

No 32.

19 years purchase and L. 10 Scots of feu-duty, and for the purchaser his thirling his estate of Jordanhill, &c. to the Viscount of Garnock's mill; and on this minute, Jordanhill took a decret against Garnock, and thereupon adjudged, but without paying any part of the price, nor did he ever enter on the possession of the lands.

A process was brought by the Creditors of John, to have it found their debts might be recovered out of the estate, notwithstanding its being entailed, as the irritant and resolute clauses were not contained in his infestment; and a decret was obtained of that import 1736, affirmed by the House of Peers 1740, whereupon the heir of tailzie obtained an act of Parliament for selling part of the estate.

Jordanhill becoming bankrupt, his Creditors raised a sale of his estate, comprehending therein the lands of Knightswood; whereupon the Viscount of Garnock insisted in a reduction of the minute, as being entered into by an heir of tailzie, who was incapable to dispone.

Answered; By act of Parliament 1685, the deeds of heirs of tailzie are effectual in favour of onerous creditors, unless the clauses irritant be inserted in their infestments, and the creditors do not only insist upon the minute, but upon their author's adjudication, as the statute is expressly in favour of apprisers and adjudgers, and other singular successors.

Replied; Jordanhill is not entitled to the privileges of an onerous creditor, as he did not implement the minute, by paying the price; neither can the adjudication better the case, which, if adverted to, ought not to have passed without payment or consignment of the money, especially considering the Viscount has, by authority of an act of Parliament, sold his mill before this process; so that the thirling the estate of Jordanhill thereto, which was part of the agreed price, cannot now be implemented to his benefit.

THE LORDS found the pursuer could not now be compelled to fulfil the minute, and therefore sustained the reasons of reduction.

Reporter, *Tinwald.*Act. *W. Grant.*Alt. *Lockhart.*Clerk, *Hall.**D. Falconer, v. 1. No 220. p. 304.*

No 33.

A marriage contract was extended, binding the bridegroom, with a cautioner, to repay the tocher to the wife, in case of her

1748. July 15.

JOHNSTON *against* ARMSTRONG.

By contract of marriage betwixt Archibald Johnston in Carnwath and Margaret Armstrong, sister to Christopher Armstrong in Waterhead, the said Christopher, and Christopher Armstrong of Howdale, became bound to pay to the intended husband L. 10 Sterling, with interest during not payment, in name of tocher, which he became bound to repay to the wife, in case of her surviving him; and it being agreed that he should procure George Johnston of Whiteknow to bind as cautioner for him in this prestation, the contract was extended

in these terms, and signed by all the parties, except George Johnston, who was not present, and never signed.

The marriage took effect, and Archibald Johnston charged Howdate for payment of the tocher, who made *answer*, That the deed was a mutual contract, and not being subscribed by all the parties intended to be bound on the other side, he was not obliged.

THE LORD ORDINARY, 2d July 1748, 'found the letters orderly proceeded: the charger before extract finding sufficient caution to pay the L. 10 Sterling provided to his wife, in case she survived him.'

Pleaded in a reclaiming bill, It has always been found that a mutual contract is not binding unless signed by the whole parties intended to be bound thereby, Colvil, June 1583, Thain against Cant, No 14. p. 8405.; 25th March 1634, Lady Edenham against Stirling, No 18. p. 8408.; 6th January 1727, Sir Alexander Hope against Cleghorn, No 21. p. 8409.

It is *argued* for the charger, That matters are not entire, but this does not apply to a case where a contract is null for want of consent, but obtains where an agreement, to which writing would be necessary, is verbally made, and something done in consequence thereof, which takes away the right otherwise competent of resiling.

Observed, That not only the marriage had here intervened, but the suspender had no interest in the counter prestation which was to be made to the wife, and which his plea tended to frustrate her of.

THE LORDS refused the bill.

Pet. Brown.

D. Falconer, v. I. p. 372.

1761. January 24.

JOHN WHYTE *against* WILLIAM M'CONOCHIE, Wright and Undertaker.

By contract betwixt John Whyte and William M'Conochie, M'Conochie became bound for L. 430 Sterling money, to erect and finish a country house for Whyte, conform to a plan agreed on; and it was stipulated that the whole work should be well and sufficiently done.

M'Conochie being a wright and undertaker, employed hands of the best reputation for mason-work, and the sclater-work; gave them good materials, and desired them not to be sparing of them. He finished the wright-work himself.

When the building was finished, it was found that the mason-work and sclater-work was entirely insufficient, so that the rain came in at all corners; but the wright-work was well done.

John Whyte brought an action for avoiding the contract altogether, and for repetition of all the sums he had paid to M'Conochie.

No 33.
survivance, and signed by the parties, but not by the cautioner. The husband charged the obligee in the tocher, who suspended, on the ground, that it was a mutual contract, in which there was to have been a cautioner which not having happened, the contract was null. It was found he was obliged to pay, on the husband's finding caution.

170 34.
Duty of one who undertakes to build a house to another for a price.