

No 132.

burier of the wife, by this fiction, being supposed to have contracted with her, the debt could only affect her own interest.

THE LORDS remitted with instructions to find the division tripartite, and that the funeral charges affected the wife's share. See LEGITIM.

Reporter, *Tinwald.*For the Executor, *H. Home.*Alt. *Macdowal.**D. Falconer, v. I. No 173. p. 231.*

\* \* See Kilkerran's report of this case, No 7. p. 3948.

1762. November 18. AGENT for MRS M'ALISTER against Her HUSBAND.

No 133.

A WOMAN having prevailed in a declarator of marriage, and the LORDS having given her a certain sum in name of costs, her agent, who had expended L. 104 over and above the sum for costs, pursued her husband for re-payment.—He urged, That he could not be liable for a debt contracted against his consent, and in prosecuting himself; and besides insisted, That the sum allowed by the Court was taxative, and excluded higher costs.—THE LORDS found the husband liable.

*Fol. Dic. v. 3. p. 286. Fac. Col.*

\* \* See this case, No 19. p. 4036.

## DIVISION IV.

The Husband's powers with regard to the management of the common stock, and of the Children.

No 134.

The second husband of a liferenter, with her consent put the fiar in possession. She was barred from again removing him.

1623. December 10. IRVINE against ———.

ONE ——— Irvine being infeft, conform to a contract of marriage, by her husband, in certain lands to be held of himself, and thereafter, she coming in actual possession of the same, really, by labouring thereof, by the space of many years after her husband's decease, thereafter, married a second husband, in whose time, her husband, with her consent, as was alleged by the defender, put the said liferenter's son, who was fiar of the same land, in possession thereof, who became, and remained in the possession thereof, for the space of two years; and which son sells the same lands to a stranger, who also receives the possession from the son, disponer thereof, by the space of

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.

No 134.

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