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ferred by
payment of
the money
without a
charge.

ing, ' to be kept by him with his own, upon the deponer's hazard ;' and that the pursuer for his security, did thereafter go to Dundee and took his goods thither, where he lost the said sum and all his other goods, by the English taking the town by storm and plundering it; yet Fiddes convened him before the English officers at Leith, who most unjustly decerned him to pay the sum, and put him in prison till he was forced to give bond for it, and thereafter paid it unto this defender his assignee, who concurred with him and knew the whole matter; and now craved repetition *condictione indebiti*. The defender *alleged* absolutor, because the pursuer made voluntary payment, and so homologated the decret, and never questioned the same till now. The pursuer *answered*, it was no homologation nor voluntary, he being compelled to grant it, and expected no remeid from the English Judges, with whom the officers had so great power; neither could this be counted any transaction, seeing the whole sum was paid, nor any voluntary consent nor homologation, being to shun the hazard of law; so that though that these officers had been a judicature, if in obedience to their sentence, he had paid, and after had reduced the sentence, he might have repeated what he paid, much more when they had no colour of authority. THE LORDS repelled the defence of homologation. It was further *alleged* for the defender, absolutor, because he offered him to prove, he required his money from the pursuer, before he went to Dundee, and got not the same; and it was his fault he took it to Dundee, being a place of hazard. The pursuer *replied*, That after the said requisition, he made offer of the money, and Fiddes would not receive the same, but continued it upon his hazard as it was before.

THE LORDS repelled the defence, in respect of the reply; and because the defence and reply were consistent, ordained the parties to prove, *hinc inde*; the pursuer his libel and reply; and the defender his defence.

Stair, v. 1. p. 55.

* * * This case is reported by Gilmour, No 2. p. 2923.

1665. November 14.

BARBARA SKENE and Mr DAVID THOIRS *against* Sir ANDREW RAMSAY.

No 20.

In an action at the instance of a relict against her husband's heir to make up what was wanting of of the liferent stipulated to her in her

BARBARA SKENE being provided by her contract of marriage with umquhile David Ramsay, to eighteen chalders of victual, or 1800 merks, her husband having acquired the lands of Grangemuir, worth ten chalders of victual, she pursues Sir Andrew Ramsay, as heir to his brother, to make her up the superplus. The defender *alleged* absolutor; because he offered him to prove, that the said Barbara stood infeft in the lands of Grangemuir upon a bond granted by her husband; which bond bears, in full satisfaction of the contract of mar-

riage, by virtue of which infestment, she having no other right, she had possessed five or six years after her husband's death, and thereby had accepted that right and had homologated the same. It was *replied*, That the bond being a deed of the husband's, a clause foisted thereinto, so far to the detriment of his wife, and the infestment not being taken by her, but by an attorney, her possession cannot import homologation thereof, because homologation being a tacit consent, is not inferred, but where the homologator cannot but know the right homologated, and can do the deeds of homologation no otherwise, but by virtue of that right; neither of which holds here, because the personal obligation in the contract was a ground for the wife to have continued her husband's possession, and would have excluded his heirs, if they had quarrelled; and, not only the clause must be presumed to be without the woman's knowledge, but the bond itself and the infestment, especially considering the simplicity of wives and their confidence in their husbands, who, if this were sustained, would easily deceive them. It was *duplied* for the defender, That he offers him to prove, that the pursuer did not continue her husband's possession, but did begin possession, her husband being never in possession before his death, and that she set two several tacks, expressly as liferenter, and the third, with consent of Mr David Thoires her husband being an advocate; and so she cannot be presumed to have been ignorant, but on the contrary she must be presumed to have known the right, and could never denominate herself liferentrix by a personal obligation to infest her in so much victual and money, without mentioning any land in particular; and her acceptance, though to her detriment, may be the more easily presumed, because she had two children surviving her husband, in whose favour the restriction did accresce, and her husband did secure her in all that he had; but now *ex post facto*, the children being dead, she could not return upon Sir Andrew, her husband's brother, contrary to her homologation.

THE LORDS sustained the defence and duply; for they thought, albeit ignorance might be presumed in a wife, *de recente et intra annum luctus*, yet she having continued for so many years, and doing so many deeds, expressly as liferenter, and that the bond was not clandestinely lying by her husband, but in a third party's hand who had taken the infestment, they thought, in that case, ignorance was not to be presumed, but knowledge.

Fol. Dic. v. 1. p. 378. Stair, v. 1. p. 307.

* * Gilmour reports the same case:

BARBARA SKENE and Mr David Thoires advocate, her present husband, pursue Sir Andrew Ramsay, now provost of Edinburgh, as charged to enter heir to the deceased Lieutenant Colonel David Ramsay his brother, first husband to the said Barbara, for implement to her of her contract of marriage, whereby he was obliged to infest her in lands worth eighteen chalders of victual during her

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contract of
marriage, it
was alleged
that she was
infest in cer-
tain lands up-
on a bond
granted by
her husband,
bearing to be
in full of the
contract, and
had possessed
the lands for
5 or 6 years.
Answered,
the bond was
a deed of her
husband, and
the infestment
was taken by
an attorney;
she cannot,
therefore, be
presumed to
know that it
contained
such a clause.
The Lords
sustained the
homologa-
tion.

