

NO 144.

THE LORD ORDINARY 'preferred Donald Macdonald to the sums in the hands of the raisers of the multiplepounding.'

A reclaiming petition for John Buchan was appointed to be answered; and the Court, considering the case to be attended with great difficulty, afterwards ordered memorials.

On advising them, several Judges thought the Lord Ordinary's interlocutor should be altered. Mrs Loch (it was observed) had exerted herself to the utmost to encrease the reversion; and from the steps publicly taken by her for this purpose, her creditors had reason to suppose that it was her property. Besides, she had an undoubted right, in consequence of her apparenacy, to draw the interest of the reversion from the time when the estate was sold; and had she done so, it would have been impossible to maintain that she did not attain possession of it. But to give the creditors of an apparent heir the benefit of the statute, it does not seem necessary that he should have drawn the rents; it is sufficient that he should have had it in his power to do so. This is not a naked civil possession like that of a fiar, while the subject is possessed by the liferenter.

A majority of the COURT were however of opinion, that the creditors of an apparent heir could not avail themselves of the statute, unless their debtor had actually attained possession, which it was admitted Mrs Loch had not done.

THE LORDS 'adhered.'

Lord Ordinary, *Justice-Clerk Brasfield.*

For Buchan, *G. Fergusson, Ja. Gordon.*

Att. Solicitor-General Blair, Macleod Bannatyne.

Clerk, Home.

R. D.

Fac. Col. No 5. p. 12.

DIVISION IV.

Vicious Intromission.

S E C T. I.

In which circumstances intromission does or does not infer a Passive Title.—Action transmits against heirs *in valorem* only.

1623. December 5. SCOT against LIVINGSTON.

No 145.

A widow's
intromission
with a small
quantity of

IN an action betwixt Scot *contra* Livingston, the defender being convened, as universal intromissatrix, for a debt owing by the defunct, her husband, it being *alleged*, That there were executors nominated in the defunct's testament,

who, conform thereto, intromitted;—this was repelled, because the executor was not confirmed; likewise the Lords found, That the qualification against the defender, of her intromission with a mean quantity of the defunct's goods, viz. the selling of five bolls of corn, and the slaying and eating of four or five sheep, and the retention of other thirty sheep, which she had yet extant, was not sufficient to constitute her universal intromissatrix, and so to pay the whole debt, but only sustained the same to that effect, viz. to make the said particulars forthcoming, wherewith she should be proved to have intromitted. This was found, because it was thought hard that so small quantity of intromission should bring on the whole burden of the defunct's debts on her, and to make her as universal intromissatrix to answer for all, albeit her intromission was with goods, which was not necessary, there being no fraud on her part.

Act. *Lowrie.*Alt. *Cockburn.*Clerk, *Gibson.**Fol. Dic. v. 2. p. 41. Durie, p. 86.*

No 145.
the defunct's
goods was
found not suf-
ficient to con-
stitute her
universal in-
tromitter.

1624. *March 20.*

COCHRAN against STURGEON.

In the action pursued by James Cochran, burges of Edinburgh, against Helen Sturgeon, as intromissatrix with the goods of her umquhile husband, for payment of a debt owing by her husband to the pursuer;—the Lords sustained the action against the relict as intromissatrix, notwithstanding that she alleged that there were executors confirmed, in respect that they were not confirmed before the raising of the principal summons in this cause, and before the execution thereof, albeit they were confirmed before the day of compearance, to the which the defender was summoned; which was found not to be sufficient, albeit the Commissaries in their judicatories admit confirmations, before litiscontestation, to be sufficient to liberate persons convened as intromitters, which is not received before the Lords: And where the defender would have purged his intromission, being condescended to be of wares in her husband's merchant booth in the town of Dunse, where he dwelt, such as pepper and spices, and such like other wares, which she alleged were sold by her, for the supply and necessary entertainment of herself and her bairns in meat and drink, having no other means wherewith to entertain them; the same was not sustained, but the Lords found that she was answerable, as intromissatrix, to the pursuer, for his debt owing by her husband.

No 146.
Found con-
trary to the
above.

Act. *Nicolson, younger.*Alt. *Miller.**Fol. Dic. v. 2. p. 41. Durie, p. 121.*