Malloch, for extinction of Malloch's apprising, by intromission within the legal; Malloch craved a defalcation out of his intromissions, for the expenses of a process of reduction at his instance, against a third party, who had an inhibition which would have excluded both parties' rights; and for the sum he paid out profitably for both parties, by transaction, for being free of that inhibition.

The Lords found, That no such defalcations of the appriser's intromissions were to be allowed; but only such as were real burdens upon the land: but, as to that conclusion of the account for repetition of Malloch's intromission, after he was satisfied, they found compensation competent to what he profitably expended for the behoof of both parties, to secure them against an inhibition which would have affected them both.

Vol. II, Page 531.

1677. *July* 6. LOCKHART *against* LOCKHARTS.

THE deceased Stephen Lockhart of Wickedshaw, having communed a marriage for his eldest son, did, before the contract of marriage, take a bond from his son, bearing, That, albeit by his son's contract of marriage, he was to dispone to him his whole estate, with the burden of 4600 merks to his children, yet it should be leisom to him to burden the estate with 1400 merks more to his children; and making both sums, bearing annualrent after his death. The contract of marriage is subscribed three days thereafter. William, the son, having shortly deceased after the marriage, Stephen, the father, did divide the 6000 merks among his children, and died *in anno* 1663. William, son and heir to William, son to Stephen, *in anno* 1664, counted with Walter Lockhart, one of the children, and with Robert, another of them, *in anno* 1671, for their shares. William, the oy, having also died, the said Walter and Robert pursued his son and heir for their portions, who alleged, Absolvitor:—1*mo*. Because, as to the 1400 merks, and the additional annualrent, it was *contra pacta dotalia*, and so *contra bonos mores*, and thereby null; for, if the father had disponed his estate without mention of his children's provision, a bond by the son in their favours, being anterior, might have been effectual; but the contract of marriage bearing expressly a burden to the children of the 4600 merks, any further was not fair, but fraudulent, in prejudice of the wife and her relations, who would not have otherwise proceeded in the marriage. *2do*. This bond by a son to his father, being minor, is null; he not being authorised by his father, who was his lawful administrator, and could not authorise *in rem suam*.

It was ANSWERED, That these provisions being expressly to the behoof of the children, granted before the contract of marriage, were valid; for such provisions, contrary to contracts of marriage, can only be null *in quantum* there is a true prejudice and wrong to the parties-contractors; wherein their interest, not their humour, is to be considered: so that the addition of 1400 merks, (there being many children, and their whole provision being but 6000 merks, bearing annualrent after their father's death,) it was the discharge of a natural duty, and no wrong to the son or wife, who were put in the whole estate. And, as to the nullity, the bonds were homologated by the oy, after his majority, by

counting for, and paying the annualrent expressly relative to the bonds; and it is most unfavourable to quarrel the bond or contract, passed near 40 years since, which did draw in question the grandsire's deed.

It was REPLIED, That homologation can only be by express deeds of knowledge; but the oy might have been ignorant of his father's contract.

The Lords found the homologation by an account relative to the bond, and payment of annualrent thereof, for many years, sufficient to exclude any question against the bond; and therefore dived no further into the nullities.

Vol. II, Page 534.

1677. *July* 12. MONTEITH *against* HENDERSON.

HENDERSON of Fordel, having raised improbation of a disposition, by Randifoord to Carrubber, of his estate; and having desired the writer and witnesses inserted to be examined, to remain *in retentis*, lest they might die, or be put out of the way, before the process, by the course of the roll, might come in: they were accordingly examined. Carrubber did likewise pursue a declarator of his right to be true and valid; and desires that certain witnesses, here and abroad, be examined, to remain *in retentis*, whether or not they heard Randifoord declare that he had disponed his estate to Carrubber; and likewise that he might have warrant to cite several witnesses, who heard one of the witnesses inserted declare that he had gotten 200 merks from Fordel to depone.

It was answered for Fordel, That he, being in an improbation, wherein the direct manner is used, and the writer and witnesses inserted examined; till that be concluded and determined, there is no place for the indirect manner, either by improbation or approbation. And as to the examination of witnesses, upon one of the witnesses inserted his declaring he had received 200 merks, it is a reprobator, and should not be sustained but by way of ordinary action, and after sentence.

The Lords found, That if there were no doubtfulness in the improbation by writer and witnesses, there was no place for the indirect manner: but, because there were only two witnesses, and the testimony of one was quarrelled, they gave warrant to cite the witnesses quarrelled, and other witnesses to be condescended on, before extracting of this warrant, upon his hability; and declared they would sustain the same as a reprobator, to proceed, as an incident, with the principal cause of improbation summarily, without going to the roll as a distinct process; but that they would not stop the principal cause in dependence before, by the dependence of the reprobator.

Vol. II, Page 537.

1677. *July* 24. The EARL of DUMFERMLING *against* The EARL of CALLENDAR.

THE Earl of Dumfermling, having pursued the Earl of Callendar before the