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M'Conochie *answered*, That he had employed the best hands, and given the best materials, which was all an undertaker was liable to do; and with regard to what he had executed himself, he had done it thoroughly well: That he was still willing to build up the walls a-new, and to new-slate the house; both of which he could do without spoiling the wright-work.

THE LORDS, before answer, ' allowed the defender to perform the operations proposed by him, and any other thing he shall find necessary to make the house sufficient, in terms of the contract, all to be done betwixt and the 1st of August next; but the defender shall not be allowed to haul or cast any of the walls with lime.'

Act. Lockhart, Gordon, Wight.

Alt. Müller, Dalrymple.

Clerk, Justice.

J. M.

Fol. Dic. v. 4. p. 13. Fac. Col. No 10. p. 17.

1768. November 16.

JAMES, ANDREW, & KATHARINE WEMYSS, Younger Children of the deceased JAMES WEMYSS, and ELIZABETH TOD, his Relict, *against* DAVID WEMYSS, Eldest Son of the said JAMES WEMYSS.

No 35.

A contract of marriage found binding, tho' not subscribed by the wife.

IN 1730, James Wemyss, tenant in Bogie, intermarried with Elizabeth Tod, daughter of James Tod, tenant in Gelstane. The contract of marriage proceeds upon the recital of its being "concorded, agreed, and matrimonially contracted between the parties following, viz. James Wemyss, tenant in Bogie, on the one part, and Elisabeth Tod, lawful daughter to James Tod, tenant in Gelstane, with the special advice and consent of her said father, and the said James Tod, as taking full burden in and upon him for his said daughter, on the other part."

By this contract, James Wemyss binds and obliges himself to have in readiness, of his own proper means, the sum of 2000 merks, which, with the farther sum of 1000 merks of tocher, received with his said spouse, he obliges himself to employ on land or good security, and to take the rights and securities thereof to himself and Elizabeth Tod, his promised spouse, and the longest liver of them two, in conjunct fee and liferent, and the heirs and bairns to be procreated of the marriage, in fee; and whatever lands, goods, and gear, should happen to be conquest and acquired during the marriage, James Wemyss bound himself provide and secure the same to himself, in liferent, and to the bairns of the marriage, in fee. He farther obliged himself, his heirs, &c. in case of his wife surviving him, to pay her 1000 merks at the first term of Whitsunday or Martinmas after the dissolution of the marriage, and an yearly annualrent, corresponding to the principal sum of 500 merks, with the half of the household plenishing, if no children, and one third thereof, in case of children. On the other part, James Tod, the bride's father, binds himself, his heirs, &c. to pay to James Wemyss, 1000 merks of tocher.

This contract was signed by James Wemyss, the husband, and by James Tod, the bride's father, but not by Elizabeth Tod.

In 1766, the marriage dissolved by the death of James Wemyss, the husband, when there existed David the eldest son, and a number of younger children. During the standing of the marriage, James Wemyss purchased the lands of Lathallen, the rights of which he took to himself, in liferent, and David, his eldest son, in fee. He left besides a considerable sum in money, a good deal of moveable effects, and the tack of the lands of Cassingray, for a considerable number of years to run, and for which a grassum had been paid.

James Wemyss made no settlement of his affairs; and, soon after his death, the widow, and some of the younger children, brought an action against David, the eldest son, who had intromitted with the effects.

Elizabeth Tod, the widow, insisted, that, as she had not signed the contract of marriage, she could not be bound thereby, and was entitled to a terce of the lands of Lathallen, and a third of the moveables.

The younger children founded on the provision in the contract of marriage, by which James Wemyss was bound to secure the heirs and bairns of the marriage, in the sum of 3000 merks, and also the hail conquest, during the standing of the marriage.

It was, on the other hand, *contended* for David, the eldest son, that, supposing the contract of marriage not binding, the widow could not claim a terce out of the lands of Lathallen, the disposition to these lands being taken to him in fee, and his father only in liferent.

And to the claim of the younger children, he *answered*, that the marriage contract never having been signed by the wife, it was an incomplete deed, and not binding on any of the parties contracting; and, therefore, the succession fell to be regulated in the same manner, as if the marriage contract had never been executed.

The LORD ORDINARY found, "That James Wemyss's contract of marriage not being signed by the wife, is an incomplete deed, not binding upon any of the parties; and therefore, that the wife and children of the said James Wemyss can only claim their legal provisions: That the widow is entitled to a terce of the lands of Lathallen, purchased by him, and to a third of the free-moveables belonging to the defunct at the time of his death: That the younger children, who are parties in this process, have a right to their proportional share of two thirds of the defunct's free moveables."

The eldest son and younger children severally reclaimed to the Court against the Lord Ordinary's interlocutor.

