

1669. *January 23.*

The DAUGHTERS of umquhile CRICHTON of Crawfordston *against* BROWN of Ingliston.

No. 257.
Effect of de-
livery.

The daughters of the umquhile Crichton of Crawfordston, as heirs apparent to him immediately after his death, gave in a supplication to the Lords, desiring his charter-chest to be inventoried and sequestrated ;

Which the Lords granted.

But before the commission came to the house, William Lawrie, the Lady's nephew, upon notice of the order, rode night and day, and prevented the same ; so that all the writs were carried from Crawfordston to Ingliston.

Thereafter the apparent heirs raised exhibition *ad deliberandum*, against the Lady and others, who produced three dispositions by Crawfordston, in favours of Brown of Ingliston, who had married one of his daughters, and the heirs of that marriage, whereby he disposed his estate of Crawfordston to them, with a bond of £20,000, the intent whereof seems to have been that they might have apprised, to make the disposition effectual ; and she and William Lawrie having deponed, acknowledged that the writs and charter-chest were carried out of Crawfordston to Ingliston, but deponed that they knew not whether these writs were amongst them or not, or whether they were formerly delivered to Ingliston himself, who is now dead : There was in the exhibition libelled a declarator, that the writs were null, as not delivered, and that being unwarrantably taken out of the defunct's charter-chest, after the Lords' order to the contrary, they ought to be put back and sequestrated, till the rights of parties were discussed. The pursuers did now insist in this last member, to the which it was answered, that the writs being exhibited to the apparent heirs *ad deliberandum*, and they having seen them, they could have no further interest, but the Lady Crawfordston tutor to her oye Ingliston, ought to have them up again, who produced them ; neither is it, nor can it be instructed, that these writs were unwarrantably taken out of the charter-chest, after the Lords' warrant, seeing their oaths bore, that they knew not whether these were in the charter-chest, or not ; and therefore being a pupil's writs, in his favours, produced by his tutrix, they cannot be taken from him or sequestrated, unless the unwarrantable meddling therewith were proved. *2dly*, By a disposition of the moveables to the Lady produced, granted by the defunct, it bears a delivery of the keys of the charter-chest to her, to be delivered to Ingliston with the charter-chest, which is equivalent as if they had been delivered to Ingliston himself, and she was content to be enacted to produce them when ever the Lords found cause. It was answered, that the Lords' warrant being anticipated, and the bulk of the writs in the charter-chest carried away, it must be presumed, that these dispositions, and that bond was amongst the rest, and so must be returned *in statu quo*.

The Lords found this allegiance relevant, unless the defenders would instruct that these writs were not in the charter-chest the time of the order, but out there-

of in Ingliston's hands: and yet they allowed the parties presently to dispute whether, albeit these writs were in the charter-chest, Ingliston or his tutrix should have them up, or if they should remain sequestrated.

No. 257.

Stair, v. 1. p. 590.

1669. July 23.

MR. JOHN ELEIS *against* INGLISTOUN.

Crichtoun of Crawfordstoun having only one daughter, disposed his estate to John Brown of Inglistoun, in contemplation of the marriage betwixt him and Crawfordstoun's daughter, and to the heirs-male of the marriage, which failzieing, to certain other heirs substitute, bearing a power to burden the estate with 5000 merks to whom he pleased, and containing a clause that the disposition should be valid though not delivered in his lifetime; and after Inglistoun's marriage Crawfordstoun grants a bond relating to his former promise of £20,000, to Inglistoun and the heirs of the marriage, (which failzieing,) after which words there follows a blank of a line and a half, and the sum is payable at the first term after Crawfordstoun's death; the intent of which bonds seem to have been, that thereupon apprizing might proceed to denude the heirs of line, and to compel the superior to receive Inglistoun. Thereafter Crawfordstoun made a second tailzie, wherein Inglistoun's son, with his daughter being then born, is fiar, and several members of the tailzie altered; and after that he made a third, wherein his daughter (Inglistoun's wife) is fiar, and the substitutions much like the former. After his death these papers being exhibited, at the instance of two of his daughters, heirs of line, married to Mr. John Eleis, and Alexander Tran, upon a process *ad deliberandum*, and being craved up again from the clerks, by the tutor of Inglistoun's son, it was alleged for the heirs of line, that the said writs could not be delivered up, because they not having been delivered by the defunct in his *leige houstie*, could not prejugé his heirs of line; and albeit his first disposition contained a dispensation for not delivery, which ordinarily is accounted sufficient, yet where it appears the defunct altered his purpose, both by the posterior dispositions of a different tenor, and several missive letters showing a resolution after all to alter the same, the said clause cannot be effectual, and there is no presence for delivering the bond, and the two other dispositions, seeing they want that clause. It was answered, that the dispensation with delivery is in all cases equiparate with the delivery itself, and that the remanent writs ought also to be delivered, though they bear not that clause, because the heirs of line being absolutely excluded by the first disposition, they have no interest to quarrel the other dispositions; and albeit if the posterior dispositions were to different effects, the want of dispensation therein might make them ineffectual, yet where they are but qualifications of the first tailzie, they are accessory thereto, and must be delivered therewith, seeing the defunct so long as he kept the writ in his own hand, might still alter the same at his pleasure. It was answered, that the posterior dispositions wanted the clause, reserving power to the defunct to

No. 258.

Effect of a clause dispensing with the not delivery.