

defunct's self might have sought it, and if they have not done it, it were no reason therefore that she should want the benefit of the said contract; and it being further *alleged*, that this contract, which is the ground of the pursuit, is but an imperfect minute, and wants the date, and designs not the writer, therefore until it be extended, it ought not to produce action;—THE LORDS repelled both the allegances, in respect the party had the person obliged to pay the sum by the contract extant to pursue therefor, and if he did not the same, the pursuer, who was not obliged to pay the sum, ought not to be prejudged thereby; but they superseded the execution upon this sentence till Whitsunday, that the defender might use his diligence, to recover the sum from the party obliged in payment thereof; and if he should never recover it, they found that the defender was not the less obliged to employ the like sum to this relict, he being obliged thereto by his contract, and the party being responsible, who was obliged to pay at the term of payment appointed thereto; and the second allegiance was repelled, because it was a minute of a contract of marriage to have been perfected, whereupon marriage had followed thereafter, and that the pursuer condescended the said minute was the hand writ of her deceased husband. See WRIT.

No 268.

Act. Nicolson & Craig.

Att. Advocatus, Hepburn & Gilmour.

Clerk, Gibson.

Fol. Dic. v. I. p. 407. Durie, p. 823.

1665. February 22. CAMPBELL against CAMPBELL.

No 269.

A wife pursuing her father-in-law, for employment of her tocher, conform to her contract; he *alleged* absolutor, because the clause bore expresly, that so soon as the tocher was paid compleatly, he should employ it, and so much more for the wife's liferent use; so that, unless it were shown, that the tocher was compleatly paid, he was not obliged. The pursuer *answered*, that she was not obliged to pay the tocher, but her father, and if any neglect or defect was therein, it was not her fault, but the defender ought to have done diligence, *debito tempore*, and therefore, albeit the tocher were not paid, at least he must employ his own part proportionable to what of the tocher he hath received.

Which the LORDS found relevant, and if the pursuer had not restricted herself to that proportion they would have sustained it simply, for all the defenders own part.

Fol. Dic. v. I. p. 407. Stair, v. I. p. 274.