

delivered a great pot, which was the best pot, to a flesher, for satisfaction of some flesh, furnished to himself, after the decease of his father; as also having sold the house and lands of the Peell to the Earl of Linlithgow, he delivered, and freely gifted the said board and bed to the Earl of Linlithgow, which was a disposition and intromission sufficient of the law to make him heir to his father, and consequently to make the defender, his son, who is served heir to his father, heir also, by progress to the goodsire, his father having intromitted with and disposed upon the heirship goods foresaid, as said is. THE LORDS found not the foresaid qualification relevant, concerning the defender's father's using of the board, bed, and cauldron, to make the defender, or his father, heir to the goodsire; and as to that part of the qualification anent the gifting of the said bed and board, and delivering the pot to the flesher, the LORDS also found it not relevant to make him heir, except the pursuer would prove, that the same was gifted by writ, because the particulars foresaid, so intromitted with, and disposed, were but matters of small importance, and not of such consequence, whereby the defender should be found heir to his goodsire. In which decision, the LORDS were also moved by consideration, that the sentence desired to be transferred was recovered about 36 years since, and that it was never executed against the goodsire, against whom it was recovered in his own time, nor against his son in his lifetime, but only now craved against the oye, who was not born the time of the sentence; and sicklike, that the goodsire's wife lived after the goodsire's decease, and kept the possession of the alleged heirship goods four or five years after her husband's decease, before ever the son intromitted.

Act. Aiton &amp; Oliphant.

Alt. Burnet.

Clerk, Gibson.

Durie, p. 33.

\*\*\* Spottiswood reports this case.

1622. November 7.—A decret of spuilzie being sought to be transferred against one as behaving himself as heir to his father by intromission with a cauldron, in so far as he gifted the same after his decease; it was found, That it could not be proved but by writ or oath of party, because it would bring upon the defender the profits of a spuilzie for many years.

Spottiswood, (EJECTION and SPOLIATION.) p. 87.

1626. July 14.

JOHNSTON against MASON.

GILBERT JOHNSTON, and Mason, his spouse, convene Mason, as behaving himself as heir to his umquhile father by intromission with his heirship goods, to

No 16.  
Found in conformity with  
Baillie a-

No 16.  
 against Home,  
 No 13. P.  
 9638.

In this case,  
 the apparent  
 heir continu-  
 ed in posses-  
 sion of the  
 heirship for  
 two years  
 without mak-  
 ing inven-  
 tory.

make payment of a sum of money promised to them by his father in tocher ; in the which cause, the defender *alleged*, that he could not be convened *hoc nomine*, as intromitter with the said heirship goods, to make him heir, because he being infest by his umquhile father in a tenement of land, before the contract of marriage libelled, after the decease of his father, he removed the relict and entered to the possession of that tenement, within the which the said heirship goods were then standing for the time, and which he could not cast out, but suffered the same to remain in the house, where they are yet extant, to be forthcoming to the pursuer, or any other having interest in the same ; and except he had sold and disponed thereupon, or had made some other use of them, than by retaining of the same in the house, he cannot be therefore convened, as thereby behaving himself to be heir. This allegiance was repelled, and the retaining of the possession of the said goods, and using of the same, by eating on the boards, and lying on the beds, was found sufficient ; neither was it found necessary, that the pursuer should reply upon the defender's selling or disponing of the heirship, seeing his retaining thereof, and using of the same, as said is, was found enough ; for if he had pleased to evite the danger of being heir, he had his ordinary remeed to have meaned himself to the LORDS, and to have obtained a warrant to make inventory of the goods within the dwelling-house foresaid, before he had entered thereto, to have been forthcoming to all parties ; which not being done, he has prejudged himself, especially seeing it was offered to be proved by the pursuer, that there are two years past since his father's decease, during the which whole space, he has retained the possession of the said goods.

Clerk, *Gibson*.

*Fol. Dic. v. 2. p. 27. Durie, p. 218.*

1626. July 14.

SMITH against GRAY.

No 17.  
 A son con-  
 firmed execu-  
 tor creditor  
 to his father  
 after intenti-  
 ing action a-  
 gainst him as  
 intromitter  
 was assoil-  
 zied.

THOMAS SMITH pursues John Gray as intromitter with his umquhile father's goods and gear, to make payment to him of a sum addebted to him by his said umquhile father. In the which action, this exception was found relevant to assoilzie the defender, in so far as he was convened as intromitter, viz. that the defender *alleged*, that he himself was executor confirmed to his umquhile father, and so had *beneficium inventarii*, and could not be further convened as intromitter ; likeas, he was confirmed executor, as a creditor of his father's ; for he being cautioner for him to sundry persons, he had paid to them their debts, wherein he was cautioner for his father, and had taken assignation from them to their bonds, and for relief of his cautionry he was confirmed executor.—