

father should grant bonds of provision to many children at once, and should deliver some of them before the rest, if he had not means sufficient to pay all, the bonds first delivered, could not be thought to exhaust his whole means, and exclude the other bonds of provision, but all would come in *pari passu*, according to their dates, except their diligence alter the case.

The Lords (notwithstanding of what was alleged) found the reason of reduction relevant, and that the undelivered bonds of provision, though prior in date, yet posterior in delivery, could not affect the fee intervening.

Here there was much alleged upon the onerosity of the pursuer's disposition, which came not to be considered in the decision.

*Stair, v. 2. p. 501.*

No. 255.

1668. June 19. AGNES HADDEN and MARY LAWDER *against* SHORSWOOD.

Thomas Shorswood having granted an assignation to a bond of 500 merks in favours of Agnes Hadden and Mary Lawder, they pursue Magdalen Shorswood, his nearest of kin, to deliver the same; who alleged absolvitor, because the assignation was never delivered, but being made a year before the defunct's death, remained by him till his death, and was never delivered: And it is not the subscribing of a writ, but the delivery thereof, that makes it that party's, in whose favours it is conceived, unless the party were in family, as a father's custody is the child's custody, and equivalent to delivery, and unless the writ had contained a clause to be valid without delivery, which this doth not. The pursuer answered, that this assignation reserveth expressly the defunct's liferent, and a power to dispose thereof, during his life, which sheweth his mind, not to deliver the assignation, even when he made it; otherwise the reservation in his own favour, would not have been in his own hand, which sufficiently shews his mind, that the writ should be valid, though not delivered in his life. *2do*, This being a moveable sum, this assignation is in effect *donatio mortis causa*, and so must be valid, without delivery, for a testament or legacy is valid without delivery. It was answered to the first allegiance, that the defunct might have delivered the assignation, and kept the bond; so that the keeping of the assignation was not necessary, and so did not import his meaning to be, that the assignation should be valid without delivery. To the second, this assignation is in the terms and nature of a proper assignation, and is a right *inter vivos*, and not *donatio mortis causa*; because *donatio mortis causa*, is but as a legacy, affecting only the dead's part; but if this assignation had been delivered, it would have affected all, and so could be no *donatio mortis causa*; and albeit it was not delivered, it remains the same kind of right.

The Lords repelled the defences, and decerned the delivery in regard of the tenor of the assignation, and that it was a moveable sum, it being also informed that the defunct had no children, and the said Agnes Hadden, who was to have 400 merks of the sum, was cousin-german to the defunct.

*Stair, v. 1. p. 541.*

No. 256.

Deed not to take effect till death good without delivery.