

1674. *January 22.* HELEN CRANSTOUN *against* WILLIAM SWINTON.

No. 23.

Attempt to prove the tenor of a contract of marriage by presumptions of its existence, without adminicles.

In an action for proving the tenor of the said Helen's contract of marriage with the said William Swinton's father, it was alleged for the defender, That there being no adminicle in writ produced, the tenor of the contract could not be proved, that being absolutely necessary in our law. It was replied, That there having followed marriage upon the said contract, it was a sufficient adminicle to sustain the probation of the tenor, without any other adminicle in writ, seeing it is presumed that there are contracts of marriage prior to the same; likeas, in fortification thereof, the pursuer offered to prove, by the writer and witnesses inserted, the verity and subscription of the contract of marriage, they being all yet alive; and that the pursuer's deceased husband having by him a prior contract of marriage with another wife, he did give the same to the writer of this contract, that accordingly he might write the same. The Lords, finding the probation of the tenor of writs, which are obligatory, were of concernment, Ordained, before answer, that the writer and witnesses should be examined, and if they were clear to depone, as was alleged, they thought that the case of proving of a contract of marriage, whereupon marriage did actually follow, was singular, and did not necessarily require other adminicles in writ, specially the contract not bearing any obligation to infest, or do any other deed in writ for her security.

Gosford MS. No. 676. p. 399.

1674. *June 9.* CUNNINGHAME *against* GREENLEES.

No. 24.

A proof admitted of the tenor of a contract of marriage without adminicles; the *casus amissionis* being violence.

Elizabeth Cunninghame pursues a probation of the tenor of her contract of marriage, libelling, that her husband, having borrowed a sight of it, did tear it, and produces the draught of it, and offers to prove the hand-writing to be such a notary's who drew the contract, and is now dead. The defender alleged, That there was no sufficient adminicle produced, nor any subscribed writ, but a scroll; and many scrolls have been written, whereupon nothing followed; and that the pursuer's deceased husband was well known to be a regular person, and no question was moved anent the same in his life, nor several years after his death; and that there are clauses in this contract which are not ordinary, "as providing a part of the woman's tocher to the children of a former marriage."

The Lords sustained the tenor without an adminicle in writ, being a contract of marriage, and the *casus amissionis* being violence, and positively offered to be proved.

Stair, v. 2. p. 270.

* * This case is reported by Gosford :

No. 24.

In an action for proving the tenor of a contract of marriage, at the instance of Elizabeth Cunninghame, relict of John Greenlees, against his executor, whereby it was libelled, That there was a special clause in the contract, that, failing of bairns of the marriage, her tocher should return to her and her executors, it was alleged, That the action could not be sustained for proving the tenor of a contract bearing that special clause, because there was no adminicle in writ to prove the same, all that was produced being but a torn piece of paper, without any subscription, which could not be sufficient to prove any special obligation, which is extraordinary, and inserted in very few contracts of marriage. It was replied, That the *casus amissionis* being violence, and that the husband did tear the wife's contract of marriage, the probation thereof, and of that special clause, ought to be sustained, without any other adminicle, seeing the persons were married, and lived together, which certainly presumes there was a contract; and it being offered to be proved, that the same was violently rent and torn, it was sufficient to libel, and offer to prove, that it contained this special clause. The Lords did sustain the libel, and admitted the same to probation, and that the contract did contain the foresaid clause in favours of the wife, without any other adminicle;—it being clearly proved, in the *first* place, that the contract was violently torn and rent, and, in the *second* place, that those who were witnesses in the contract of marriage, and writers and comuners, did specially know that that particular clause in the pursuer's favours was inserted therein; which was done upon these two reasons, that marriage being celebrated betwixt persons who have any means, the law necessarily presumes that there was a contract of marriage, and that, in the proving thereof, there is no necessity of adminicles in writ, as in other actions of that nature; *2do*, That violence being clearly proved in destroying the said contract, the wife or children thereby prejudged ought to have the benefit to prove the verity of any special clause conceived in their favours, seeing the law presumes that that was the cause why the husband did use violence to destroy the same, *et nemo debet lucrari ex suo dolo*.

Gosford MS. p. 412. No. 692.

* * This case is also reported by Dirleton :

The relict of James Deans, alleging that her husband had violently torn her contract of marriage, pursued his heir to hear and see the tenor of it proved, and offered to prove *casum amissionis*, as said is.

The Lords, albeit there was no adminicle in writ, sustained the summons, in respect there is *presumptio juris* that there are contracts of marriage betwixt persons of any consideration, so that the marriage was an adminicle; and the effect being merely civil, and not penal, they had no respect to that allegiance, that the process was after the husband's decease, and some seven or eight years after the deed.

Dirleton, No. 186. p. 75.