

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.

for as much as would exhaust any thing that she could crave in law, there remained no goods that could be confirmed. The Lords, having heard those of their number who had been commissaries, did find, That notwithstanding of a general disposition the husband ought to confirm himself executor, but that he need not give up a special inventory, seeing he could not be liable to the nearest of kin for any creditors; which, in reason, might have freed him from confirmation, these being the chief reasons of confirmation.

Fol. Dic. v. 2. p. 369. Gasford, MS. No. 885. p. 566.

* * * This case is reported by Stair :

THE Procurator-Fiscal of the commissariat of Edinburgh having charged William Whyte to confirm his wife's testament; he suspends on this reason, that his wife had disposed to him the sum of 6000 merks, which he by his contract of marriage was obliged to ware and bestow to him and her in conjunct-fee, and to the bairns of the marriage, which failzieing, the one half to return to her; containing likewise a disposition of all goods and gear that did or should belong to her at her death; and there being no children, he was burdened, and had actually paid to her relations near to the value of all her interest: And albeit dispositions or assignations not intimated, or attaining possession, do not denude the defunct, but these sums and goods remain *in bonis defuncti*, yet a disposition by a wife to a husband who is in possession of the whole goods, is presently clad with possession. *2do*, As to the disposition of her interest in the 6000 merks, seing the same was never actually employed, it imports only a discharge in favours of the husband of that obligation. It was answered, that dispositions *omnium bonorum*, to take effect after death, are ever interpreted fraudulent, to escape quot and confirmation; and if this should be sustained in favours of husbands, there should never be a confirmation of a wife's testament, but she would always dispoise to her husband with the burden of such sums as she pleased to leave to her children and relations, as is done in this case; for none of these persons to whom the husband is burdened to pay, are creditors; and as to possession, it is not sustained by instrument, where the natural possession is retained, for the husband and wife while they live together do jointly possess in communion, and so the wife possesses her share so long as she lives, which no delivery to her husband can avoid, because the communion of goods is established by law, and makes what is in the person of the husband *ipso facto* to be communicated to the wife for her share.

The Lords found that the disposition as to the 6000 merks imported but a discharge, and needed no confirmation, but found that the wife's share of all other goods of the husband behoved to be confirmed, notwithstanding of this disposition.

* *Stair, v. 1. p. 428.*