and payment of a precept directed to him by Primrose, for payment of a part of the sum contained in the decreet, bearing expressly to be in satisfaction of a part of the decreet; which was found relevant, and admitted to Duie's probation; for proving whereof, Duie produced the precept, acceptance, and discharge.—It was *alleged*, That the writs produced proved not to the homologation of the decreet as to the article controverted, being the freight of a vessel, which Duie offered to prove to have been decerned to have been within the third part of the just avail, and the precept bore payment of five dollars, decerned for the deterioration of the tackling, by virtue of a promise.

No 85.
quoad one of many articles, not sufficient to homologate the whole.

THE LORDS having considered the decreet arbitral and precept, found it proved not the homologation as to the point in question, because the decreet contained diverse heads. The precept bore to pay the deterioration of the tackling, and bore expressly, that the same was uncontraverse, and founded upon the defender's promise.

Fol. Dic. v. 1. *p.* 383. *Stair, v.* 1. *p.* 144.

1663. *February* 21. ANNA WARDLAW *against* FRAZER of Kilmundie.

No 86.
An heir having paid part of a legacy of an heritable bond, the whole legacy was sustained, though otherwise null.

ANDREW WARDLAW having a wadset upon some lands of the Lord Frazer, the debtor raises suspension of multiplepoinding against Anna, sister and heir to the said Andrew Wardlaw, and Frazen of Kilmundie, pretending right by a legacy from the defunct to the said sum.—The heir *alleged*, That it could be liable to no legacy, being heritable.—The defender *answered*, 1*mo*, The legacy was made *in procinctu belli*, where there was no occasion to get advice of the formal and secure way of disposing of the wadset, but the will of the defunct appearing *in eo casu*, it must be held as effectual as *testamentum militare in procinctu*, which needs no solemnities. 2*dly*, The heir's husband hath homologated the legacy, by discounting a part thereof.—It was *answered*, That no testament whatever can reach heritable rights with us. 3*dly*, That the homologation of the husband cannot prejudge his wife nor himself, *quoad reliquum* not discounted.

THE LORDS found the heirs had only right, except in so far as the husband had homologated the legacy, which they found to prefer the legatar to the whole benefit the husband could have thereby *jure mariti*, but not to prejudice the wife thereafter. See TESTAMENT.

Fol. Dic. v. 1. *p.* 382. *Stair, v.* 1. *p.* 186.

1682. *January*. ERSKINE *against* ERSKINE of Balgownie.

No 87.
A person on death-bed executed a

SIR JOHN ERSKINE of Balgownie having granted a bond of provision to his wife's children, whereby every one of them was provided to 2000 merks, and

No 87.
bond of provision in favour of his younger children. Payment made by the heir to some of the children, found a homologation as to the rest.

that such of the children as should die, their portions should accresce to the survivors; George Erskine, one of the children, pursues his brother Sir John for payment of his own portion, contained in the bond of provision, and for that part of his brother James's portion that was resting the time of his decease.—*Alleged* for the defender, That the bond being granted by his father upon death-bed, it could not oblige him who was his heir; and upon that ground he had raised a reduction of the bond, which he now repeated.—*Answered*, That the pursuer could not reduce the bond as being granted upon death-bed; because as to James's portion, he had homologated the same, in so far as he had paid a part of the sum, which the Lords have already sustained as a sufficient homologation to make the pursuer liable for the remainder; as also, that he had homologated the bond as to the whole provisions, in so far as he had paid several of the children their provisions, conform to the bond, and had taken their discharges; and by payment of any of the children's provisions, he did thereby acknowledge and homologate the whole bond, and it must be effectual not only in favour of the children to whom he paid a part of their provisions, but also to the other children, all their provisions being contained in one bond; and his approving and homologating of it as to a part, must be reputed a homologation as to the whole, *nam nemo potest approbare et reprobare* one and the same writ; and if the bond be effectual as to a part, it must be effectual as to the whole. As also the defender, by a missive letter after his majority, writes to the pursuer that the account might be stated betwixt them what he was due; for the pursuer being major, it was fit accounts should be cleared, that what was owing might be paid, by which he clearly acknowledges the debt.—*Replied*, That the pursuer's paying any of the children is no homologation of the bond as to the rest of the children; for what he did to some of the children upon the account of personal affection, or upon some other consideration, cannot oblige him to pay the other children their portions; for if the bond had been null, as wanting writer's name, and witnesses, and date, or other intrinsic nullities, if the pursuer had paid any one of the children their portions, contained in such a bond, which did not at all oblige him, he could not have repeated it; or however, if he had paid a part of the portion, that might import an homologation as to the remainder of the sum, yet that will not oblige him to pay the other children their portions; for albeit the portions be contained all in one bond, yet they are *jura penitus desperata*, whereof the homologation of one cannot be understood to be an homologation of the other, albeit in the same writ, as was found in the case of a decreet arbitral, Pringle against Duie, No 85. p. 5702. where the homologation of a decreet arbitral *quoad* one of many articles of different natures, was found not sufficient for the whole; and a discharge is properly no homologation, because the design of a discharge is not *contrahere sed distrahere obligationem*, for every understanding man will take a discharge of an obligation, albeit it were never so small or invalid, of purpose to free himself of any trouble, and has been frequently so decided, and particularly Sir

