

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

No 18.

this time since he hath used in his house at ordinary times of eating, as he would have used if the same had been properly his own; and the defender alleging that that qualification of using was not enough, except that he could allege that he had disposed upon these particulars, seeing they were not the worse of that manner of using condescended on, specially seeing the first time of the defender's intromission ought to be respected, at which time his brother, to whom he is conveyed as heir, was then living, who being declared idiot, and he served tutor to him, his intromission then as tutor, albeit he retained the possession since his decease, being of such goods which he could not cast out of his house, and so in effect the intromission was necessary, and the same not being deteriorate, and which he offered to make forthcoming as good as they were the time of the defunct's decease, therefore he could not thereby be found to be heir: THE LORDS repelled the exception, and found the using of the foresaid particulars at table, viz. the bason and spoons, washing therein, and supping and eating with the spoons, and eating upon the board, and lying in the bed to be a sufficient qualification being proved, to make the defender heir, notwithstanding of the offer to make the same forthcoming as good as they were; and that albeit the first time of his intromission was as tutor as said is, which was repelled by the LORDS, and the foresaid qualification of using and retaining of the possession so long after the defunct's decease was sustained, seeing during that time the defender, if he had intended to have been freed of the danger of being heir, ought to have meant himself to the LORDS, and craved inventory to have been made of the goods, &c. as use is in such cases, which not being done, he hath prejudged himself. Yet *I. C. Cujuscunque rei et negotii initium inspiciendum et causa, non finis.*

Act. Baird.

Alt. Lermonth.

Clerk, Gibson.

*Durie, p. 256.*

\* \* \* Kerse reports this case.

FOUND, That the retention of heirship goods by Monimusk which he concealed while after his father's death as tutor to Duncan Forbes, his eldest brother, and heir to his father, who was served idiot; induced behaving as heir to Duncan, his brother, to whom he was apparent heir, and that *ex hoc solo* because he used the heirship goods after his brother's decease.

*Kerse, MS. fol. 139.*

\* \* \* This case is also reported by Auchinleck.

THE Laird of Monimusk being pursued by one Fraser, as heir to his brother Duncan, who was heir to their father, who was obliged by his bond to the pursuer for a certain sum of money, at least as behaving himself as heir to his brother Duncan by intromission with certain heirship goods and gear pertain-

