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.

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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.

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

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

council for a riot, for carrying away the plenishing of the house of Pinkie, belonging to the Countess of Dumfermling;—He alleged, That the property of the goods belonged not to the Countess, but to the Earl, her husband, *jure mariti.* It was answered, That the Earl, before his marriage, had renounced his *jus mariti.* And it being replied, that, by the supervenient marriage, the right of the moveables returned to the husband *jure mariti,* the council, in respect the spuilyie was old, superseded to give answer till the property of the moveables was decided before the Lords of Session. Which being now debated,—

It was ALLEGED for Callendar, That, albeit this renunciation of the Lady's moveables bore date before the marriage, yet it was truly granted the time the Earl's estate was sequestrated by the English, long after the marriage; and so is *donatio* between man and wife, revokable, and, *de facto,* revoked under the Earl's own hand. *2do.* Marriage being a legal assignation, suppose the moveables had been the Earl's before the marriage, and had been disponed by him to the lady, yet they did return by the subsequent marriage. *3tio.* The public law hath established the right of man and wife as to moveables, that there is a communion between them, and that the husband hath the management; and there is no exception but a competent aliment to the wife, *ad victum et amictum.*

It was ANSWERED for the pursuer, That the defender can never pretend that the writ subscribed by his predecessor was false; which would be forgery. *2do.* Whatever might be said in a simple assignation, this renunciation is in contemplation of the marriage, and so in the same condition as in a contract of marriage; in which case, the husband or his heir would certainly be repelled, by a personal objection, to question the wife's right, whatever the creditors might say. *3tio.* The moveables being extant after the dissolution of the marriage, as there is no question but all provisions are allowable, by husband and wife, to take effect after the marriage, so must this as to these goods extant. Neither is it essential to marriage to have this communion of goods; which the Roman law hath not; and therefore it may be renounced.

It was ANSWERED, That this being a public law for public utility, private pactions cannot derogate therefrom. But this communion is competent *ipso jure;* and no paction can free husband or wife of the debt of each other; so neither, of the communion of moveables. And, on the same ground, donations between man and wife are revokable; which no renunciation, or contract of marriage, or otherwise, can alter, both these being introduced for the quiet of a conjugal society. And this renunciation relates not to the dissolution, but to the standing of the marriage; bearing expressly that the husband should not meddle with the moveables but by the wife's consent; which is an inconsistent interdicting him to his wife, contrary to the power of the government of his family: which was found inconsistent in the case betwixt the Lady Collingtoun and her husband, where, before the marriage, the lady disponed the half of her liferent to Ratho, who gave a back-bond to employ it to the use of the family of the future spouses: and though, thereafter, Collingtoun ratified Ratho's right, and renounced his *jus mariti,* yet the Lords found, that, Ratho's back-bond applying it to the benefit of the family, that the lady could not separate from the family, and crave a share; nor, being in the family, have any share in the management; but that the husband had it alone, as an inseparable right.

The Lords found the allegeance for Callender relevant, that this renunciation

was antedated, for a reasonable cause, to exclude the usurpers from sequestration; and, therefore, found it relevant, that it was duly subscribed during the marriage, and revoked by the husband as a donation to the wife; and reserved the other point, which needed no probation, till the close of the cause.

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1677. *November* 8. BARBARA GRANT *against* JANET CUTHBERT.

BARBARA Grant, being executrix confirmed to her husband, did make payment to Archibald Neilson, her son, of a bond granted by the defunct his father, to him and Janet Cuthbert, his future spouse, and the heirs betwixt them; which failyieing, Archibald's heirs;—whereupon she obtained decreet before the Sheriff against the said Janet Cuthbert, to exhibit and deliver the said bond, as satisfied. Janet Cuthbert raises suspension and reduction, on this reason, That the Sheriff had committed iniquity in decerning her to deliver up a bond of a sum provided to her in liferent by her husband's father before her marriage; which sum he could not uplift, nor the debtor pay, without the liferenter's consent, unless the debtor had seen the sum securely re-employed for the wife's liferent.

It was ANSWERED, That the husband was fiar, and *dominus bonorum;* and the executrix having made payment upon sentence, payment made *bona fide* should secure her; and the wife ought to pursue her husband's executors to re-employ.

It was REPLIED, That the tenor of the bond put the executrix *in mala fide* to pay without the relict's consent.

The Lords found, That the husband could not lift, nor the debtor pay, the principal sum, without the wife's consent, or re-employing it sufficiently for her behoof; and, therefore, reduced and suspended the decreet for delivery.

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1677. *November* 13. THOMAS WILSON *against* GEILES FERGUSON and Her SPOUSE.

THOMAS Wilson pursues Geiles Ferguson, for payment of an account of ale and beer furnished to her by the space of six years; and also her husband, for his interest.

The defender ALLEGED, That the libel was only probable *scripto vel juramento*, by the Act of Parliament declaring all counts to be so probable after three years; and so no article of this account can be sustained, it being three years preceding, to be proven by witnesses.

It was ANSWERED, That the Act of Parliament allows counts to be proven by witnesses, being pursued within three years; which three must be accounted from the last article of the count; and so must not severally relate to every article, but to the account, consisting of more articles.

It was REPLIED, That though the currencies of counts have been found rele-