George M'Kenzie against Mr John Fairholm, No 23. p. 5639.; and Farquhar against Gordon, No 65. p. 5685. where a minor, pursued for relief of a sum after he was major, was found not to infer homologation by taking a discharge *quia distrahebat non contrahebat obligationem;* and homologation being only but presumption of a party's intention to approve a deed, it cannot be understood approbation and acknowledgment of the deed so as to oblige the party, if it can be ascribed to any other cause; and the reason why the defender paid some other of the children their portions, albeit he was not obliged, was, because not only they were provided to 2000 merks of portion by the bond of provision, but also the father had disponed to them a part of the price that should be gotten for the wood of Ballquhery for augmenting of their portions, and upon the consideration that the children to whom he paid the portions did quit any interest they could pretend to any part of the price of the wood of Ballquhery, conform to a particular agreement betwixt them, the pursuer and his curators have paid them their portions contained in the bond, and the pursuer is content to pay the defender his portion on the same terms; and no respect ought to be had to the letter, because it does not relate to the bond of provision, but only desires that accounts may be cleared betwixt them; and there were other things betwixt them than the matter of their portion; for the pursuer had given out some thing to writers upon the defender's account, and buying some necessaries to him; so that the letter may be understood on these accounts; and albeit it were to be understood to relate to the bond of provision, yet that can only be in the same terms that he paid the other children their provisions according to the agreement, which was to pay the portion contained in the bond of provision, he discharging the defender of any interest he could pretend to the price of the wood of Ballquhery; and the defender offers to prove by the cautioners, and other persons present at these treatings and communings, that the defender would never condescend to pay the pursuer his portion on any other terms; and when the defender wrote the foresaid letter, he sent him an order to receive some money in part of what was due to him from the merchant to whom he sold the victual, as appears by the letter; and in respect the order did bear, that the merchant should take a discharge from the pursuer in the terms of the foresaid agreement, as he had paid the other children, which the pursuer would not accept of, but sent it back; which evinces that the defender did not design to pay the portion and homologate the bond on any other terms.——THE LORDS sustained the deeds of homologation, in so far as the pursuer, by the death of his brother, had right to these portions the time of the homologation; and ordained the pursuer to be further heard if the homologation was sufficient to make the bond subsist in him. No 87.

1686. *January.*—IN the action mentioned in January 1682, at the instance of George Erskine against Erskine of Balgonie, his brother, it being further *alleged*, That the provisions being to several children, albeit in one

