

No 68.

1639. February 19. LD. CRAIGMILLER *against* CHALMERS.

RENUNCIATION of a tack cannot be proved but by writ or oath of party.

*Fol. Dic. v. 2. p. 220. Durie.**** This case is No 302. p. 6089, *voce* HUSBAND AND WIFE.

No 69.

Where a reduction had been instituted on minority, and a defence consistent with the reason of reduction was proponed, the pursuer was notwithstanding bound to prove the reason of reduction.

1661. July —. JEAN & MARION MITCHELLS *against* HUTCHISONS.

HUTCHISONS having obtained sentence against Mitchells, as heirs of their father, and their tutors and curators; they intented an action before their age of 21 years, of restitution *in integrum*, and reduction of the service and retour *ex capite minoris ætatis et læsionis*. Against the which, it was *alleged*, That all parties having interest were not called, viz. the pursuers in the decret, Hutchisons, who were a necessary party, having obtained their decret against Mitchells as heirs, and which decret would fall *per consequentiam*, and they not being acted *pro interesse*, before the pursuers' age of 25 years, there is now no *locus* for restitution to their prejudice. To which it was *answered*, That Mitchells being only *principaliter*, to reduce a service and retour, they needed not to call any but the judge, clerk, and inquest, which they did *debito tempore*, and they were content, that Hutchisons should compear for their interest, to propone any thing against the restitution, as if they had been cited. Likeas, their decret was not known to the Mitchells, being recovered against them when they were but 12 years of age, which never came to their knowledge, or if ever it did, they had forgotten it after so long a time.

THE LORDS repelled the allegiance.

In this process there having been an interlocutor of the English Judges, finding that a defence proponed by the Hutchisons, viz. that the pursuers had disponed, or excambed lands pertaining to their father to whom they were heirs, did exoner the pursuers *ab onere probandi minorem ætatem et læsionem*;

THE LORDS found this unjust, and that the pursuers should prove the reason of reduction, because the defences and reasons are consistent, and the defender might lawfully propone the defence, denying the reason.

*Gilmour, No 3. p. 3.**** Stair's report of this case is No 77. p. 2216, *voce* CITATION.

No 70.

The oaths of tutors were taken relative

1662. February —. LAIRD OF FAIRNY *against* LORD MELVILLE.

THE Laird of Fairny having disponed to the Lord Melville, the minor, the lands and teinds of Pitlour, with absolute warrandice, the Lord Melville charges

Fairny to warrant the disposition for 13 bolls of victual, paid to the minister for his stipend, since the year 1646. It was *alleged* by Fairney, That the warrandice cannot be extended to minister's stipend, unless the warrandice had *per expressum* carried the same, especially seeing, since the date of the disposition, the Lord Melvile has been still in use to pay the minister, without seeking relief till now; and Fairny offered to prove, by Bogie, who was the bargain-maker, and by the rest of the Lord Melvile's curators, that the lands and teinds were bought according to a rental, which they paid over and above the minister's stipend. It was *answered*, That the absolute warrandice was opposed *per expressum* set down in the disposition, and that the price of the lands and teinds were equivalent thereto, being freed of the minister's stipend; and no tutor, curator, nor witness's oath, could be taken to take away writ.

THE LORDS, before answer, ordained the tutors' and curators' oaths to be taken.

Gilmour, No 37. p. 26.

1662. February 13. JAMES SLUMOND *against* WOOD of Grange.

JAMES SLUMOND having charged James Wood of Grange, to pay a sum wherein he was cautioner for the Laird of Balcaskie, to William Smith merchant in Edinburgh, who constituted Richard Potter assignee, who transferred the same to the said James Slumond, and suspends; the reason of suspension was, because this bond was paid, and retired by Balcaskie the principal debtor, who took a blank translation thereto, from Potter the assignee, which translation, with the bond itself, were surreptitiously taken out of his coffer by James Hay, who filled up this charger's name therein; likeas, the suspender produced a declaration of Potter, that the sum was paid to him by Balcaskie, and therefore the suspender craved, that the oaths of this charger, the said James Hay, and Potter, and also the witnesses who were present at the payment of the sum, might be taken before answer.

Which the LORDS granted, albeit the charger had the translation for an onerous cause.

Stair, v. 1. p. 100.

1662. July 5. DUNCAN DRUMMOND *against* COLIN CAMPBELL.

DUNCAN DRUMMOND pursues Colin Campbell for payment of a debt of his father, because, in a writ betwixt his father and him, the father had disposed all his moveables to him, and he had undertaken his father's debt, whereby the pursuer, as creditor, had interest to pursue him to pay this debt; the defender having *alleged*, That the bond and disposition was never a de-

No 70.
to the extent
of warrandice
in a disposi-
tion.

No 71.
Witnesses
received to
prove pay-
ment of a
bond.

No 72.
Delivery of a
writ probable
by the notary
and witnesses
inserted in it,
where it was