

No 62. 1664. December 15. CAMPBELL against CAMPBELL.

By contract of marriage betwixt Alexander Campbell and Janet Campbell, the deceased Alexander as principal, and certain persons as cautioners for him, are obliged to pay to the said Janet yearly the sum of L. 80, whereupon she intents action against the cautioners for payment.—It was *alleged*, That the contract *quoad* the cautioners is null, being only subscribed by one notary.—*Answered*, That marriage having followed, it homologates the contract, and supplies the defect of two notaries.—*Replied*, That the subsequent marriage might supply the defect of a necessary solemnity, *quoad* the principal party contractor, but not *quoad* the cautioner; and for this some old practiques were alleged.

THE LORDS found the contract null, *quoad* the cautioners. See WRIT.

Fol. Dic. v. 1. p. 382. Gilmour, No 119. p. 87.

* * * Newbyth reports the same case :

JANET CAMPBELL, relict of umquhile Alexander Campbell, pursues Dougall M'Cullen, and several other persons as representing their fathers, who were cautioners for the said umquhile Alexander Campbell, for a provision to his wife.—It was *alleged* no process, because the sums due being L. 80 yearly, the contract of marriage by which the cautioners were bound, was subscribed only by one notary, and so *quoad* the cautioners, the contract was null upon the act of Parliament.—THE LORDS found no process, and found, That albeit the contract of marriage was valid *quoad* the parties contracted themselves, yet *quoad* the cautioners, the same not being subscribed by two notaries, was null.

1665. January 4.—IN the same cause Campbell *contra* M'Cullen, it was farther *alleged*, That the pursuer offered him to prove that the defuncts gave warrant to two notaries to subscribe for them.—THE LORDS likewise repelled that allegiance, in respect of the act of Parliament; and found it not relevant that the pursuer should prove *per testes insertos*, that the defenders gave command to a single notary to subscribe for them.

Newbyth, MS. p. 14. & 15.

No 63. 1665. June 28. KEIL against SEATON.

A PERSON who in his minority had granted bond, being pursued for the same when he was major, proponed payment, in which he succumbed. This was NOT

found homologation to exclude him from another defence of minority and lesion.

No 63.

Fol. Dic. v. 1. p. 380. Stair.

* * See this case, No 64. p. 2732.

1665. December 12.

CHRISTIAN BARNES *against* HELEN YOUNG and her SPOUSE.

HELEN YOUNG being provided to the annual rent of 800 merks, and to the conquest, obtained decret thereupon, against Christian Barnes the executrix, who suspends on this reason, That the pursuer was infest by the defunct, her father, in a testament, in full satisfaction of these provisions.—It was *answered, non relevat*, unless it were *alleged*, that the charger had accepted; whereupon it was *alleged*, Accepted, in so far as she had uplifted the mails and duties after her father's death, and had no other title to ascribe it to.—It was *answered*, That she had another title, viz. her goodsir had disposed this testament to her father and mother, the longest liver of them two, and the bairns of the marriage, by virtue whereof, as heir apparent of the marriage, she might continue, and uplift, and misken the new infestment given by her father.

Which the LORDS found relevant, unless the other party insist on that allegiance proponed, that the pursuer had pursued, and obtained payment upon the title, bearing 'in satisfaction.'

Stair, v. 1. p. 325.

No 64.

Homologation of an infestment not inferred by possessing the lands, the possessor having another title.

1668. February 20. FARQUHAR of Tonley *against* GORDON.

FARQUHAR of Tonley pursues reduction of a bond granted by him upon minority and lesion.—It was *alleged* absolutor, because he had homologated the bond, in so far as he being cautioner in the bond, he had pursued relief, and obtained decret for relief, which did necessarily import that he acknowledged himself bound, else he could not have craved relief.—The pursuer *answered*, That seeing the bond stood unreduced at that time he might lawfully pursue the principal debtor to relieve him, against which he could have no objection; for the benefit of reduction upon minority is peculiar to the minor himself, and no other can make use of it; and in his pursuit of relief he might very well have declared, that in case he obtained not relief against the principal debtor, he might free himself by reduction against the creditor; so that homologation

No 65.

Against a reduction of a bond, at the instance of a cautioner, homologation was pleaded, in so far as the reducer had obtained decree against the principal to relieve him, which implied that he acknow-