

No 253.

chan *contra* Scot, *voce* PROCESS; and such general dispositions give only *jus ad rem*, and are but a title *ad inchoandam litem*, but they must always confirm before extract, as was found, June 1665, Procurator-fiscal of the Commissariat of Edinburgh, *voce* SUCCESSION; and the Procurator-fiscal of St Andrew's against Hay of Balhousie, *IBIDEM*. For a general disposition can no more defend against a creditor of the defunct's confirming, than of old a base infeftment not clad with possession defended against a public infeftment, before the 13th act 1693, taking away the difference. *Answered*, There was no pretence for simulation here, the onerous cause of the disposition not being so much as denied, and the symbolical possession fully denuded the disponent of the property; so that he was no more but a *nudus detentor* for my use and behoof. And that such instruments of possession complete the right, is evident from the parallel of a sasine, which is no more but a symbolical tradition, and yet perfects the right; and which is consonant to the Roman law, L. 1. C. De donat. l. 1. § 24. l. 18. D. De acquir. et amit. possess. by which the very pointing at a thing, though the natural possession be not apprehended, is equivalent in law; *nec muto causam possessionis sed alium possessorem ministerio meo facio*. And as to his allowing the debtor's widow to possess, and give up inventory, that can never give advantage to a third party, but only to her, as to whom he dispensed, and ceded his right during her life; and on the 27th July 1669, the Executors of Reidpath *contra* Home, No 39. p. 2792. an assignee, though unintimated, was preferred to an executor confirmed. THE LORDS preferred the executor-creditor to Davidson's disposition.

Fountainhall, v. 2. p. 647.

1739. *January 18.*CHALMERS *against* M'AULAY.

No 254.

Simulation in a disposition by a debtor to his creditor, whence inferred.

A DISPOSITION of the furniture of a house being made by a debtor to his creditor upon the 16th of May, of which, notwithstanding the debtor continued in the possession till the 8th of August, when the disponent took the furniture into his possession; and another creditor having, upon the 2d of August, and before the disponent attained the actual possession, done diligence by horning against the debtor; and, upon the 10th of August, two days after the disponent had attained possession, arrested in the hands of the disponent; in a forthcoming upon this arrestment, wherein a reduction of the disposition was repeated, the LORDS "found the disposition simulate *retenta possessione*, and reduced and decerned in the forthcoming."

The argument for the disponent was, That though rights cannot be effectually granted after even the inchoate diligence of another creditor; yet, being granted before diligence is inchoate, they may be completed after it is inchoate; and that, therefore, the disposition being prior to the horning and arrestment, was preferable thereto, although not completed by possession till after the horn-

ing. To which the answer was satisfying, That the disposition being once supposed simulate at the date of the creditor's horning, it could not, by the act of attaining possession on it thereafter, become effectual in prejudice of the intervening horning.

No 254.

Fol. Dic. v. 4. p. 127. Kilkerran, (PRESUMPTION.) No 2. p. 426.

S E C T. II.

Gift of Escheat, when presumed simulate.

1605. June 27. GAVIN HOME against ALSCHIE HOME.

IN the declarator of the escheat of David Home of Blackadder, betwixt Gavin Home and Alschie Home; it being *objected*, That Alschie's gift was null, as simulate, purchased to the behoof of the rebel by the donatar, a conjunct person, viz. his goodsir, dwelling in household with the rebel, who was yet unrelaxed; the LORDS repelled the allégeance, unless the said Gavin would offer him to prove the simulation, and taking of the gift to the rebel's behoof with his own gear and upon his expenses, either by writ or oath of party; and found not the conjunction and remaining in house sufficient, without the foresaid probation.

No 255.

Haddington, MS. No 859.

1622. June 25. LO. BORTHWICK'S BAIRNS against their FATHER.

IN an action of declarator pursued at the instance of the Lord Borthwick's Bairns, as donatars to their father's escheat, the LORDS found the same to be null; seeing it was *alleged*, That it was simulate, taken to the rebel's behoof, in so far as it was taken to the behoof of his bairns, he remaining rebel, which was alike as if it had been taken to himself; which allégeance the Lords found relevant; but here, the bairns were *in potestate patria* unforisfiliate. *Vide* 20th March 1623, Dalgarno *contra* Earl Marishal, No 258. p. 11593. where the contrary seems to be done, except that the donatar was not *in potestate*.

No 256.

For the Pursuer, *Nicolson.*

Fol. Dic. v. 2. p. 158. Durie, p. 27.

* * * Kerse mentions this case thus :

SIMULATION of an escheat sustained, proving the escheat to be taken to the behoof of the rebel's bairns.

Kerse, MS. fol. 220.