No 87. bond must be looked upon to be in the same case as if there had been distinct bonds, so that the payment made to one of the children cannot be understood to be a deed of homologation in favours of the rest, and the missive letter written by the defender to the pursuer cannot import an homologation, seeing it has no relation to this bond, but in the general desires, that the pursuer would clear counts after his majority; and at several communings the defender did always declare, that he would pay no more to the pursuer but his own proportion of the bond of provision, which was 200 merks; and the taking of a discharge from any of the children of their provision contained in that bond, can import no homologation as to the rest, because by the taking of a discharge there was only *animus distrahendi et non contrahendi obligationem;* and it being free for the defender either to pay or not as he thought fit, the paying of one of the children their portions contained in the bond of provision, will not make him liable for the rest, as in the case of a decreet arbitral containing several heads, an act of homologation of a part of the decreet arbitral will not import an homologation of the rest, if they be distinct heads, as was decided, Primrose against Durie, No 85. p. 5702.; and acts of homologation which are but simple presumptions of law, are not to be inferred but by such deeds as can admit of no other construction, as is clear by several decisions; and, particularly, Sir George M'Kenzie against John Fairholm, No 23. p. 5639. where in a reduction of a bond upon minority, granted by Sir George M'Kenzie, as cautioner for his father, it being alleged he could not reduce the bond, having homologated the same by accepting of a discharge of the annualrent after his majority, the Lords found that the discharge imported no homologation unless it were instructed that the defender paid the annualrents out of his own money. And, in the case of Farquhar of Tonely against Gordon, No 65. p. 5685. where, in a reduction of a bond upon minority and lesion, the Lords found the cautioners pursuing for and obtaining a decreet of relief, to be no homologation to exclude reduction, *quia distrahebat non contrahebat obligationem;* and albeit the defender did pay some of the children's provisons and did take a discharge thereof, it was not only in satisfaction of their proportions of the bond of provision granted to them by their father, but of all that they could ask or claim of the defender, their brother, any manner of way, and particularly of their share of the wood whereunto likewise they pretend right; and the defender was always willing to have paid the pursuer his proportion of his father's bond of provision, providing he would grant a discharge of what he could ask or crave, as succeeding to his other brothers and sisters, and his proportion of the wood, or any other manner of way: As also the father, by a warrant under his hand, did empower the tutors to restrict the bond of provision if they found cause; and accordingly, after the father's decease, the tutors and the mother having considered the debts, and that the arrears thereof would be much more than the rents of the lands during the mother's lifetime, who is yet alive; and therefore the tutors, by a contract and agree-

ment, did disburden and free the defender, the heir, of the wood, and accres- No 87.
sing portions; and the mother was to educate and maintain the children for the annualrent of their portions; and it was provided, that in case the heir should reduce his father's bond of provision, or refuse to pay to every living child at their majority, their proportions of the bond of provision, in that case, he should be liable to his mother for his own aliment, and for the annualrents of all the children's portions, notwithstanding they discharged the same in his favours; and in case that any of the rest of the children did quarrel the tutors' agreement, that they should be liable to the heir for whatever the law did allow for their aliment, maintainance, and education, during their residence with their mother; and according to that agreement, the defender did pay two of the sisters their proportions of the bond of provision, but no part of the wood nor accressing portions. *Answered*, That there being a bond of provision granted to all the children, and it being acknowledged and homologated by the defender, by payment making to one or more of the children of their proportions, it does so far import his consent and acquiescence to the bond, that he cannot quarrel it as to the rest of the children, seeing *quod approbat non reprobat*; as in case a minor should pay a part of a sum contained in his bond after his majority, it is such an homologation that he cannot question the res; and albeit voluntary payment by an apparent heir will not import a behaviour, nor make the apparent heir liable for the debt, yet the case differs when payment is made in relation to a preceding obligation; in which case, the payment of a part imports a homologation; and the case of Primrose and Dowie does not meet this case, because the decreet arbitral was in relation to several particulars, that were *penitus desperata*, and therefore the homologation of one part thereof was not extended to the rest, and the defender's payment of a part of the sums contained in the bond of provision to the other children, can be attributed to no other cause, nor admit of any other construction but to be an homologation and acknowledgment of the whole bond, being the same and individual right, especially being conjoined with the defender's missive letter, by which he desires the pursuer to state accounts as to what was then resting to him; and the other decision does not meet this case, for, as to the case of M'Kenzie against Fairholm, the Lords found that the son, who was cautioner for his father, accepting of a discharge of annualrent after his majority, did not import an homologation, because the discharge did not bear that the son had paid the annualrent, but that it was paid by the principal debtor; nor that other case of Farquhar against Gordon, because the Lords found a minor might secure himself either by reduction, or by an action of relief, and that both actions were compatible; and the father did give no warrant to restrict the bond of provision, but having only signed a blank paper, in order to the filling up the inventory of some moveable goods, the tutors did unjustly fill up a warrant to themselves to restrict the children's provisions; whereas all that the defender designed by signing of the blank paper, was in order to the filling up

