

back-tack duties; and by payment of the annualrents so accumulated. Mr Petrie, provost of Aberdeen, having acquired the right of reversion, and having used an order of redemption, and thereupon having intimated declarator, it was *alleged*, that he should have consigned the sum contained in the said second contract, which he could not misken, by reason as he not only knew of the said second contract before he acquired the said right, but acted in relation to the said contract and in effect homologated the same, in so far as, *1mo*, By the said second contract, he and certain other persons being named and appointed to determine the question betwixt Richart and Buchan, what should be paid to Buchan for the charges he had been at in prosecuting his right against Richart, the said Petrie had accepted a submission relating to the said second contract, whereupon a decret arbitral did follow, ordaining 300 merks to be paid to Buchan for his charges; *2do*, By the second contract, Buchan was obliged to cause Petrie (being his friend) to give bond that he should engage for Buchan's performance of the said second contract; and accordingly, Buchan being charged to fulfil that head of the said contract, had procured a bond from the said Petrie, and produced it in judgment the time of the discussing of the suspension; *3tio*, Petrie had assigned the 300 merks of charges modified by himself, and the instrument of intimation of the assignation mentioned the said sum to have been modified by the decret arbitral, proceeding upon the said contract. From these acts it was urged, that knowing and having homologated the said contract in manner foresaid, he was *in pessima fide* to take a right in prejudice of the defenders, and to pretend to be in better case than his author.

THE LORDS notwithstanding found that the said second contract not being registrate in the register of reversions, he was not obliged to take notice of it; and might redeem by payment of the sums contained in the first contract. It was acknowledged by some of those who were for the decision, that these acts imported an homologation; but the second contract though by our law valid, was not favourable, and was against the common law; in so far as the accumulating annualrents to be a principal sum, is *usura usurarum ἀνατομικῶς*. I have often urged that favour is not *nomen juris*, and law ought to be uniform, and not *Lesbia Regula* pliable and variable upon pretences of favourable or not favourable; *Sed nunquam credita Teucris Cassandra*.

Dirleton, No 27. p. 12.

1668. February 14. SIR GEORGE M'KENZIE *against* JOHN FAIRHOLM.

SIR GEORGE M'KENZIE insisted in the reduction of the bond subscribed by him, as cautioner for his father in his minority. It was *alleged* for John Fairholm, that he could not reduce upon minority, because he had homologated the bonds after his majority, in so far as he had accepted discharges of the annual-

No 22.
infer homologation, as the party was not obliged to take notice of it.

No 23.
Homologation of a bond subscribed by a minor as cautioner for his father,

No 23.
found not in-
ferred, altho'
the son, after
majority, had
taken dis-
charges for
annualrent
not paid by
himself.

rent, bearing deduction of the bond by his father as principal, and him as cautioner, and discharging them both; which discharges Sir George himself did receive from John Fairholm, and paid the money. Sir George *answered*, That the discharges do not bear that he paid the money, but bear that the same was paid by the principal debtor; and his receiving of a discharge, not having paid, cannot import his homologation or acknowledgment of the bond; for, to prevent question and trouble, one may take discharge of what he denies to be due, and the bond being then standing unreduced, he may well accept a discharge, not knowing the event of the relevancy, or probation of his minority.

THE LORDS repelled the defence, and found that the discharges imported no homologation, unless it were instructed that Sir George, out of his own money paid the annualrent.

Stair, v. I. p. 524.

1670. January 18.

Dr BALFOUR and His SPOUSE *against* Mr WILLIAM WOOD.

No 24.
A father-in-
law, who was
tutor to his
daughter-in-
law, gave dis-
charges of an-
nualrent as
tutor, in pre-
judice of his
own rights
jure mariti.
This having
been done by
mistake, was
found no ho-
mologation of
the pupil's
right to the
annualrent.

UMQUHLE Mr James Wood having been tutor to his wife's daughter, she being now married to Dr Balfour, they pursue Mr William Wood, as representing his father, for a tutor accompt; in which accompt, the auditors reported these points: *1mo*, The pursuer insisted for the whole sums bearing annualrent, whereof no part belongs to the wife as relict, she being excluded by the act of Parliament. The defender *answered*, That he opposed the testament and confirmation unreduced, whereby there is a tripartite division of the whole sums, and the relict has one third which belonged to the defunct tutor, her husband, *jure mariti*.

THE LORDS repelled this allegiance, and found that the error of the confirmation was corrigible without reduction.

2do, The defender *alleged* that he was not comptable for the annualrent of one of the sums acclaimed; because, by the bond, it was provided in liferent to the relict, whereto his father had right, *jure mariti*. It was *answered*, That the tutor had given several discharges of that annualrent as tutor, and not as husband, and so had homologated and acknowledged the pupil's right to the annualrent. It was *answered*, That the discharge was so granted by error and mistake, *et falsa designatio non obest ubi constat de re*, and offered to prove by the bond that the wife was liferenter.

Which the LORDS found relevant.

Stair, v. I. p. 661.