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life, or to pay her 1800 merks yearly. It was *alleged* absolvitor ; because by a disposition made by him to her, he had disposed to her the lands of Grange-muir, acquired by him from the Laird of Ardross, and that in full satisfaction to her of her contract of marriage, whereupon she is infeft. It was *answered*, *Non relevat*, unless it were also alleged, that she has also accepted the right in full satisfaction, which the defender cannot say, because the disposition nor sasine was never in her custody, nor knew she of it, till the intending of the cause ; nor can it be thought that ever she would have accepted it, in full satisfaction, being much to her disadvantage. *Duplied*, That she cannot be heard, because law and reason must presume, that she did accept it, and that she has homologated the same ; because there being nothing in her contract, but a personal obligation to provide her *ut supra* in no particular lands ; and which lands above specified, being acquired by her husband only about half-a-year before his death ; she thereafter entered, not only to the uplifting of the mails and duties of the said lands, but twice set tacks thereof to the tenants as liferentrix of the same, being so designed in the tack. As also, after her marriage with her second husband, she of new set tacks with his consent ; and so by several acts of homologation, has acknowledged and accepted the said right ; which lands, with some moveables, whereto she was executrix and universal legatrix, were all the estate belonging to her husband. *Triplid*, That she might lawfully uplift the mails, her husband being obliged to infeft her in lands worth eighteen chalders victual in general, he having no other lands but these, which cannot infer against her to have accepted the same in full satisfaction, or any homologation, she not having known the alleged deed to be homologated. Likewise, she is content to make faith, she never knew it, and it did remain always in the notary's hand who wrote it, till it was produced in the process ; neither was she acceptor of the sasine following thereupon, or any attorney appointed by her, the attorney being a near relation of the first husband's ; and, if such fraudulent clandestine deeds should be sustained to prejudice relicts, they may be very easily excluded from the benefit of their contracts of marriage, whose case is very favourable, especially where they bring large portions with them as the relict did. Nor was this deed made known, either to herself or to any of her relations. And, as to her setting of tacks, and designing herself liferentrix, she had probable reason so to do, her husband being obliged to infeft her in eighteen chalders victual ; and having pursued this land, and no other, she might very well call herself liferentrix, which must be interpreted *pro tanto*, and not *pro toto*.

Notwithstanding whereof, the LORDS sustained the allegiance and duply ; and thereafter, there being a reduction raised *super dolo*, and in effect *eisdem deductis* ; and the cause being heard in *præsentia*, the LORDS assoilzied in January thereafter.

Gilmour, No 166. p. 116.

. This case is also reported by Newbyth :

BARBARA SKENE and Mr David Thoires, now her spouse, for his interest, pursue Sir Andrew Ramsay, provost of Edinburgh, as representing his brother, David Ramsay her first husband, for implement of and fulfilling to her her contract of marriage, and specially for infesting her in eighteen chalders of victual during her lifetime. It was *alleged* absolvitor; because it is offered to be proved, that the said umquhile David infest the said Barbara Skene in the lands of Grangemuir, in implement and fulfilling to her of all that she could claim through her contract of marriage, whereinto she did enter to the possession of the said lands since her husband's decease, and as yet does remain in possession of the same. To which it was *replied*, That albeit her infestment proceeded upon a bond of provision, bearing that the same should be in satisfaction of all that she could claim by her said contract of marriage; she cannot be understood to homologate the said bond and infestment, by entering to possession, unless the said bond had been delivered to her as her own evident. *2do*, She being in possession of the said lands with her husband the time of his decease, she might lawfully continue her; specially by the contract of marriage, her umquhile husband being obliged, in case his estate were converted into land, to provide her to eighteen chalders of victual or 1800 merks. Likewise, by her husband's testament, she was appointed tutrix to her children, who might, and did possess the same as apparent heirs to their father. To this it was *replied*, That she being infest in the said lands in satisfaction of all that she could crave, and entering to the possession thereof after her husband's decease, law and reason presume, that her entry thereto was in contemplation of her own right, seeing her possession cannot be ascribed to any other right. *2do*, The said Barbara has homologated the said right and infestment, because she has possessed the said lands since her husband's decease, has set tacks for seven years to run, and hath designed herself liferentrix thereto. The obligation in the contract of marriage could be no ground whereupon she could possess, there being no special lands mentioned in the contract, and there was no right competent to the said Barbara, but only a personal obligation and action for implement; neither is her conjunct possession with her husband, nor her possession as tutrix, of any moment, because the said David her husband, was never in the natural possession himself, having deceased half-a-year after buying of the land from Ardross. *2do*, She is designed in the tacks liferentrix, and not tutrix. *3tio*, Both she and her second husband have continued her own begun possession, and set tacks, designing herself liferentrix.—THE LORDS found the pursuer her setting of tacks, and designing herself liferentrix, to be deeds of homologation of the bond of provision and sasine following thereon, whereby the contract of marriage was innovated; and therefore assoilzied the defender from the conclusion of the summons.

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Newbyth, MS. p. 39.