

No. 15.

provide her lawfully thereto, and, after her decease, the one half thereof should pertain to his heirs, and the other half to Janet and Marion Eistons, daughters to the wife of a prior marriage; whereupon the said daughters, after their mother's decease, having caused register the said contract, by the compearance of a procurator for the husband surviving, and they having thereupon charged him to fulfil the contract, in the special heads condescended upon by them, anent the infesting of them in the half of a tenement of land conquered by him at the time of the said marriage; the Lords found, That this contract could not be registered after the wife's decease, in this manner, viz. by a procurator's consent for the husband, and consequently that such summary charges could not be raised thereupon, at the instance of those in whose favours the said clause of the contract was conceived, they being neither contractors nor subscribers of the contract, and the contract not being registered betwixt the parties who were direct contractors, in their own life-time, but only registered by this third party, after the decease of the wife; which was sustained, and the reason of suspension thereupon found relevant, notwithstanding that the contract was registered as said is.

Act. *Nairn*.Clerk, *Gibson*.*Fol. Dic. v. 2. p. 404. Durie, p. 742.*

1635. February 12.

BROWN against BINNIE.

No. 16.

Summary diligence cannot proceed, even at the instance of parties contractors and subscribers, where the principal party is dead.

By contract of marriage betwixt Robert Brown, on the one part, and Margaret Binnie, his future spouse, with consent of John and Alexander Binnies, her brethren, on the other part, the said Robert is obliged to employ the tocher to himself and his future spouse in life-rent, and to the heirs begotten betwixt them in fee, which failing, the one half to himself, and the other half to the said John and Alexander Binnies; which contract, after the decease of the wife, being registered, by consent of procurators, at the instance of the said John and Alexander Binnies, and the said Robert Brown charged thereupon to fulfil the same, and he suspending the said charges; the Lords found, That, seeing the principal party, viz. the wife, who, by the procuratory contained in the contract, gave warrant to the procurators to compear, and consent to the registration, was deceased before the registration thereof, that the same could not be so summarily registered, by the consent of procurators adhibited for the parties consenters; notwithstanding that it was alleged for them, That they were parties contractors, and had subscribed the contract, and so they might lawfully register the same, and seek execution thereupon; and that being the case, it was more than if there had been only a clause conceived in their favours, *quo casu* such summary registration could not have been sustained; but they being expressly contractors and subscribers, the case was far different; which allegiance was repelled, and, notwithstanding thereof, the Lords found, that the contract could not be so summarily registered, at the instance of the consenters, after the death of the principal party; but reserved to them their action

to pursue for fulfilling to them of that contract, in any head obligatory in their favours, by way of ordinary action *prout de jure*.

No. 16.

Durie, p. 754.

* * Auchinleck reports this case :

Contracts or bonds cannot be registered, or charges raised and executed thereupon, at the instance of consenters, the principal being dead, but it must be pursued by way of action.

Auchinleck MS. p. 190.

* * Spottiswood also reports this case :

By contract of marriage between Robert Brown and Christian Binnie, with consent of John and Alexander her brethren, it was provided, that the half of her tocher should be repaid by the said Robert to her said brethren in case of her decease without children. After her decease, her brethren registered this contract, and charged Robert for fulfilling that part of it. The Lords would not sustain the registration at their instances, after her decease, although they were parties consenters in the contract, and in whose favours that condition was conceived, but ordained them to pursue it by way of ordinary action.

Spottiswood, p. 274.

1642. July 15. LADY GAIRLES *against* EARL GALLOWAY.

The Lady Gairles being provided, by her contract of marriage, to certain lands, which her father-in-law, the Earl of Galloway, obliged him to make yearly worth to her 6000 merks ; whereupon she having raised letters, and charges ; and the same being suspended by the Earl ; at the calling whereof the Lady declared, that she charged the Earl to make the rental of the lands good, conform to the contract, which she declared the lands were not able to pay, having never paid the half of the rental ; and it being here controverted by the suspender, that this trial could not be taken *hoc ordine* by a charge so summarily, but that it ought to abide an ordinary pursuit, by way of declarator, or other action, and not by way of suspension ; the Lords sustained the trial to be cognosced upon the charge in this suspension, and found no necessity that the charger should be put to any other pursuit or declarator therefore, and sustained the same to be taken *hoc ordine*.

No. 17.

Summary diligence upon a contract of marriage.

Act. *Stuart, Nisbet, & Neilson.*

Alt. ——— *& Oswald.*

Clerk, *Hay.*

Fol. Dic. v. 2. p. 403. Durie, p. 899.