

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

deeds could infer no homologation of their own, because they were not done in favours of the defender, but only of his curators, who were then *functi officiis*, to secure them from any trouble thereafter, which in justice could not have been refused, they having made a faithful account; and the receiving of money or bonds, as the price of these lands could not prejudice the pursuer of the benefit of restitution *in integrum*, seeing it was *actus necessarius*, for the pursuer could not be heard in his reduction until first, *et ante omnia*, he had offered to repon the defender, by delivering back all that was gotten as the price of the lands, which he was not in a capacity to do, until he did take up the same from his factor. 2do, Homologations being but inferences from tacit deeds and founded upon presumptions *cedunt veritati*, where there is *expressa* and *enixa voluntas*; but so it is, that before the granting of that discharge to the curators, the pursuer had intented reduction upon minority and lesion, and executed the same against the defender; as likewise the time of the count and reckoning, and granting the discharge, he did protest and take instruments in a notary's hands, that what he did should not prejudice him in his reduction intented, nor be any ratification of the disposition made by him in his minority. It was *duplied* for the defender, That he opposed the deeds of homologation which were so proper acts to infer a ratification, that it did necessarily follow *ex natura*; for *emptio et venditio*, consisting *ex re vendita et pretio*, the receiving of the price by a major, and discharging his factor and curators, who received the same in his name, is such a deed that, in law, it imports the perfecting of that contract of vendition, against which the minor can never be reponed; and albeit he had protested, yet that cannot prejudice the defender, seeing it was *protestatio contraria facto*, and inconsistent therewith, to which the law hath no respect, whereas in this case, the pursuer ought to have declared his mind to the defender, and required him to receive back the price of the lands which he had delivered and made offer to him thereof, and upon his refusal, protested for remeid of law; which not being done, but his declaration only emitted to his own curators, the defender could not thereby be concerned, or his right prejudged. After this debate it being *alleged* for the defender, *separatim*, That they offered to prove that the pursuer's father did enter to the possession of the lands by debarring all other creditors, actually intromitting with the rents thereof, during the whole years of his apprising whereby he was more than satisfied, the LORDS, before answer to the homologation, did ordain both parties to count and reckon before an auditor.

Fol. Dic. v. 1. p. 383. Gosford, MS. No 323. p. 143.

* * See Stair's report of this case, No 6. p. 3474.