

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.

No 138.

he had been all the years libelled, and many others of before *bona fide* possessor, therefore he ought to be assoilzied from all payment of any bygone duties, in respect of his right standing, which has never been interrupted by warning or otherwise;—THE LORDS repelled the exception, in respect of the relict's infetment of liferent produced, and that she could not be prejudged therein by any disposition flowing from her husband, which the pursuer had no necessity to know or to pursue to be suspended during her lifetime, albeit the defender had acquired his right immediately from Dalgety; and found, that the defender's *bona fides* could not defend him from paying of the duties since the husband's decease, the relict having done diligence by this pursuit so shortly after his decease, viz. within two or three years, for the which the pursuit was sustained, for a quantity modified by the Lords yearly, the years libelled, and the said allegiance was repelled. And it being further *alleged*, That the defender cannot be convened for the duties of the lands libelled the crop and year , which was one of the years pursued for; because the pursuer having warned him to remove before the term, he for obedience of the warning removed, and left the ground void;—and the pursuer *replying*, That that was not enough, except he had come, or sent to the pursuer, and had renounced the right and possession of the lands before notaries and witnesses, and had taken instruments thereupon; otherwise, upon the defender's alleged naked leaving of the ground, the pursuer could never have been *in tuto* to have entered to the possession of the land without danger, especially where the defender was clothed, and clothes himself, as he does, with a title; so that without renouncing by writ, she could never have been freed of danger of ejection. This allegiance was found relevant, notwithstanding of the answer. And the LORDS found no necessity that the defender should have renounced his possession to the pursuer; but found it sufficient to allege and prove by witnesses, that for obedience to the warning, he left the ground waste.

Act. Dunlop.

Alt. Hay.

Durie, p. 834.

No 139.

A husband confirmed his wife's testament, and made faith on the inventory. By this he was not excluded from disappointing the wife's legatees, by adding another debt forgot.

1665. December 7. ELIZABETH ANDERSON against ANDREW CUNNINGHAME.

ANDREW CUNNINGHAME's wife having left a legacy to Elizabeth Anderson, it was *alleged* by the husband, that his wife's share of the moveables was exhausted. It was *answered*, That he having confirmed his wife's testament, and given up the debts due by him therein, and made faith thereon, he cannot now be admitted to adduce any other debts, especially being so recent before the testament, within three or four years. It was *answered*, That he had only made faith upon the inventory of the goods belonging to him, but not of the debts