

1637. February 15. LAWDER against GOODWIFE of Whitekirk.

No 6.

An assignation, referred to a former assignation, declaring that it should be effectual for one half. Found effectual for the whole, as this was evidence that the second assignee knew of the first.

JAMES HOWIE having made the Goodwife of Whitekirk assignee to the sum of 300 merks, which he had upon a tenement of land in North Berwick, pertaining to John Lawder ; which tenement the said John Lawder thereafter disposes to John Hepburn of East Craig, who uses redemption; and consigns the 300 merks, which the said James Howie had thereupon assigned, as said is, to the Goodwife of Whitekirk. The said John Lawder arrests that 300 merks consigned, and pursues the same to be furthcoming to him, for satisfaction of L. 100 which he acclaimed, as being made assignee *pro tanto* by the said James Howie ; wherein the Goodwife claiming preference for the whole 300 merks, by virtue of her assignation, which she alleged to be prior to John Lawder's assignation, in so far as John Lawder's assignation, albeit it was made upon that same day wherein her assignation was, yet the same bore, and made mention in the body thereof, ' That he had assigned that sum of before to her, and willed that her assignation should be effectual for the one half, and his assignation for the other half of the sum ;' which he could not do, being denuded of before in her favours, and so confessed in his own assignation, which was as sufficient as an intimation *quoad eum*, who so knew the same.—And John Lawder *alleging*, That his assignation ought to take effect, albeit of the tenor foresaid, because the Goodwife of Whitekirk by her back bond, at that same time of the acquiring of the said assignation by her, obliged her to make compt, reckoning, and payment to the said James Howie, at his home-coming from London, whensoever he then pleased ; and he having declared his will by this assignation, made of the half of the sum to him, it ought to be found sufficient ; and this will he might lawfully make, and effectually, in respect of the back-bond, which evidently declared, that the assignation made to her should be respected only as *donatio mortis causa*, which was changeable by the maker, and changed by him, as said is.—THE LORDS preferred the first assignee for the whole sum, in respect that the assignation made to her was pure and simple, and was referred to in Lawder's own assignation, which could not therefore be miskened by him ; and the said first assignation being *simplex donatio*, could not be revoked by the cedent thereafter, notwithstanding of the back-bond given to him by the assignee, which the LORDS found made not the assignation to be of the nature of *donatio mortis causa* ; and which back-bond being, of the tenor, That she should compt and reckon, and pay to the cedent at his home-coming from London, and that he died before he came home, the said back-bond being restricted to that one condition, the same was found could not receive any further extension, than as she had bound herself by said back-bond ; so what he had done before his home-coming ought not to derogate from the said assignation ; for the condition of her compting and paying being referred to his home-coming, and he never coming home, that behoved to be esteemed as a condition, that if he came not home, she was not

holden to compt ; for in law *dies incertus pro conditione est* ; and therefore she was preferred *in toto*. See Mungal against Steil, Durie, p. 827. *voce* HUSBAND and WIFE ; where a bond to pay a sum to the husband and wife, and their heirs, gave the wife no more right than she would have had, albeit her name had not been insert therein, and no mention made of her or her heirs. See DONATIO MORTIS CAUSA.

A&. Sibbald.

Alt. Forbes.

Fol. Dic. v. 1. p. 105. Durie, p. 826.

No 6.

1661. July 25. WEMYSS against LORD TORPHICHEN.

LADY Mary, Jean, Elizabeth, and Katharine Wemyss, pursue the Lord Torphichen, alleging that their deceased sister, Dam Anne Wemyss, having a wadset of 20,000 merks upon the barony of Errol, granted a bond of provision thereof to her daughter Jean Lindsay, thereafter Lady Torphichen, and to the heirs of her body ; which failing, to return to the said pursuers, with an obligation, that her said daughter should do nothing to prejudice the said heirs of tailzie ; which bond was delivered by the Earl of Wemyss to the defender, then husband to the said Jean Lindsay, who obliged himself to make the same forthcoming to all parties having interest, as accords. Yet thereafter, during the marriage, the said Jean Lindsay entered heir to her mother ; and she and the defender uplifted the wadset sum, passing by the bond of provision ; which sum being in place of the wadset, and unwarrantably uplifted by the defender, contrary the bond of provision, known to himself, which he was obliged to make forthcoming ; he ought to re-fund the same — The defender *answered*, That the libel is noways relevant ; for if his deceased Lady, Jean Lindsay, being fiar of the wadset, did uplift the same, and contraveened the bond of provision, *nihil ad eum*, who is but a singular successor, having right from his Lady, by contract of marriage, whereof there was a minute at the time of his marriage, expressly disposing this sum, without any mention or knowledge of the bond of provision ; and albeit he knew the same after his right, *nihil est*. And as for his ticket, it can work nothing ; for though the bond of provision were now produced, it being but a personal obligation, can oblige none but his Lady's curators or successors ; and if they will allege that he is either heir or successor relevant, and his ticket to make it forthcoming as accords, *nihil novi juris tribuit*. — The pursuer *replied*, That albeit a singular successor, for an onerous cause, might have uplifted the wadset, and been free, yet the defender being as the same person with his Lady, and having no onerous cause but his contract of marriage, wherein there was a plentiful tocher of L. 20,000 provided to him besides this, and having known the bond of provision, before the uplifting of the sum ; and so, *particeps fraudis*, he is liable to make the sums received by him forthcoming. by the act of Parliament 1621 ; and also by the common law, *in quantum est lucratus alterius dispendio*.

No 7.

An heirs of entail made up titles, neglecting the entail. She disposed the subject, which was a wadset, to her husband. He uplifted the wadset sum ; but was obliged to re-fund to the substitutes, although a singular successor would not. He knew of the entail.