1750. *January* 3. RIDDEL *against* INGLIS.

No 243.
Effect of delivery by a man to his wife of a deed in favour of their children.

By the contract of marriage between William Inglis and Mary Eason in the year 1718, 4000 merks was provided to the wife in liferent, and in fee to the children of the marriage.

In the year 1728, when there were several children, and his stock encreased, Inglis executed a deed, whereby he became bound to pay 6000 merks to his wife in case of her survivance, with annualrent from the first term after his death, and provided the remainder of his estate heritable and moveable to his wife in liferent, and to the children of the marriage in fee, and made some further provisions in his wife's favour; and *lastly*, In case of her predecease, he became bound to pay to the children, at their marriage, or majority, if but one, and if more than one, to them equally among them, the sum of 10,000 merks, with annualrent from the term of payment.

This deed was by him put into his wife's hands, and she a little before her death, put it into the hands of Alexander Scot portioner of Kenmore, who put it into the register.

The marriage dissolved by the wife's predecease in 1730, and the children all died, except one daughter, who having in 1747 married John Riddel shopkeeper in Glasgow, transferred to him all right she had by the said settlement.

This proved to be a very uncomfortable marriage; for in 1748 they parted, when he gave her the following writing under his hand: 'Glasgow, 15th November 1748. Gentlemen, you may give the bearer Mary Inglis, my wife, 'bed, board and washing, because she will not live with me; so I hereby o-'blige myself to pay to any person who shall give her the above boarding. 'She hath a five pounds bank note, which will pay part of the above.

(Signed) 'JOHN RIDDELL jun.'

(And on the back addressed thus,) 'To any person who shall give bed, 'board and washing to the within designed person.' Upon this she applied to her father, who received her into his house, when his affairs had become in much worse order than they had been in 1728.

In these circumstances, John Riddel the husband, as assignee by his wife, pursues William Inglis her father for payment of the 10,000 merks.

The defence chiefly insisted on was, that the deed whereby he became bound for the 10,000 merks was never a delivered evident: True, his wife had it in her hand, and delivered it to Scot, but that was what she could not do without his consent, as a writing in the hands of a man's wife is still, in the eye of the law, in his own hand, unless it should appear that it was put into her hand *eo intuitu*, that she might render it effectual by delivery to any third party interested in it; whereas in this case, there is no evidence of having put the deed into her hand, but his own acknowledgement, which must be taken as it stands, and runs in these words: 'That he never delivered the settlement to his chil-

No 243. 'dren, or to any person for their behoof, it being only at signing left in the 'hands of his wife for her own interest therein: That they had a common re- 'pository for their papers: That after his wife's death, having missed the pa- 'per, and heard that it was in the hands of Alexander Scot portioner of Ken- 'more, he complained to him of the want of the paper, and sought it up from 'him; and that Scot told him he had got it from his wife, and refused to give 'it up,' &c.

Nevertheless, the Ordinary having advised the above condescendence, with the answers thereto for the pursuer, "Repelled the defence, and found it presumed, that the deed libelled on was a delivered evident at the time of granting thereof;" and the Lords, at advising petition and answers, "adhered."

The defender again reclaimed upon the general ground above set forth, arguing the danger of such a decision, as what might have a bad effect upon the peace of families, and make it necessary for a man to lock up his papers from his wife as much as from a stranger: That as in general a wife's possession is the husband's possession, so there was real evidence, that the leaving the paper with the wife was not in this case intended as a delivery to the wife for behoof of the children, as it was not to take effect, except in the event of her predecease, and therefore she was a most improper custodiar of it; and *separatim pleaded*, that in all events the defender was entitled to the *beneficium competentiæ*.

This petition the Lords "Refused without answers as to the general point by the narrowest majority; and remitted to the Ordinary to hear the defender on the other points."

What the Lords chiefly proceeded on was, that the deed was partly in favour of the wife herself, and therefore so far as respected her interest could not be denied to have been delivered; and it was inconsistent to suppose delivery of a writ for a part, and not for the whole.

But with this some were not satisfied, in respect, that so far as concerned the wife's interest, being a *donatio inter virum et uxorem*, it remained no less in the husband's power to recal it, than if it had remained in his own custody; who therefore thought, that unless it could be maintained, that a man's provisions to his children, not containing a power to alter, being by him lodged with his wife, became thereby delivered evidents for behoof of the children, which would be a dangerous doctrine, the defence of not having been a delivered evident ought to have been sustained.

Fol. Dic. v. 4. p. 126. Kilkerran, (Presumption.) *No 6. p. 428.*

*** D. Falconer reports this case:

1750. *January* 16.—William Inglis merchant in Glasgow, having, in his marriage-contract, provided his spouse, and the children to be procreated, in a

manner suitable to their then circumstances, afterwards became bound, amongst several other prestations to his wife, to pay to the children, equally amongst them, 10,000 merks Scots money, at their majority or marriage, with annualrent from the term of payment; which deed, as he acknowledged, he left at signing in the hands of his wife, for her own interest, but denied that he ever delivered it to his children, or to any person for them; however she had put it into the hand of a friend, where it appeared at her death. No 243.

All the children having failed, except one, Mary, she married to John Riddel merchant in Glasgow; and they pursuing for the provision, the LORD ORDINARY, 21st January 1749, " Found the bond of provision libelled on presumed was a delivered evident at the time of granting thereof.'

Pleaded in a reclaiming bill, It was not in the power of the wife, without her husband's consent, to bind him by delivering the deed; and the leaving it in her hand cannot be looked upon as delivery, her custody being the same with her husband's, who retained it in his power so long as it was in hers; it is of no importance that there were prestations contained in it, in her own favour, which ought to be held as made effectual by delivery; for these, as *donatio inter virum et uxorem*, were revocable, and of no consequence.

The deed, unless it were understood to remain under the power of the father, was irrational, binding him to the payment at a term, which might happen before his death; without consideration of what his circumstances might be, or the behaviour of his children; and it had been decided that bonds of provision delivered to the mother's brother, were only depositated, 21st February 1629, Monimusk against Pittarro, No 234. p. 11566.

Answered; The deed was intended to be delivered, for it contained no dispensing clause, and was delivered to the wife, which must have been effectual so far as her interest was concerned; and it were absurd it should be held effectual in one respect, and not in another; it was certainly given to her, that she might put it into the hand of a friend, for the use of herself and children.

An assignation by a mother to a son, put into the hand of his father-in-law, was held to be delivered, 11th June 1630, Fairly against Fairly, No 235. p. 11567.

" THE LORDS, 3d January, adhered; and this day, refused a bill and again adhered." *See* WRIT.

Act. *Lockhart.* Alt. *H. Home.*

D. Falconer, v. 2. No 123. p. 139.