

1630. December 22.

A. against B.

No. 31.

A clock belonging to the heir, as an heirship moveable, was ordered to be delivered to the executor, upon finding caution, the heir not having been served.

THE executor of umquhile B. confirmed in his testament a *knock*, which should pertain to the heir; and the knockmaker, who held the knock in his hands the time of the said B.'s decease, is pursued for delivery thereof to the executors, and decerned by the Commissaries. He suspends, alleging he was pursued by the executor, on the one part, and by A. B. who had bought the knock from the apparent heir, on the other part, who had best right thereto, seeing the knock was heirship goods, and so not confirmable in testament, and that he had bought the same from the apparent heir. It was answered, That the knock was confirmed with the rest of the moveables, and decret obtained against the haver thereof, at their instance, and so could pertain to no other, except the apparent heir were served heir. The Lords ordained the knock to be delivered to the executors, they finding caution to make the same forthcoming to the heir, when he were served, or to the creditors, when they would seek adjudication thereof.

Fol. Dic. v. 2. p. 369. Auchinleck, MS. p. 7.

1665. June 23.

PROCURATOR-FISCAL of the COMMISSARIOT of EDINBURGH against THOMAS FAIRHOLM.

No. 32.

Confirmation found necessary, though there was a disposition *omnium bonorum*.

THOMAS FAIRHOLM being charged to give up an inventory of the goods and gear pertaining to umquhile Alexander Deninstoun, whose daughter he had married, he suspends, on this reason, that the defunct had granted a disposition to one of his daughters of his hail moveable goods and sums of money, so that he had nothing the time of his death, and there needed no confirmation, but he might lawfully possess by virtue of his disposition; and there was no law to force persons, in such a case, to confirm, neither had it ever been sustained by the Lords. It was answered, That it was *juris publici* to have the goods of defuncts confirmed; that nearest of kin, children, creditors, and legatars, might know the condition thereof; and this defunct's moveables, albeit disposed, yet not delivered, remained *in bonis defuncti*, and so behoved to be confirmed.

The Lords having read the disposition, and finding it to be general, *omnium bonorum*, that he had, or should have, the time of his death, and there being nothing alleged of any onerous cause, or that it was before his sickness, albeit the case was new, yet they found there was necessity of confirmation in this case; but if it had been a disposition only of special things, as bonds or goods, or had been for any onerous cause, or had been made *in liege pousti*, and any symbolical delivery, the Lords were not so clear in it, but resolved to hear such cases in their own presence, when they should occur.

Fol. Dic. v. 2. p. 369. Stair, v. 1. p. 286.

* * * Gilmour reports this case :

IN a suspension raised at the instance of certain persons, against the procurator-fiscal of the commissariat of Edinburgh, there was a reason, bearing, that the suspender was not obliged to confirm the defunct's moveables, because they were all disposed to him in the defunct's life; and as the disposition would exclude any other executor, if he had confirmed the goods, so ought it to secure the suspender against the fiscal. It was answered, That the defunct remained in possession all his time, and if such a disposition should be sustained to exclude confirmation, then not only should all confirmation of testaments be evited, but also creditors should be prejudged by relicts and others, whom it concerns to know the value of the defunct's goods, by giving up inventory and confirming, notwithstanding of any such pretended disposition whereof there may be any just ground of quarrel.

The Lords found the letters orderly proceeded, notwithstanding of the said disposition, and ordained the suspender to confirm.

Gilmour, No. 146. p. 105.

1665. July 4. COMMISSARY OF ST. ANDREW'S *against* BALHOUSIE.

THE commissary of St. Andrew's having charged Hay of Balhousie to confirm his father's testament, he suspends, and alleges his father had disposed all his moveable goods and gear to him, and so *nihil habuit in bonis*, and offered him to prove, that he was in possession of the whole goods before his death. It was answered, The disposition was but simulate, in so far as it contained a power to the disponent to dispose upon any part of his moveables during all the days of his life; and if such a disposition were sustained, there should never be another testament confirmed; and all people would follow this course; which would not only exclude the quot, but keep the means of defuncts *in obscuro*.

The Lords, in respect of the generality of the disposition, and the clause fore-said, repelled the reason.

Fol. Dic. v. 2. p. 369. Stair, v. 1. p. 295.

* * * Gilmour reports this case :

IN like manner, the same month, betwixt the Procurator-fiscal of the commissariat of St. Andrews and Hay of Balhousie,

The Lords ordained Balhousie to confirm, notwithstanding that he had a disposition, with possession, a long time before the death of Mr. Francis, his father, who was blind, and who had quitted the possession to his son, in respect the disposition carried a clause, that, notwithstanding thereof, his father might, in his own

No. 32.

No. 33.
Found in conformity with the above.