

No 33.

the extract of the decret under the clerk's hands, bearing the consent, is as sufficient as if he had subscribed the consent, and albeit it were not sufficient, yet Barry having subscribed the factory, which relates to the decret, it is a sufficient homologation and equivalent as if he had subscribed the consent. THE LORDS found that John Barry, by the granting the factory, did homologate the decret of preference, and therefore assoilzied from the reduction.

Sir P. Home, MS. v. 2. No 87c.

1694. January 26.

OGILVIE against SCOT.

No 34.

No homologation where there is ignorance of circumstances, which, if known, might have prevented acquiescence.

OGILVIE, relict of Scot of Brotherton, *contra* Scot of Comiston. She craved, that though the decret-arbitral did not decern Comiston to give her a real right for security of her liferent, that the Lords would supply; because if he (who was turned very infirm) died, she was loose, having renounced her jointure to her son, and he was not bound; and insisted on these two heads of fraud; *imo*, That she knew not then of her additional jointure, but that it was concealed from her; *2do*, That Comiston was denuded of the fee of his estate in favours of his nephew, Brotherton, before this decret-arbitral, and so was a mere liferenter, and this was also concealed from her; which, if she had known, she would not have submitted. THE LORDS thought it a fair offer, that Comiston was willing to reponer her against the decret-arbitral. But it was represented, *quod res non erat integra*, her bond of provision being either cancelled or discharged to her son, who was not in the process to give it back; therefore they fixed on the above mentioned points of fact, and ordained the parties, before answer, to depone thereanent.

Fountainball, v. 1. p. 638.

1714. July 13.

DAVIDSON against DAVIDSON and WEIR.

No 35.

An eldest son subscribed witness to his sister's contract of marriage, in which she assigned to her husband a bond of provision granted by her father, and execution was appointed to pass at the

THE deceased George Davidson, brewer in Leith, having granted an heritable bond to his three younger children for 9000 merks, George Davidson, the eldest son and heir, raised reduction of this bond *ex capite lecti* against his sister Elizabeth and her husband, whose share thereof was 3000 merks.

Answered for the defenders; That the pursuers had homologated the bond, in so far as he is a subscribing witness to his sister's contract of marriage with John Weir, wherein the said bond is specially assigned *nomine dotis*, and the person at whose instance execution is provided to pass for implement of the clauses in that contract.

Replied for the pursuer; *imo*, Homologation ought not to be sustained where it is ascribable to another cause, particularly 1st February 1676, Veitch *contra*

Pallat, No 28. p. 5646., it was found that subscribing witness to a writ did not infer a consent to the contents thereof, and *multo minus* can it imply a consent to the validity of the right conveyed or assigned; especially where the writ assigned may be valid as to one effect and not as to another, as in the present case, the bond assigned, though ineffectual as to the heritage, is effectual as to the moveables. For, though the bond be heritably conceived, yet when it is reduced upon the head of death-bed, it is no more heritable; but still the creditor, by virtue of the personal obligation, can affect the moveables; so that the pursuer's subscribing the contract may import his consent to the standing thereof, and its being a probative evident, but that can never be drawn to imply a ratification of all the deeds conveyed, and a consent to their being effectual farther than by law and their own nature they would otherwise have been; especially considering, that he never saw the bond before his signing the contract nor for some time after, nor yet did he know how it was conceived; and he as little knew what was assigned by his sister in the contract, never having read or heard it read at any time before signing witness thereto. *2do*, As to the other circumstance of the execution's being appointed in the contract to pass at the heir's instance, that was only done *moris causa*, without any particular consent or order, for his sister's security. And still there would have been such a clause of execution for implement of the provisions to the wife, suppose no tocher had been stipulated.

Duplied for the defenders; *imo*, There is a very great difference betwixt an indifferent person's being called to supply the form of law, and a brother-german's subscribing witness to his sister's contract of marriage, who had none other to patronize her, and at whose instance execution is expressly provided, which cannot be presumed to have been adjected without his knowledge; so that really this case is in very different circumstances from that of Veitch and Kerr *contra* Pallat, or the inferring homologation from the subscription of a witness adhibited only *pro forma*. Had the bride stipulated in general to pay a certain sum to her husband in name of portion, the pursuer might have been witness to the contract, and yet no homologation of the portion; but where there is a special bond assigned, wherein the pursuer is debtor as heir to the grantor, and upon the view of the assignment, the husband tied to terms, and where the pursuer is to be the executor against the husband, is it imaginable that he has not approved of the cause, without which that contract and execution could not subsist? For there might be a defence competent upon *causa data non secuta*.

THE LORDS found the pursuer's subscribing the contract as witness, and that execution is therein provided to pass at his instance, with his knowledge of the assignation made by his sister, sufficient to infer homologation.

Fol. Dic. v. 1. p. 379. Forbes, MS. p. 83.

No 35.
brother's instance for implement of clauses in the contract made in her favour. Found that he had thereby so far homologated the bond of provision as to prevent him from reducing it *ex capite lecti*.