

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-

No 65.
 ledged him-
 self bound.
 The Lords
 found the de-
 cree of relief
 did not ho-
 mologate the
 bond.

being a tacit consent, can never be presumed where the deed done might have another intent; and his pursuit for relief was not to bind himself, but to loose himself. He did also *allege*, That the pursuit of relief was at his father's instance, and his own promiscuously; and after the decret was thereupon extracted, he gave it in again, and took a new extract, which bears not a relief for him of his debt.

THE LORDS found the pursuit and decret of relief to be no homologation to exclude this reduction.

The defender then offered him to prove that the pursuer was major when he subscribed; so that the libel and defence being contrary, and great advantage arising to him who had the benefit of probation by highland witnesses,

THE LORDS resolved to prefer neither to probation; but before answer, ordained them to adduce such evidents and adminicles as they would use to prove, the pursuer's age, that they might prefer the strongest and clearest probation.

Fol. Dic. v. 1. p. 380. Stair, v. 1. p. 528.

No 66.

If a *protestatio
 contraria facto*
 will take off
 homologa-
 tion, debated,
 but not de-
 termined.

1671. January 26. CHARLES CASSE *against* DR CUNNINGHAM.

IN the reduction of the disposition of the lands of Auchinharvie and others, made by the said Charles to the Doctor when he was minor, with consent of his curators, upon minority and lesion in so far as he was infeft in the said lands as heir to his father, who was a lawful creditor and preferable to all others, both because of his right and possession, and thereby might have claimed full payment of his true debt, whereas by the said bargain he was a loser in above 20,000 merks, it was *alleged* for the defender, absolvitor from the reduction, because the pursuer since his majority had ratified the sale and disposition of the lands made to the defender by the pursuer with consent of his curators, in so far as he having granted to Mr John Smith a factory to uplift all debts and sums of money belonging to him, the factor did accordingly uplift the whole price of the lands agreed upon, partly by the real receipt of the sum of 10,000 merks, and partly by assignation to bonds equivalent to the remainder, with a bond of corroboration and warrandice made by the defender; whereupon the factor, being himself one of the curators, did grant a discharge to the Doctor of the whole price, and having counted with the pursuer after his majority, and in his articles of discharge given up those same sums of money received from the defender, and how they were profitably employed for the pursuer's affairs, as likewise, having delivered to the pursuer the bonds and assignations foresaid, which were a sufficient security for the remainder of the price, the pursuer long after his majority did grant a full discharge to the said factor, and all the rest of his creditors, declaring, that they had behaved themselves honestly and faithfully. It was *replied* for the pursuer, *imo*, That these