

No 9. more than altering a simple destination. Besides, if it had been intended to have stripped the husband of the property, and to make him only a naked life-renter, some words would have been found importing that intention, which nowhere occur in the contract.

THE LORDS found, That the provision in the contract of marriage between John Tait and Christian Morison, providing two thirds of their household plenishing in the events, and with the reserved powers therein mentioned, in favours of Thomas and Margaret Pollocks, children of the said Christian Morison, imports only a destination of succession; and that the same was alterable by the said John Tait, with consent of the said Christian Morison, at pleasure; and found the same accordingly altered by the disposition by the said John Tait, in favours of his said spouse, and accepted by her, whereby the half of said household plenishing is, in the event therein mentioned, granted to Thomas Tait, the pursuer; and therefore sustained process at his instance for the half.

C. Home, No 98. p. 155.

1759. January 8. MARION WARNOCH *against* MARGARET MURDOCH.

No 10.
Found in conformity with
Bishop of St Andrews
against Wylie,
No 3. p. 7720.

JAMES GLEN, in his marriage-contract with Margaret Murdoch, 31st May 1751, provided her to a certain annuity after his death, payable at two terms in the year, to which was subjoined this clause: 'But in case that Marion Warnoch, stepmother of the said James Glen, and widow of the deceased John Glen, merchant in Glasgow, his father, shall survive the said James Glen, and that the said Margaret Murdoch, his future spouse, be then also alive, then she and her annuity, in every event, shall be burdened with, and she, with consent foresaid, obliges herself to pay the sum of L. 12 Sterling yearly to the said Marion Warnoch, from the said annuity, at the terms before specified, for payment of the said Margaret Murdoch's annuity, and beginning at the same time, and that during the joint lives of the said Margaret Murdoch and Marion Warnoch allenary.'

In December 1756, James Glen executed a settlement of his affairs, by which he divided his fortune amongst his children. This settlement contained the following clause: 'But as to a gratuitous annuity of L. 12 Sterling yearly, mentioned in my contract of marriage, and intended to be given by me to Marion Warnoch, my stepmother, and with which I burdened my wife and her annuity, as specified in the said contract, I do hereby, for good reasons, revoke, recall, and make void the said provision of L. 12 Sterling yearly, in favour of the said Marion Warnoch, declaring that the said Margaret Murdoch, and her annuity and provisions, and my estate and succession, shall be as free of the said L. 12 Sterling, as if the same had never been mentioned in the said contract.'

James Glen died very soon after executing this settlement, and Margaret Murdoch, his wife, refused to make payment to Marion Warnoch, his stepmother, of the L. 12 of annuity, because it had been discharged by her husband's last settlement.

An action was brought against her by Marion Warnoch, upon this ground. That by the clause first recited in James Glen's contract of marriage, a right was established in favour of the pursuer, his stepmother, which it was not thereafter in his power, with the concurrence of his wife, to revoke, without the consent of his stepmother; for that when a right in favour of a third party is expressed in a contract between two persons, the right is effectual to that third party, though not present nor accepting, and it cannot be recalled; but that third party may compel either of the contractors to exhibit the contract, and thereafter may insist for performance. This is clearly set forth to be the law of Scotland by Lord Stair, b. 1. tit. 10. § 5. and it is supported by various decisions; 9th January 1627, Nimmo, No 16. p. 7740.; 25th June 1634, Renton, No 4. p. 7721.; 18th December 1633, Bishop of St Andrews, No 3. p. 7720.

Answered; The provision in favour of the pursuer was gratuitous; she was no party to the contract, and the stipulation was entirely between James Glen and his wife; it was submitted to by the wife, not upon account of Marion Warnoch, but upon account of her own husband; the stipulation was a voluntary eventual burden, created by him upon his wife's annuity; and no good reason can be figured why he might not again free his wife's annuity of that burden, when he found reason, or chose to do so; for he never could mean, that it should not be in his own power, if he saw cause, to relieve his wife of that burden. James Glen and his wife had it certainly in their power to have destroyed their contract of marriage by joint consent, and to have entered into a new contract, in which they were not obliged to insert this burden. Besides, no deed can be effectual without delivery; and, in this case, there was no delivery to Marion Warnoch, nor was the deed even put into the register, which is held to be a general delivery to all parties interested. If it is said, that the delivery of the contract of marriage by the wife to James Glen, must be held as a delivery to him, for the behoof of Marion Warnoch, the contract cannot, even upon this footing, have a stronger effect, than if he had taken a bond from his wife for payment of this annuity to his stepmother; in which case, he might certainly have given up or discharged that bond at his pleasure; his wife was bound, but he himself was not; and he was at liberty to discharge the obligation upon her.

THE LORD BANKTON Ordinary "found, That the defender must take her liferent, with the proper burdens, as there stipulated, and therefore repelled the defence, and decerned for payment of the L. 12 Sterling yearly."

"THE LORDS adhered."

Act J. Dalrymple.

Alt. T. Miller.

Clerk, Pringle.

W. J.

Fol. Dic. v. 3. p. 365. Fac. Col. No 156. p. 278.