

1666. *February.* CUNNINGHAME *against* The LEGATARS of His WIFE.

No 21.

An executor found to have made legacies debts of his own, by confirming the testament, and not entitled thereafter to reduce it.

AGNES HOWIE, spouse to George Cunninghame, by her testament, nominates her husband executor, and leaves some legacies to friends extending to 1000 merks; her husband confirms the nomination, in which the free gear and the defunct's part thereof did far exceed the legacies; and yet he intents a reduction of the testament as it is confirmed, and a declarator, that he may be free of the legacies, in respect of a debt owing by the pursuer himself, before the defunct's decease, and still owing the time of the confirmation. It was *alleged* for the defenders, absolvitor; because the confirmation being his own deed, and the inventory given up by himself, by which his deed, he has constituted himself debtor in the legacies, he cannot, upon a debt of his own, liberate himself from the legacies nor quarrel the confirmation, unless it were an emergent debt, owing by the defunct testator herself. *Answered*, That the husband has liberty, in the wife's confirmed testament, either to give up, or not give up, his own debt, for exhausting the inventory, and his wife's part; and therefore, he not having given up this debt, he may, *quocunque tempore*, exhaust the inventory therewith. *Replied*, That he having privilege to give up and exhaust with his debt, and being executor nominated by his wife's testament, wherein she appoints the legacies to be paid, he becomes debtor of the legacies by his own deed, and by omitting to make use of that privilege which was due to him, viz. the upgiving of his own debt, thereby to exhaust the inventory, but specially this debt which could not but consist in his knowledge, the bond being registered not long before the confirmation, and being charged thereupon not long after.

THE LORDS found the allegiance and reply relevant, in respect of his knowledge of the debt, unless he would condescend upon, and make appear, some probable reason of ignorance, or why he did not confirm the same. This cause was again heard and considered in February and June thereafter.

June, this interlocutor was adhered to; though in February it went otherwise; but at that time the knowledge of the debt was not considered.

Gilmour, No 184. p. 134.

1666. *July 24.*

PETRIE *against* RICHART.

No 22.

The knowledge of a contract of wadset not entered in the register of reversions, found not to

RICHART of Auchnacant having a wadset of 12000 merks from Buchan of Portlethem, did thereafter enter in a second contract with Buchan's son and heir, who had right to the reversion; and divers years back-tack duties being accumulated and made a principal sum, it was agreed that there should be no redemption but by payment of the sum contained in the said second contract, made up as said is, of the sum contained in the said second contract, and the

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,