*Pleaded* for David Wemyss, the eldest son, The rule of law is, that a widow has right only to a terce of the lands in which her husband died infert; so is laid down by our lawyers, and established by the judgments of the Court,

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Carruthers, 29th January 1706, No 2. p. 2253. And there is but one exception to this rule, that is, if the husband fraudulently abstains from taking infeftment, merely to disappoint his wife's claim; in such case, the law will hold him infeft. In the present case, the husband never was infeft, nor is there any reason to suspect, that he meant any injustice to his wife.

*Answered* for the widow, The spirit of the law is, that a widow shall have a terce of the lands of which her husband died proprietor, whether infeft or not. In this case, though the son is infeft in fee, the liferent is reserved to the husband, with power to alter the deed, or burden the subject; and, in support of this doctrine, sundry authorities were referred to.

*Pleaded* for the younger children against the Lord Ordinary's interlocutor, Where there are but two parties to a contract, if the contract is not executed by both, it cannot constitute an obligation upon either. The essence of every contract is the *duorum vel plurium in idem placitum consensus*, so that, if either do not concur in executing, the contract can bind neither. But, if there are three or more parties to a contract, who are all reciprocally, but separately bound to one another, the contract, though incomplete between two of the parties, will still subsist as to the others. In this case, James Tod, the father of the bride, became bound to pay 1000 merks of tocher with his daughter, and this obligation he fulfilled, by paying the 1000 merks; so that, *quoad* him, the contract received full implement; and, after receiving this payment, the husband could not refuse implement of what was prestable upon his part, to James Tod, for behoof of the children of the marriage for whom he contracted. The obligation to the children is not connected with that to the wife; and she, by neglecting or refusing to sign the contract, cannot defeat the children's claim in this case, where the husband has received payment of the portion from the father, who was the party contracting for behoof of the children.

*Answered* for David, the eldest son; Mutual contracts must be good to all parties, or neither can be bound. And this principle has been carried so far, that, where the contract was duly executed, and both parties fixed, if one of them becomes unable to perform, the other will be free, and the contract at an end. In this case, the contracting parties are, the husband on the one side, and the wife, with consent of her father, on the other; the wife is the principal contracting party, and not having signed the contract, is not bound; the consequence of which must be, the contract must fall to the ground. Where there are three or more separately bound, in one contract, to each other, and the one cannot qualify any interest that he has in another's signing, who has not done so, it may be true, that the contract, as to those that signed, would subsist, because there the obligations fall to be considered, not as one mutual contract, but as separate distinct agreements, though contained in one writing; but, if the parties signing can qualify an interest in the person's signing, who refuses to perform, the contract must fall as to the whole. If, in this case, the

husband could qualify no interest in the wife's subscribing, it might afford some handle for the other party's plea; but, it is evident, the husband had a direct interest in the wife's signing. Where the husband settles the conquest on the children of the marriage, and the wife gives up her legal claims of *terce* and *jus relictae*, it must be understood, that the wife's giving up her legal claims, was the inductive cause of settling the conquest on the children; and, therefore, if she refuse to sign the contract, the husband, or his heir, cannot be bound to implement the obligations he came under, in the belief that his wife was to accept of the conventional provisions stipulated by the contract, in place of her legal claims.

The following interlocutor was pronounced on both petitions, when advised, with answers.

"THE LORDS find the contract of marriage betwixt James Wemyss and Elizabeth Tod, in respect of the subsequent marriage betwixt them, subsisting and obligatory upon all parties, viz, upon David Wemyss, upon the widow, and upon the younger children."

And refused, without answers, a petition for the widow, and another for David, the eldest son, reclaiming against said interlocutor.

For David, *Macqueen & Ilay Campbell.*

For the Widow, *Alexander Bruce.*

For the Younger Children, *Lockhart.*

A. E.

*Fol. Dic. v. 4. p. 16. Fac. Col. No 78. p. 324.*

1771. February 22.

ANDREW ROSS, and Others, Mariners, *against* JOHN GLASFORD and Co. Merchants in Glasgow.

THE pursuers were engaged as mariners on board the ship *Ingram*, the sus- penders' property, destined to proceed on a voyage from Clyde to Newfound- land, from thence to Spain or Portugal, and from thence home. A months pay was advanced to them before they sailed; the ship proceeded on her voy- age, discharged a small cargo of three hogsheads of tobacco, and took in a com- plete cargo of fish at Newfoundland; arrived and sold the same at Lisbon; and having taken in a cargo of goods there, sailed again for Clyde, but was captur- ed in her passage by the *Belleisle* privateer, commanded by *Thurot*, who put the crew ashore in Ireland.

Having come home, the pursuers applied to the owners for the wages due at the time of their arrival at Lisbon; which, being refused, they brought an action before the Judge Admiral, who gave judgment in their favour. The owners brought the cause into Court by suspension; when, after allowing a proof to be taken of the custom of the trade at Glasgow, Liverpool, and Lon-

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A vessel on a trading voyage being captured, the sailors en- titled to wages *pro rata iti- neris.*