Alleged for the defender, No process; because the pursuer was not infeft. No 146.

Answered; It was not necessary for the pursuer to take infeftment, his right being only an apprising of the legal, especially if the lands held ward.

Replied; No person but he that is infeft can reduce rights that are real by infeftment, or pursue removings; although a bare comprising may be a title to call for production of contracts, or personal rights; nor is the pursuer within year and day of the first effectual apprising.

THE LORDS sustained the allegeance and reply for the defender.

Thereafter the pursuer *alleged*, That this is a dilator, which cannot be proponed now, after the taking of terms; which the LORDS found relevant, and repelled the defence *in hoc statu processus*.—See TITLE TO PURSUE.

Fol. Dic. v. 2. *p.* 186. *Harcarse*, (IMPROBATION, &c.) *No* 581. *p.* 162.

1695. *December* 26. ROBERT FALL *against* MARGARET NISBET, *&c.*

No 147.
A donatar of escheat having pursued intromitters, they pleaded the goods did not belong to the defunct. They were not, after failing to prove this, allowed to deny intromission.

IN the concluded cause, Robert Fall, Bailie of Dunbar, against Margaret Nisbet, and Charles Emilton, her son; the LORDS found Emilton liable for the moveables, seeing it was not proved, in the terms of the act, that they belonged to the first husband; and the second husband dying in possession thereof, it presumed property, and so made them fall to Fall, the pursuer, donatar to his escheat; and he needed not prove the defender's possession of the same, seeing the defence was proponed without denying their intromission, quantities, or prices. Against this interlocutor Emilton gave in a petition, representing, it were hard to make the negligence or omission of his Advocates, or the Clerk, in proponing or minuting the debate, to bind him, and it was only sustained as a tacit acknowledgment of the libel, where a defence of payment was founded on, but not in other exceptions; and cited Zoesius, ad tit. D. De Probationibus, that a defender's succumbing to prove his defence does not exoner the pursuer from proving his libel; and farther *alleged*, That he, his mother, and brother, being all convened in one summons, the decerniture ought to divide, and he only be found liable for a third.—*Answered* for Bailie Fall, He was not in the case stated by Zoesius, where *actor nihil probavit*; for he had proved these goods were in the rebel's possession the time of his decease, and they being all *correi debendi*, were liable *in solidum*, it being only a continuation of a joint possession, and all had accresced to him by the other's death.—THE LORDS refused the bill, and adhered to their former interlocutor. But he at last recurring to minority, and alleging he was minor at the time, the LORDS would not receive it *hoc ordine*, not being instantly verified, but reserved his reduction, as accords.

Fol. Dic. v. 2. *p.* 187. *Fountainhall, v.* 1. *p.* 692.