this allegiance, proponed upon the defender's right acquired from her son, who was heritably infeft in the lands, albeit after her liferent, clad with possession foresaid, relevant, to elide this removing, in respect the defender offered to prove, that the son fiar was in possession, put therein by the husband, with his wife's consent, who was liferenter, and that his being in possession, and infeft, put the defender in *bona fide* to buy from him, and so was in *bona fide* to defend against this removing; neither was it respected that the pursuer replied, that there was no deed done by her to take away the right of her liferent; for albeit she consented to the deed done by her said second husband, in putting her son in possession, yet that was not a reason to take her right from her, but that she might lawfully claim the same, whenever her husband died, she being in real possession of before, as said is. The exception was found relevant against the removing, and the consent ordained to be proven by the woman's oath, but prejudice to her to pursue declarator upon her right, as accords of law.

Act. *Aiton & Davidson.*Alt. *Hope & Burnet.*Clerk, *Gibson.**Durie, p. 89.*

No 134.

1628. *January 16.*ALLAN'S EXECUTORS *against* LAUDER.

No. 135.

AN action intended against Robert Lauder, as intromitter with the goods and gear of Abigail Pringle, his umquhile wife, which Abigail did intromit with the goods of N. her husband, debtor to the pursuer, not sustained; in respect, that this intromission was not vitious, but only with his own goods brought to him by his wife, which was both necessary and lawful.

*Spotiswood, (HUSBAND and WIFE.) p. 155.** * *Durie reports the same case.*

In an action betwixt Allans, as executors confirmed, *ad omissa*, to their father's goods, against one Lauder, as intromitter with his wife's goods after her decease, and which wife, being the pursuer's mother, had intromitted with the said omitted goods, and was married upon the said Lauder, now defender, her second spouse;—THE LORDS assoilzied from this pursuit, because it was found, that the husband defender, having only continued after his wife's decease, in the possession of his goods, which he had before his wife died, and while they lived together, that continuing of the possession retained by him,

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 marrieth 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 intromitter 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 intromitter, 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 intromitter 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 intromitter with her goods, to pay her debts, he being her husband, and so *dominus omnium ejus bonorum*, and continuing only in that