No 87. an inventory of some moveables, as appears by a note written upon the head of the paper, bearing to be an inventory of the goods disponed to a blank person for L. 600 Scots; and the father was so far from designing that the children's portions should be restricted, that by his testament he recommends to his son and to his tutors and curators, that they should timeously and faithfully make payment to the children of their provisions, as he would expect the blessing of God upon the rest of his estate. The Lords found, by the writs produced, that the defender hath homologated the bond of provision, not only in relation to the other children, but also in relation to the pursuer, without respect to any restriction, and therefore sustain the bonds of provision with the substitutions.

Fol. Dic. v. 1. p. 382. Sir P. Home, MS. v. 1. No 106. & v. 2. No 774.

*** Harcarse reports the same case:

Erskine of Balgownie having left a bond of provision to his five younger children of 2000 merks to each of them, with a mutual substitution, George Erskine, the only survivor of the five, pursued his eldest brother for his own 2000 merks, and for the shares of others that had accresced to him by the substitution.

Alleged for the defender; That the bond was granted *in lecto.*

Answered for the pursuer; That a bond of provision was *debitum naturale.* 2. The defender had homologated it, by paying the shares of two of the children, and by writing a letter to the pursuer, desiring he might state his debt; and there was no other ground of debt between them but the bond of provision.

Replied for the defender; The two children got only payment of their 2000 merks a-piece, and nothing by the substitution, though one share had then accresced, and the defender is content to pay the pursuer's 2000 merks, if he will pass from the benefit of the substitution and accrescence. 2. The bond being in favours of distinct persons, must be considered as so many distinct obligements; so as the acknowledgment of one does not import acknowledgment of all; nor does the letter relate to the bond; and all that was intended thereby was only to state an account about the pursuer's own provision of 2000 merks.

'The Lords found the deeds of homologation sufficient to sustain both the provision and the substitution.'

Harcarse, (Homologation.) *No* 506. *p.* 141.

*** The following report by Fountainhall is connected with the above case.

1705. *Jan.* 4—Mrs Margaret Erskine *contra* J. Erskine of Balgony, her brother. She pursues him for payment of 9500 merks, contained in a bond of provi-

sion granted by her father to her. *Alleged*, He has raised reduction of the bond, as granted on death-bed, and so cannot prejudge the heir. *Answered*, Our ancient law of death-bed, being by the 13th statute of King William, has two exceptions, both which take place here, viz. unless the defunct be burdened with the debt; and, 2*do*, unless the heir consent; but *ita est*, a father's providing his younger children is *debitum naturæ*, and a very just and rational obligation; and here the heir consented, in so far as he gave directions to the writer how to draw the bond, and insert sundry clauses in his own favour, of substitution and return in case of irritancies, and presented the same to his father to be subscribed. 3*tio*, Bonds on death-bed are not reducible, if they depend on antecedent onerous causes as this did, they having prior bonds of provision, which on the granting of this were cancelled; and it is expressly given in lieu of what would have belonged to them, as their legitim, and by their mother's third of the moveables; and they are excluded from claiming these, in the very bond itself. *Replied* to the *first*, King William's old statute, allowing bonds on death-bed for paying of anterior debts, is only for such debts as had a *jus exigendi*, and legal compulsitors to force payment; but the natural debt of providing younger children hath no such right of exaction; and the second exception of the heir's consent must be understood of a positive explicit consent, and not of an illative implied one, inferred from remote and conjectural matters of fact, as this condescended on is; for why might not the defender so far comply with his father, as at his desire to employ the writer to draw up a bond blank in the sum, when he knew perfectly, that so long as he did not formally consent he was in no hazard? and it is not so much the bond he complains of, as the exorbitant sum his father filled up therein; and a son's subscribing witness to his father's bond on death-bed (which is a more explicit act) was found not to infer a consent in a late case, betwixt Dallas and Paul, No 55. p. 5677.; and his father labouring under a lent disease, he knew not but he might outlive the 60 days, now set as the period of death-bed. 3*tio*, As to the anterior causes mentioned to support this bond, he is willing it stand as far as these onerous causes either of prior provisions, legitim, or the mother's share will go; but to encroach on that excellent law of death-bed by remote and implied consent, is to shake the foundation of our properties. And in the Parliament 1672, a proposal being brought in, to empower fathers on death-bed to burden their estates with three or four years' rent towards providing their younger children, it was refused, as tending to weaken and subvert the ancient families of the land. For the anterior onerous causes of the mother's third, &c. there was a decision cited 4th February 1665, Beg *contra* Beg, *voce* TUTOR AND PUPIL. There was a separate allegeance propone for making the heir liable, viz. that he had homologated this bond of provision, by transacting with one of his younger brethren whose provision was in the same bond, and taking an assignation thereto; and both being *in eodem corpore juris*, he cannot reprobate the same, the whole bond being *unum jus individuum*; and that it was so decided in a parellel case

