

1685. *March.*ANNE GRAHAME *against* MARQUIS OF MONTROSE and JAMES FENTON.

A person having named a stranger his executor and universal legatar, with the burden of some particular legacies, his sister raised reduction of the testament as nearest of kin, upon this ground, that it wanted habile witnesses, in so far as one of the witnesses was a considerable legatar, and so could not be *testis in causa sua*.

Alleged for the defender : That the reason is not relevant ; because, *1mo*, The witnesses were in effect instrumentary witnesses, who cannot be rejected ; *2do*, By the civil law *legatarii et fide commissarii* were habile witnesses *in testamento scripto*, though not *in nuncupativo* ; *3tio*, Whatever might be pretended against a testamentary witness pursuing for a special legacy, the witness there quarrelled may prove the verity of the testator's subscription, in favours of the universal legatar, to exclude the pursuer's interest of nearest of kin.

Answered for the pursuer : Though, where writs are granted and accepted by parties, as in the case of bonds, contracts, &c. the creditor receiving the security consents to the hability of the witnesses therein, that cannot be drawn as a rule to a testament in prejudice of the nearest of kin, who did not consent to or subscribe it ; *2do*, It was upon special considerations that legatars are allowed to witness by the common law, in respect here, *principale negotium agebatur inter testatorem et hæredem*, and seven witnesses were required ; and the heir who had the heritage by the testament, had no reason to quarrel it ; but these specialties take no place with us where moveables only are testable, and testaments need but two witnesses. Again, more faith was given to witnesses by the civil than by our law, *ne defunctus intestatus decederet*.

The Lords repelled the reason of reduction, and sustained the testament as a complete probative writ.

*Harcarse, No. 561. p. 155.*

1698. *November.* MUNGO CAMPBELL *against* MARGARET ROBERTSON.

In this case, the Lords had occasion to give another decision on the same 5th act of Parliament 1681\*, in a pursuit by Mungo Campbell against Margaret Robertson, relict of John Bready, and now spouse to Anderson, writer in Glasgow ; where a bond was quarrelled as false, because one of the witnesses deponed he did not know Bready, to whose subscription they subscribed as witnesses, being then a boy of 14, and called off the street to be a witness. The Lords were convinced the bond and debtor's subscription were true ; yet, in respect of the fore-said act of Parliament, they found the bond not false, but null ; and yet that knowledge of the party, which the act requires, cannot be understood of a distinct,

No. 115.

The objection to a testament, that one of the witnesses was a legatee, was repelled.

No. 116.

\* See Grant against Keir, Sect 5. *h. t.*