

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.

170 340  
Duty of one who undertakes to build a house to another for a price.

No 34.

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.  
J. M.

Alt. Müller, Dalrymple.  
Fol. Dic. v. 4. p. 13. Fac. Col. No 10. p. 17.

Clerk, Justice.

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.