

man's death, the trustees might have paid it to her without a service; and the multiplepoinding which they raised, together with the interlocutor of the Court, preferring her to the fund, ought to be held as equivalent to payment.

A majority of the Court, however, came at last to be of opinion, that Mrs. Bowman not being a *nominatim* substitute in the bond, nor having actually got possession of its contents, the fund *in medio* fell to be considered as still *in hæreditate jacente* of her brother.

The Court at first adhered to the interlocutor of the Lord Ordinary; but afterwards, on advising a reclaiming petition for Duncan Stewart, with answers, "they altered the interlocutor reclaimed against, preferred the petitioner to the fund *in medio*, and remitted to the Lord Ordinary to proceed accordingly."

And, on advising a reclaiming petition for Lieutenant Græme, with answers, the Court "adhered."

Lord Ordinary, *Craig*.

For Stewart, *H. Erskine, J. W. Murray*.

For Græme, *Solicitor-General Blair, Cha. Hay, M. Ross*.

Clerk, *Home*.

R. D.

Fac. Coll. No. 118. p. 266.

No. 44.

SECT. VI.

Intromitters with the Defunct's effects may be pursued directly without Confirmation.

1623. February 5.

SCHAW *against* AUCHINLECK.

IN an action Schaw *against* Auchinleck, the Lords sustained the action against the relict of the defunct, who was convened as intronmissatrix with certain particular goods of the defunct, to make the goods intromitted with by her forthcoming to one of the defunct's creditors, notwithstanding that the relict alleged, that there were executors confirmed, who ought to be convened for the defunct's debts, and to which executors she ought only to be accountable for her intromission: But the pursuer replied, that she might be pursued for that particular libelled wherewith she intromitted, seeing it was not contained in the defunct's confirmed testament: She duplied, that she could not be convened therefore by this manner of pursuit, but any having right thereto, as omitted out of the testament, and obtaining a dative thereof, might pursue therefore, to whom she should be answerable as accords. This allegiance was repelled, and the action sustained against the relict for her intromission, seeing the testament wherein the pairns are confirmed executors, was given up by herself, and that her omission to give up the particular goods of the

No. 45.

Found, that a relict intromitting with some things omitted in the defunct's testament, might be pursued directly for the same by the creditors, without either first insisting against the executors confirmed, or take a dative *ad omitta*.

No. 46.

defunct, which was fraudulently done by her, ought not to be profitable to her, nor prejudicial to the creditors, and found in respect of her fraudulent omission, that there was no necessity to seek a dative *ad omissa*.

Act. Mowat.

Alt. Hamilton.

Clerk, Gibson.

Fol. Dic. v. 2. p. 369. Durie, p. 44.

* * Haddington reports this case :

In an action pursued against Pitoddie and some other vassals, as intromitters with the goods of defunct, the defenders excepted no process, because there was a testament confirmed before the intenting of this cause. It was replied, That the confirmation could not relieve the mother, who, giving up the goods and debts for her bairns, minors, had omitted above the worth of a thousand pounds of goods, wherewith she had intromitted, and so her intromission was not purged *sua culpa* : In respect of which reply, the Lords sustained the action.

Haddington MS. No. 2745.

1624. March 18. CANT against CHEISLY, and TOURIS against DOUGLAS.

No. 47.

Found in conformity with the above.

BARBARA CANT being convened as intromissatrix with the goods and gear of William Muirhead, her umquhile husband, to pay to Mr. Robert Cheisly the sum of 300 merks, addebted to him by her said husband ; and she alleging that there were executors confirmation before the intenting of this pursuit, to whom she was only answerable for her intromission, and not to any creditor, who ought to pursue the executor, and not her : This exception was repelled, in respect of this reply, bearing, that the defender had intromitted with as many of the moveables and utensils of the house, as would pay this pursuer of his debt, by and attour the quantity of the utensils confirmed in testament, and which intromission of the said further quantity, was referred to the relict's own oath, and which was found relevant by the Lords, to the effect, that the particulars so intromitted with by her, and not confirmed, might be made forthcoming to the pursuer *pro tanto*, to satisfy his debt : And the Lords sustained this, and found no necessity to seek a dative *ad omissa*, as the defender alleged ought to have been, seeing this sentence was sufficient to her, to liberate her *pro tanto*, at all hands : See Shaw *contra* Auchinleck, *supra*, from the which this differs, because in that, the testament was given up by the relict's self, and her bairns confirmed executors, so that her fraudulent omission ought not to be profitable to her ; and in this cause, strangers, viz. two of the defunct's creditors, were confirmed executors, who gave up the inventory, and not the relict.

The like case was agitated upon the last of March 1626, betwixt Touris and Douglas, wherein the daughter being called as intromittor with her father's goods, to pay his debt to the pursuer, the defender alleging, that there were executors