

No 8.

kenzie and Watson, 5th February 1678, *voce* PERSONAL and REAL, the Lords preferred him who had right by the back-bond to a creditor who arrested for the trustees debt, without putting him to the necessity of an action for denuding. THE LORDS considered, that, by the tenor of Mr. Robert Forbes's back-bond, there was no debt preferable to Mr. William Lauder's, but only what Forbes should deburse in carrying on the process, and that the creditors named after him had no interest to oppose payment of his sum; therefore they sustained the Lady Pittmeden's interest as sufficient to give her a title on Forbes's back-bond to prosecute this action against Gordonston, the lady always finding caution to pay what expenses shall be instructed, that Forbes wared out on this matter, in case the fund in Gordonston's hand be not able to pay both.

Fol. Dic. v. 1. p. 512. Fountainball, v. 2. p. 404.

1738. July 20.

THOMAS TAIT *against* THOMAS and MARGARET POLLOCKS.

No 9.

A provision in a contract of marriage to the wife's children of a former marriage, was found not to import a *jus quæsitum tertio*, but only a destination of succession, alterable at pleasure by the husband and wife.

IN the contract of marriage entered into betwixt Christian Morison and John Tait, he provided her 'in and to the hail insight and houshold-plenishing, and other moveable goods and gear, belonging to him, with power to her to use and possess the same during all the days of her lifetime, in case she survive, and remain unmarried.' The contract further declares, 'That, after her decease, it is to be divided in the following manner, viz. two thirds thereof to Thomas and Margaret Pollock's children, procreated betwixt Christian Morison and Hugh Pollock, her second husband; and failing of them, or either of them, by decease, the deceaser's third to accresce and belong to the survivor; which failing, by both their deceases, to the said John Tait and Christian Morison, spouses, their nearest heirs and assignees whatsoever; and the other third of the said moveables, goods, and gear, to pertain to the said John Tait, his assignees, or to which of his children he should think fit to dispoñe the same before his decease,' &c. And, by another clause, the liferent use of the household furniture is reserved to the longest liver of them two, with full power to them to meddle, intromit with, possess, use, and dispose thereof, at pleasure.' Thereafter the said John Tait dispoñed to the said Christian Morison, her executors and assignees, all household-plenishing, goods, gear, and effects, that should happen to pertain to him the time of his decease, with this quality or provision, That in case Thomas Tait, his second son, survived his said spouse, the one half of the plenishing should, after the decease of his spouse, accresce and belong to him, or the value thereof, in his option.

John Tait died first, whereupon Christian Morison confirmed the general disposition; and, after her decease, Thomas Tait brought a process, upon the

above disposition, against Thomas and Margaret Pollock, for the half of the household-pleishing.

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For the defenders, it was *pleaded*, That, from the clauses above recited, it is plain, that two-thirds of the household pleishing are declared absolutely to belong to them *nominatim*; in so much, that the portion of the deceasing is ordained to accresce to the survivor; and, failing of him, only to John Tait and Christian Morison, their heirs and assignees; from which it is plain, John Tait did not intend to retain a power to alter, with respect to this provision in their favour; consequently, a *jus quæsitum* was thereby acquired to the defenders, which could not be taken from them by any gratuitous deed of John Tait's; more especially, as marriage-contracts are solemn deeds, and the articles therein mentioned are presumed to be agreed upon for onerous causes. It is true, that, in many contracts of marriage, the husband and wife are understood to be fiars, when the liferent is only provided to them, and the fee to the children *nascituri*. But the present case is quite different, as the defenders are *nominatim* put in the fee of the subject, by the settlement in the contract; neither can the words, 'with full power to them to meddle, intromit with, possess, use, and dispose thereof at their pleasure,' vary the argument, as that cause can never be pleaded so high as to give the husband a power to alter gratuitously, thereby to overturn the whole tenor of the contract; more especially as, from the words subsequent thereto, viz. 'which liferent-provision above-mentioned,' &c. it is plain, the power of disposal is solely applicable to the liferent competent to the husband and wife, that clause being intended only to convey to the liferenters such a faculty, power, and use, over these goods, as was consistent with their liferent-right.

Answered for the pursuer; The contract contained not only the ordinary provisions in marriage-settlements, but, further, clauses which were fitter for a testament, in so far as the husband thereby nominates those whom he intended for his successors in his moveables. It is true, the nomination is not made in words commonly used in provisions of succession; instead of instituting heirs or executors, the terms in this deed are, 'after the dissolution of the marriage, by both our deceases, shall be divided,' &c. But, it is thought, it would be wresting what appears to have been the meaning of the parties to a strange degree, if these words were interpreted as constituting an unalterable right in the defenders to two-thirds of the pursuer's father's moveables. In short, the meaning of the clause is, That, upon ceasing of the liferent-right of the moveables, constitute in favours of the wife, in case of her survivance, the defenders should succeed to two-thirds thereof, and the pursuer to the other third, in case the said moveables should not be disposed of; so that it is plain, this was only a destination of succession, which is further evident from the words, 'reserving to the parties power to dispose of the subjects at their pleasure.' Neither can there be any doubt, but that, notwithstanding this declaration of the husband's intention, he could have sold or gifted the moveables, as that would have been no

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 allennarly.'

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.'