1668. *January* 9.

LAIRD of GLENCORSE *against* His BRETHREN and SISTERS.

No. 255.
Monolateral deeds *inter vivos* not effectual without delivery.

Alexander Bothwell of Glencorse, having disponed his lands to his eldest son by contract of marriage between his son and his wife, with absolute warrandice; and by the contract the tocher being payable to the father; he did notwithstanding deliver bonds of provision to his other children, which were of a date before the contract, but not delivered divers years after his son's marriage. The eldest son pursued a reduction of the said bonds, in so far as they may affect his estate, or be the ground of a pursuit against him, as successor *titulo lucrativo post contractum debitum*. The reasons of reduction were, that the bonds were not delivered the time of the right granted to the son; and that he could not thereafter do any deed in his prejudice, and consequently could not deliver the said bonds, the delivery, and not the granting, being that which doth animate, and make the same effectual. It was answered, That the father being tutor of law to his children, he having the bonds for their use, is equivalent as if the children had them, or that they had been delivered to them; and whatever may be as to a singular successor, they ought to be effectual against his eldest son, who is universal successor. It was answered, That contracts of marriage, being not only in favours of the son, but in the behalf of the wife and children, and with the friends, are most solemn and favourable transactions, *et bona fides* is in them exuberant; so that upon no pretence, no deed ought to be done by any of the contractors *in fraudem*; and that the father, if he had intended to have burdened the said lands, should have burdened the fee expressly with the same; that provisions granted by parents to their children before they be delivered may be revoked; and that the father, by granting the disposition in favours of his son, had revoked the bonds in question, in so far as they may trouble him.

The Lords, in respect it was proved, That the bonds were not delivered till after the contract, found they could not be effectual against the son, and reduced.

Sinclair & Wallace. Alt. *Wedderburn & Lockhart.*

Dirleton, No. 129. *p.* 53.

*** Stair reports the same case:

The Laird of Glencorse having married his eldest son, and having disponed to him his whole estate, with warrandice after the disposition, he did deliver certain bonds of provision in favours of his other children, unto these children, whereupon they apprised the lands disponed to his son. In this contract there was a liferent reserved to the father, and 9000 merks of tocher paid to the father. The son pursues a reduction of the bairns' infeftment, and bonds, in so far as might be prejudicial to the disposition granted to him, upon this reason, that the bonds were not delivered evidents before his disposition. It was answered, that they were valid, though not delivered, because the father's custody was the children's cus-

No. 255. tody, especially they being in his family, both at the time of the subscribing of the bonds, and of the making of this disposition; and it was never controverted, but that bonds granted by a father to his children, though never delivered during his life, but found amongst his writs after his death, were valid, both to affect his heirs, and executors. The pursuer answered, that his reason of reduction stands yet relevant, notwithstanding the answer, because, albeit it be true, that bonds, dispositions, and provisions, in favours of children, are valid when they are delivered by the parents in their life, or if they have remained uncancelled in their hands till their death, yet till delivery, or death, they are still pendent ambulatory rights, and may always be recalled at the pleasure of the granter, and any deed done by him, expressly recalling them, or clearly inferring his mind to recal them, doth annul them before delivery; *ita est*, the pursuer's disposition bearing express warrandice against all deeds done, or to be done by the father, granter of these bonds, doth evidently declare his mind, that his purpose was not, that these bonds should affect these lands, otherwise he would either reserve the bonds, or a power to burden the lands; and if this were sustained, no contract of marriage, disponing the fee to a son, could be secure, it being easy to grant such bonds, and to keep them up above the son's head, and therewith to affect the fee; yea, it would be sufficient against any stranger, unless it were for an onerous cause. *2dly*, There is not only a revocation, but these provisions were no debt of the fathers, prior to the son's disposition, or delivery, for albeit the date be prior, yet the time of their becoming a debt, is only death or delivery, and therefore, all debt contracted, or deeds done by the father before his death, or delivery of the bonds, are prior as to the obligation thereof, to the bonds, so that the son's disposition is truly prior as to its obligations, to these bonds. The defender answered to the first, that albeit such bonds be revocable before delivery, yet here there is no express revocation, but only presumption inferred, from the father's giving a posterior disposition, which is no sufficient ground, either from the disposition, or the warrandice; for the father's mind might have been, that he would endeavour (out of his liferent, or moveables) to portion his children, and so would not absolutely burden the fee; but yet in case he should die, or not be able to do it, he would not revoke the bonds, even as to that right, which is much rather to be presumed, as being much more rational, and probable, seeing there is not any provision, or power of provision, reserved in the contract, neither is there any competent way alleged for providing of three children; but if this sole presumption be sufficient, though a father should dispone his whole estate, without any reservation of children, or to be so inconsiderate, as not to except his aliment, all prior provisions for his life-rent (undelivered) should cease, and become ineffectual, contrary to that natural obligation of parents to provide their children, against which no presumption can be prevalent. As to the other ground, provisions, though not delivered, can be in no worse case than bonds delivered with a condition, that the father might recal the same, which would be valid from their date, if they were never actually recalled, and so must bonds of provision be, at least as to gratuitous deeds after their date, though before delivery; as if a

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. No. 255.

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.

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

No. 256.
Deed not to take effect till death good without delivery.

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. 2*do*, 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 allegeance, 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.