

1685. February 20.

JOLLY *against* LAIRD of LAMINGTON.

No 31.

The taking a total discharge does not infer homologation. A partial discharge infers homologation as to the remainder.

WILLIAM BAILLIE of Lamington having revoked and raised reduction *debito tempore*, of a bond granted by him in minority, the process chanced to be lost, and being pursued *post annos* for payment, he procured a discharge from the creditor's assignee, which discharge being questioned by the cedent's creditor, as granted by a person whose assignation was in trust for the cedent's behoof, Lamington recurred to his revocation and reduction upon minority and lesion, and offered to prove the tenor thereof.

Against which it was *alleged*; That Lamington, who had homologated the bond not only after his minority, but even after the said pretended reduction, could not have the benefit thereof now, suppose the tenor were made up.

Answered for Lamington; That the taking a total discharge, either upon discharge or voluntary payment, *ad majorem securitatem*, cannot import homologation; though partial payments and discharges would infer homologation as to the remainder.

THE LORDS sustained the answer for Lamington, and allowed the tenor to be proven *incidenter*.

Harcarse, (HOMOLOGATION.) No 505. p. 141.

1686. January 6.

HEPBURN *against* KIRKWOOD.

No 32.

Subscribing witness held to infer consent. See No 26. p. 5646.

ESTHER HEPBURN, relict of Patrick Cunningham apothecary, pursues Margaret Kirkwood, spouse to Lindsay of Evelick, upon her ticket of 200 merks for the skaith the said Patrick suffered in 1681, when her son James Douglas put fire in Harry Graham's chamber. *Alleged*, The ticket is null, being granted by a wife *vestita viro*. *Answered*, The husband must be liable, because he is subscribing as witness, and it is a short ticket of seven lines only, and so he could not be ignorant of the substance of it. This being reported, "the LORDS found his subscription as witness in this case as equivalent to a consent."

Fol. Dic. v. I. p. 379. Fountainball, v. I. p. 389.

No 33.

Ignorantia juris, where a party subscribed a deed, found no reason for homologation.

1687. February.

CHARLES CHARTERS *against* ANDREW BARRY.

AN appriser claiming an equal share of the lands apprised with the first effectual appriser, who was more than year and day before him, upon this ground, that it was marked in the decret for mails' and duties, that the preferable appriser consented to bring him in *pari passu* with himself,

Alleged for the prior appriser ; That he disowned any consent ; and no such thing was subscribed by him, nor can the clerk's assertion bind it on him.

Answered ; The pursuer, after extracting of the decret of mails and duties, granted a joint factory with the defender for uplifting the rents of the tenement apprised, and applying to their two apprisings *pro rata* ; and the factory narrates the decret, though it mentions not the consent.

Replied ; It was *ignorantia juris* that made the defender subscribe such a factory, and so it can be no homologation of the consent.

THE LORDS sustained the factory as a homologation of the decret and consent therein expressed.

Harcarse, (HOMOLOGATION.) No 507. p. 142.

. Sir P. Home reports the same case.

THOMAS and Alexander Weirs having adjudged certain tenements in Edinburgh from John Scot, and thereupon being infest, and having pursued for mails and duties before the Bailies, and there being compearance made for John Barry who had adjudged within year and day of the Weirs, and craved to come in *pari passu* with them ; and likewise Charles Charters having compeared, who had adjudged within year and day of Barry, but not of the Weirs, and craved to come in *pari passu* with the prior adjudgers, upon the payment of a proportional part of the expenses of passing infestment to the Weirs the first adjudgers ; and, upon Barry's consent, Charters being allowed to come in *pari passu*, upon which there being a decret extracted, and the creditors having granted a factory for uplifting of the rents, by which the factor was to be countable to creditors for their respective interests ; and Barry having, thereafter, raised a reduction of the decret and factory against Charters, upon this reason, that the act of Parliament allowing adjudgers and comprisers to come in *pari passu*, is only in the case of a comprising or adjudication led within year and day of the first effectual apprising or adjudication ; but, seeing Charles is not within year and day, the Weirs, who were the first adjudgers, and who had completed their adjudications by infestment, albeit they be within year and day of Barry, who was within year and day of the Weirs, who had the first effectual adjudication, they cannot be allowed to come in *pari passu*, neither with the Weirs nor with Barry ; *answered*, That it appears by the decret for mails and duties before the Bailies, that Barry consented that Charles should come in *pari passu* with him, and he has homologated the said decret, of consent, in so far as he did subscribe a factory with Charters and the other creditors to a factory for uplifting of the rents and paying of the same, conform to the creditors' several interests mentioned in the decret. *Replied*, That the mentioning Barry's consent in the decret is not sufficient, unless the consent had been subscribed, especially being but a decret of an inferior court. *Duplied*, That Barry having consented judicially,

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*