No 87.

No 87.

betwixt his father and his uncle in January 1686, where Balgownie's taking a discharge from one of the sisters of her part of a bond of provision, was found to homologate the bond *in toto*, though it was alleged then, that the several portions in the bond were to be considered as so many separate bonds of provision. *Answered*, An heir's paying one creditor, and refusing another, was never sustained as a passive title; and his free gratuity and bounty to one of his brethren, can never bind the rest upon him. THE LORDS at first found it relevant to make Balgownie liable, that he gave directions for framing this bond, and brought it to his father to be signed; but on a bill, the LORDS reconsidered that constructive consents might be dangerous, and that he knew not the sum to be filled up; and, he complaining it was immoderate and exorbitant, therefore they remitted it to the Ordinary to be farther heard how far it could be supported by the claim of the legitim and the mother's third; and if it was excessive, considering Balgownie's estate and burdens, or if it was only a competent and rational provision effeiring to the heritable and moveable fortune he left behind him.

Fountainhall, v. 2. p. 254.

No 88.

A husband granted to his wife, not otherwise provided, a liferent provision, which was therefore found not revocable; yet having *de facto* revoked part of it, and bequeathed that part to his father, the relict discharged the debtor of an year's annualrent of the remainder. The Lords found this an homologation of her husband's revocation.

1687. *July* 27. CORSAR *against* CARMICHAEL.

ALEXANDER CORSAR in Dysart gave in a bill against his son's relict, now spouse to George Gowan writer, pretending she liferented all his means, and craving the Lords would modify to him an aliment out of it.—*Quæritur*, If the son, or the son's relict be bound to aliment her father-in-law, as parents are bound to aliment their son's?

December 1.—The case between Anna Carmichael and her husband against David Corsar, mentioned 27th July 1687, being reported by Redford; it was *alleged*, 1*mo*, Her liferent of 7000 merks was *donatio stante matrimonio*.—*Answered*, There was no contract of marriage, and this came in place of it; and though the husband was *dominus* of the sum, yet it was *limitatum dominium*, he could not gratuitously to her prejudice assign the annualrent of 3000 merks of it to his father. 2*do*, *Alleged*, She had restricted herself to the annualrent of 4000 merks by a discharge.—*Answered*, Homologations must be very clear, and the discharge is opponed.——THE LORDS found, That the first liferent provision conceived in favour of Anna Carmichael, taken by her former husband, is not a revocable donation, there being no former provision or contract of marriage betwixt them; but remitted to the Ordinary to hear the parties, whether the relict got right to other debts from her deceased husband after the said liferent provision; and also to be heard upon the discharge produced, or any other ground of homologation by the relict, of her husband's assignation to David Corsar, his father. And this last point being accordingly debated, and again reported by Redford, on the 10th of February 1688, the LORDS found her dis-