

1631. *July 12.* L. HASSINGTON *against* BARTILMO.

No. 44.

Minister
acting as
notary.

In a contract of marriage betwixt a man and his wife, the wife having assigned her debts to her husband, and herself during their lifetime, and what rested unspent thereof by themselves, to their heirs, executors, or assignees; which contract was subscribed for the wife by a Minister, notary for her; after her decease, her executors pursuing for the half of the gear, and the husband surviving, defending himself with the foresaid contract, whereby he alleged, that the property of the whole gear now pertained to him, she being dead, and there being no bairns betwixt them, in respect of the words of the contract, disposing the goods after their decease to their heirs, which word "their" must be only understood of the man's heirs, as being the husband, and person most respected, and who draws the same, according to the practise of this realm, to his heirs; and the pursuer alleging, that the words "their heirs" must import a division betwixt the husband's heirs and the wife's heirs, specially in moveables, whereupon this question arose, seeing this was not questioned upon an heritable infestment, where the dispute might be more questionable; but this question was not solved nor decided; for the Lords found, that so long as the husband lived, the wife's executors had no action for her goods; and the pursuer further replying, that the contract being subscribed by a Minister, after the Parl. 1584. and 133d act, which prohibits Ministers to be notaries except in testaments, under the pain of deprivation, and so that the same is null; the Lords repelled this allegiance, and found not the contract null therefore; for albeit the act prohibits Ministers to be notaries, yet such acts are not declared null, done by them to the contrary, but ordains another pain, viz. deprivation of them; so that that prohibition having a pain, specially annexed thereto, is not a simple prohibition, which ought to derogate to the fact itself.

Durie, p. 594.

1632. *February 23.* LD. JERVISWOOD *against* LD. LIVINGSTON.

No. 45.

A renunciation of a tack was found null as being subscribed by only one witness.

Durie.

* * This case is No. 117. p. 7408. *voce* JURISDICTION.