

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 dispoed 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