

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 ma-
 king 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.—

Which exception was found relevant, albeit the pursuer replied, that the confirmation was done *post hanc litem-ceptam*, and after he was summoned, and after the day of compareance therein, and also that he had intromitted with his father's goods before the confirmation; which preceding intromission could not be purged by the subsequent confirmation, to exclude the action which arose to the creditor thereby before that confirmation, and he was *in mala fide* to do the same in prejudice of this creditor. Which reply was repelled, and the exception sustained, seeing the confirmation, albeit after the intending of the cause, was within less than a year after the defunct's decease.

No 17.

The same was found before in this same session betwixt the relict of Robert Dawling and James Hume, where the LORDS found no process against James Hume as intromitter, the bairns of thè defunct being confirmed executors to him within year and day, albeit after the intending of the cause.

Act. ———.

Alt. *Mowat.**Durie, p. 216.*

1627. July 17.

FRASER against L. MONIMUSK.

No 18.

JOHN FRASER having convened the Laird of Monimusk for payment to him of a debt of his father's, unto whom he was heir, at least had behaved himself as heir, by intromitting such sundry heirship goods and gear, viz. a silver bason and laver, napery, &c.; *excepted*, That what intromission he had, was by virtue that he was curator to his eldest brother, who was idiot and heir to his father, which intromission was necessary. *Replied*, That since his brother's decease, he had used these goods. Albeit some were moved, because the beginning of his possession was not vitious, yet it was found in using them he had behaved himself as heir.

Spottiswood, (HEIR and HEIRSHIPS.) p. 136.

* * * Durie reports this case.

In an action at the instance of one Fraser against the L. of Monimusk, for payment of 500 merks contained in his umquhile father's bond, for the which the defender was convened as behaving himself as heir to his umquhile brother, which brother was served heir to their father, who was debtor by intromission with his brother's heirship goods, and the pursuer having specially condescended upon the quantity of the goods so intromitted with by the defender, and upon the manner of his intromission and quality of the deeds done by him to make him heir thereby, viz. that he, after the defunct's decease, retained the possession of the best bason, and silver spoons, and timber-beds and boards, which after his said brother's decease, who died five years since, all