

* * * 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.

No. 32.

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. 33.
Found in conformity with the above.

No. 33. time, dispone any other way thereupon at his pleasure: and therefore, least the bishops should be prejudged of their quots by such dispositions, which all dying persons may grant, not only to their prejudice, but to the prejudice of creditors also, the Lords decerned *ut supra*. See No. 32.

Gilmour, No. 147. p. 105.

* * * Newbyth also reports this case:

GEORGE HAY, of Balhousie being charged to confirm his father Mr. Francis Hay his testament, suspends, upon this reason, that his father, before his decease, had disponed to him his whole moveables, and all that should happen to belong to him at the time of his decease; and that he was in possession accordingly. The Lords, notwithstanding, found the letters orderly proceeded, and ordained the suspender to confirm, and had no respect to the disposition and possession, it being *omnium bonorum*, and containing a reservation and power to him to dispone thereupon in his own lifetime.

Newbyth, MS. p. 32.

1676. July 25.

MR. JOHN FINLAY, Procurator-fiscal of Edinburgh, *against* WILLIAM WHYTE, Merchant there.

No. 34.
Again found
as above.

WILLIAM WHYTE being charged to confirm his wife's testament, did suspend, upon these two reasons; *1mo*, That any estate belonging to her was only the sum of 6000 merks, failing children of the marriage, which debt she did dispone to her husband during the marriage, and so he was not obliged to confirm; *2do*, The disposition was burdened with the sum of 3400 merks payable to her friends, whereof he had made payment accordingly, and which was more than would have fallen to her by a tri-partite division, he having children of a prior marriage. It was answered, to the *first*, That the disposition was *omnium bonorum*, and so could not hinder confirmation, which was necessary for making all goods forthcoming to the nearest of kin, who may contend that they have right, notwithstanding of a private disposition made to a husband, as being a private deed, and reducible, if it were of goods which might not fall under testament, or was never intimated. It was answered, to the *second*, That any sums of money payable to the wife's friends, not being her real debts, were of the nature of legacies, and so could not hinder confirmation. It was replied, to the *first*, That albeit the disposition was *omnium bonorum*, yet it was a full right, and needed no intimation, he being in possession of the whole goods that belonged to him and his wife in common; and as to the sum of 6000 merks that would fall to her in case of no children, as a discharge would have freed him, so must the disposition giving him right. It was replied to the *second*, That he becoming debtor by bonds the time of the disposition.