

No 58. 1626. July 6. MATTHEW CHEAP *against* AGNES MOWAT.

A CONTRACT of marriage, whereupon marriage followeth, needs not be subscribed with two notaries and four witnesses, conform to the act 80th Parliament 1579.

Spottiswood, (MARRIAGE.) p. 203.

No 59. 1630. December 10. NISBET *against* L. NEWLANDS.

A contract of marriage defective in solemnities, was found homologated by the subsequent marriage.

JANET NISBET being, in her contract of marriage with her first husband called Thomson, provided to a liferent of an 28 shilling land of _____ and according thereto infest therein; after the decease of her said first husband, she contracts marriage with a second husband, and in this second contract of marriage, disposes that liferent right which she had by the first marriage, to that second husband, and to the heirs to be gotten betwixt them. The second husband deceasing, the heir serving of that marriage disposes the right of that liferent to an assignee, who pursues the tenants of these lands for the duties thereof. And the relict compearing *alleged* the contract to be null, because it was only subscribed by one notary; which allegiance was repelled, because that disposition of her liferent, albeit subscribed only by one notary for her, yet was contained in a contract of marriage, whereupon marriage followed, and so taking effect as an homologation of the contract, was not quarrelled for that defect. Neither was it respected that the defender *duplicated*, That the marriage could not make that act, anent the disposition of her liferent, to stand good, being an act of a several nature, and not necessary to the marriage, which might have taken effect, albeit that liferent had never been disposed; which the LORDS repelled, and also found it not necessary to take the woman's oath upon the verity of the subscription, and of the command given by her to the notary, to subscribe for her, which the LORDS found not needful, but marriage having followed, and this being done *intuitu*, and in contemplation of the marriage, the same contract was sustained. See WRIT.

Act. Gray.

Alt. —.

Fol. Dic. v. 1. p. 381. Durie, p. 546.

No 60. 1642. February 8. HUNTER and FORBES *against* HUNTERS.

Homologation of a testament was not inferred, although one of the parties

JOHN HUNTER in Edinburgh having four daughters, he married one upon Alexander Forbes, and contracts to him 5000 merks; and before the payment he dies, making after the marriage a testament, wherein he ordered all his four

daughters equally to succeed to all his lands, goods and gear whatsoever, notwithstanding of any prior assignation or right, made of before to any of his bairns; which testament is thereafter confirmed, and the said Alexander Forbes's wife is confirmed one of the father's four executors. Upon this contract Alexander Forbes pursues the other three daughters as executors, for payment of the tocher; and the defenders *alleging*, That the defunct declared in his testament, that all the four daughters should be equal portioners, as said is, likewise this pursuer had homologated the said testament, not only by confirming his wife one of the four executors, but also by uplifting of a part of the defunct's moveable sums, as executor confirmed;—THE LORDS repelled this allegiance, and found that the other three sisters were liable to the fourth sister for the tocher contracted to her as said is, as a debt owing by their common father, which did affect all his free gear, in the same case as it would have been affected to a creditor, who had been a stranger; and repelled the allegiance of homologation of the testament, notwithstanding that this sister was confirmed one of the four executors of their father; because at the time of the said confirmation she protested, that the confirmation foresaid should not prejudice her in her debt; and also that the husband and she renounced all benefit that they could claim by the executry; and for any intromission had by them, with the defunct's goods, they were content to allow the same in part of payment of this sum now acclaimed; which the LORDS sustained to elide this homologation. And thereafter it being *alleged*, That the pursuer, as one of the four daughters and heirs, should be liable for her own part, and the defenders only for the remanent, viz. three parts, this allegiance was repelled, and the three daughters were found liable to the whole debt *in solidum*, without defalcation or collation, the pursuer being always obliged, if any debts arise which may exhaust the whole moveables, to be liable to refund his own part proportionally; and the father being in the said contract obliged to entertain the pursuer and his wife in his house for a year, and dying before the year, it was found that this was a debt which should lie totally upon the other executors, without division, albeit it was *alleged* that he entertained them so long as he lived, and the contract cannot be drawn to any other meaning but that he should so entertain them, if he lived that whole space himself; and modified 400 merks therefor.

Act. *Fletcher & Johnston.*Alt. *Heriot.*Clerk, *Gibson.**Durie, p. 890.*

1662. July 1.

BREIDY *against* BREIDY and MUIR.

A CONTRACT of marriage was sustained, both against principal and cautioner, albeit subscribed but by one notary, and by one subscribing witness, there being more witnesses inserted, in respect that marriage followed thereupon. See WRIT.

Fol. Dic. v. 1. p. 382. Stair, v. 1. p. 119.

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to whom a share of the succession was bequeathed, confirmed executrix. Her separate rights remained entire, as she had protested to that effect.

No 6i.