

No 67.

A person having granted a bond of provision to his daughters on deathbed, payment of annualrents by the heir, being presumed to be done *ex pietate*, was found not to homologate the bond.

1671. June 28. HELEN HUME *against* LD. JUSTICE CLERK.

UMQUHILE ——— Hume of Renton having made several provisions to his children, and amongst the rest to Helen Hume, and having recommended the same to his son, now Justice Clerk; he gave a bond to the said Helen of 2000 merks, payable upon requisition of 40 days. The said Helen pursued registration of the bond, wherein it being alleged that any requisition made was past from, by acceptance of annualrent for terms after,

The Lords assoilzied from that charge until requisition were made, and new requisition being made since, before the extracting the absolvitor, the Lords sustained the same. It was further *alleged* absolvitor, because the bond granted by the father was done on death-bed, and the bond granted by the defender his son was in his minority, and he had reduction depending upon the said two reasons. The pursuer *replied*, That the defender had homologated the bond in question by a posterior contract, whereby he had appointed a yearly payment to his mother, in satisfaction of this and the other portions. The defender *duplicated*, That that contract was no homologation, being subscribed by him when he was minor, having curators, without their consent, and so is null by exception. The pursuer *triplicated*, That the defender had homologated the said contract and bond in question by these deeds. *First*, That after majority he had paid annualrent. *2dly*, That he had pursued exhibition and registration of the said contract, and thereupon had obtained the same registered, and the decret decerns letters to be directed at his instance thereupon. It was *answered*, That the payment of the annualrent, albeit voluntary, though it may exclude repetition of itself, it cannot infer homologation of the whole bond, especially the payment being made by a brother to an indigent sister. *3dly*, Payment of annualrent cannot homologate a contract which is null by exception. *4thly*, Any payment that was made was after the decret of registration, and so necessary; and as to the exhibition, the pursuing for a delivery of a writ doth not import the approbation of the contents of it, but only a calling for it, because the writ belongs to the subscriber thereof, though he may quarrel the obligation therein contained; and albeit the writ was ordained to be registered, yet there was neither charge nor execution used thereupon.

THE LORDS found the payment of the annualrent in manner foresaid not to import homologation, but they found that a writ subscribed by a minor without consent of his curators, as it might be ratified, so it might be homologated, and that it was *de facto* homologated by this decret of registration, containing neither reservation nor protestation for quarrelling the writ registered. It was further *alleged*, That the new requisition was null, bearing to proceed on a procuratory, and not bearing the procuratory produced. It was *answered*, The procuratory was not called for, and that the having of the writs, which the

requisition mentioned, did import a power to require. *2dly*, This is a dilator after a peremptor.

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THE LORDS found the allegiance upon the nullity of the requisition receivable after the peremptor, and sustained the requisition, the pursuer producing the procuratory, which was the warrant thereof, before extract. See REDEMPTION.

Fol. Dic. v. I. p. 381. Stair, v. I. p. 741.

1671. July 12. MARJORY MURRAY against ISOBEL MURRAY.

UMQUHILE ——— Murray having infest Isobel Murray his wife in two tenements, did thereafter by his testament, leave a legacy of L. 1000 to their daughter Marjory Murray, and gave other provisions to the said Isobel his wife, and provided his daughter to the two tenements, which testament the wife subscribes, and after his death confirms the same; but under protestation, that her confirmation should not prejudice her own right. The daughter pursues for the legacy of L. 1000, and for the rents of the tenements, and *alleges* that the L. 1000 must be free to her, without being abated by implement of the mother's contract, and likewise the two tenements by her mother's consent and subscription. It was *answered*, That the mother's subscription was a donation betwixt man and wife, for being to the man's daughter, whom by the law of nature he is obliged to provide, it was all one as if it had been to himself. *2dly*, Her subscription was obtained *in luctu*, her husband being near his death, and at his desire, *ex reverentia maritali*, and the confirmation can be no homologation, because of the protestation foresaid. It was *answered*, That it was *protestatio contraria facto*; and the wife had no necessity to do it, for she might have confirmed herself executrix creditrix.

THE LORDS found that there was here no donation between man and wife; but in respect the parties had not debated the effect of *reverentia maritalis*, ordained them to be heard thereupon, and found the protestation sufficient to take off the ratification, or homologation by the confirmation, and found the legacy of L. 1000 to be left only according to the nature of a legacy, out of the defunct's free goods, and would not exclude the relict, or any creditor. See LEGACY.

Fol. Dic. v. I. p. 383. Stair, v. I. p. 755.

* * * Gosford reports the same case :

MAJORY MURRAY having pursued her mother for entering her to the possession of a tenement of land whereof her mother was liferentrix, and for payment of L. 1000, conform to her father's testament testamentar, subscribed by the mother, it was *alleged*, That the said subscribed testament was not:

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A person in his testament appointed his wife executrix, and left a legacy to his daughter. The widow confirmed the testament under protestation, that it should not prejudice her own right. This was found to take off the allegiance of homologation, and so the legacy was found a burden upon the dead's part only.