And adhered, upon advising a reclaiming petition for the pursuer, with answers for the defenders. No 46.

For Sir Alexander M'Kenzie, *Ro. Macqueen.* For Hector M'Kenzie, *James Boswell.*

A. E. *Fac. Col. No 61. p. 298.*

1774. *January* 13. WILLIAM STEEL *against* THOMAS and DAVID STEELS.

No 47.
Where there is one deed for one sum, in favour of more persons, *ex eadem causa*, payment made in part, though not to every one of them, infers homologation of the whole.

THOMAS STEEL of Netherhouse, the father of these parties, by a deed, executed the 29th June 1764, for the love and favour he bore to James, Thomas, and David Steels, his children, did, with the special advice and consent of William Steel, his eldest lawful son; and the said William Steel for himself, and they both, bound them, their heirs, &c. jointly and severally, to make payment to the said James, Thomas, and David Steels, equally between them, of the sum of 6000 merks, Scots money, at the first term of Whitsunday or Martinmas after the decease of the said Thomas Steel, with penalty and annualrent, &c.; which sum of 6000 merks is thereby declared to be over and above the executry that will fall to them through the death of the said Thomas Steel; as also, they bound themselves to make payment of an annuity of L. 30, Scots money, to Anne Weir, spouse to the said Thomas Steel, while she should remain a widow, after his decease, besides the provisions in her favour by the contract of marriage.

William Steel, the eldest son, within the *quadriennium utile*, instituted a reduction against his two surviving brothers, Thomas and David, James being by this time dead, to have the said bond set aside, as having been elicited from his father while on death-bed, and *quoad* him, only signed by one notary, before two witnesses, and from the pursuer himself, while he was under age, to his enorm hurt and lesion; especially considering the smallness of the land estate he derived from his father, attended with so many burdens, and that his younger brothers were *aliunde* provided to the whole of the father's executry, which was considerable.

Objected for the defenders; That the bond under challenge had been homologated by the pursuer after his majority, by payment of the additional annuity to his mother, and of the annualrents of the sums provided to the younger children, and that, on that account, he was barred from setting aside the bond. And the Lord Ordinary, 'upon considering the debate, and the receipts of payment produced, whereby it appears that William Steel, pursuer, made sundry payments to and for the defenders, after his majority, repelled the reasons of reduction, and assoilzied the defenders.'

Pleaded in a reclaiming bill, upon the point of homologation; As the bond is intrinsically null and void, acts of homologation are not sufficient to support

No 47. it. In so far as the pursuer made payments after his majority, the defenders may be entitled to avail themselves of these payments, so as not to be liable in repetition; but, because a man made payments voluntarily of part of a sum constituted by a null obligation, and to perform which he could not be compelled, there seems to be no good reason why the payment of a part should bind him in payment of the whole, if thereafter he should find it an expedient measure to stop short; and, agreeably thereto, it seems to have been determined, June 1726, Katharine Harvey against Gordon, No 93. p. 5712; *vide* also, 30th June 1758, Ferguson against M'Pherson, *voce* WRIT.

The plea of homologation is, at the best, but an unfavourable plea, as the tendency of it is indirectly to subject a person to a debt or obligation, by a presumed consent, to which otherwise the person was not liable: For that reason it is, that homologation is never presumed, when the act or deed from which it is inferred, can be attributed to another cause. And, for the same reason, it is not to be extended farther than the implied consent arising from the act or deed of homologation must necessarily carry it. In the present case, by the conception of the bond in question, James, Thomas, and David Steels, upon the death of their father, were each of them creditor for one third of that sum; and the one had no more connection with the other, than if a separate obligation had been taken, payable to each of them, for the sum of 2000 merks.

In this view, it is very clear, that any act inferring an approbation or homologation of the obligation conceived in favour of any one of the brothers, could never be understood as an approbation of the separate obligation which he had granted to the other two brothers. Where an undoubted good objection did lie against all and each of the obligations he came under, it was *res meræ voluntatis* in him, either to lay hold of the objection, or to depart from it. His pleading the objection against any one of his brothers, laid him under no obligation or necessity to plead it against the other two; and, by the same rule, his voluntarily fulfilling his obligation in favour of any one of his brothers, does by no means necessarily import an approbation of it as to the other two brothers.

This would clearly be the case, if three separate obligations had been granted to his three brothers; and it does not occur how it can make any difference, when, though in one deed, the right of each brother is separately and distinctly ascertained. A document taken by any one of the brothers for his share of the debt, would not save the interest of the other two from prescription; nor would a payment made by the pursuer to one of the brothers, be held as a document of interruption, *quoad* the interest of the other two; and, if so, the pursuer can discover no principle upon which it can be maintained, that the pursuer's waving the objection that lay against the bond, as to one of his brothers, and so far conferring a favour upon him, should import a waver of his objections against the bond, as to the other two creditors.

No 47.

In fine, the payments which the pursuer made voluntarily, and which he was not obliged to make, cannot lay him under an obligation to make any further payments to any of his brothers. But, at any rate, this is perfectly clear, that the payments which the pursuer made on account of two of his brothers, Thomas and David, whatever effect these payments may have as to the supporting their right and interest in the bond, can never tie him down to depart from the objection he had against it, *quoad* the share of his deceased brother James, whose right he did not acknowledge by payment, or by any act or deed after majority.

Answered; The defender's homologation of his father's settlement, to which he was himself a party, after he became of age, by making payment to his brothers, or their mother upon their account, (she having been appointed one of their tutors) must effectually bar him from bringing any challenge of it now, and must render it equally valid as if he had been of perfect age when it was executed.

The pursuer, indeed, contends, that the deed under challenge is intrinsically null and void; and, therefore, cannot be supported by any acts of homologation, and appeals to two decisions: But neither of these decisions are in the least applicable to the present case. The deed to which Katharine Harvey was made a party was absolutely null and void, *quoad* her, in respect she was under pupillarity at the time, and was, of course, incapable of acting for herself in any shape: And, in the case of Ferguson, the indenture was likewise null and void; or, at least, could only be sustained as an obligation to the extent of L. 100 Scots, in respect it was only subscribed by one notary; but the bond of provision now in question, was by no means null, either *quoad* the pursuer or his father. If the pursuer had not concurred in granting it, he might, perhaps, have challenged it upon the head of death bed; but that ground of challenge was entirely cut off, by his signing it himself; and, though it might have been competent to him to have set aside his concurrence upon the head of minority and lesion, if he had not ratified it after his majority; yet still it was not on that account null and void; because he, at that time, was equally capable to grant a deed of that sort, as if he had been of full age.

2*do*, The deed in question does not contain separate obligations in favour of each of the younger children, but one obligation, to the amount of 6000 merks, in favour of them all; so that payment to one must be considered as an acknowledgment or homologation of the deed *quoad* the whole. And so it was expressly found, Erskine against Erskine, No 87. p. 5703, which is thus marked in the Dictionary: 'One upon death-bed having executed a 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 a document taken by any one of the brothers for his share of the debt, would not save the interest of the other two from prescription, is nothing to the purpose. One of three creditors, in an obligation, may neglect to demand what is due to him; and as,

No 47. in that case, he is supposed to have relinquished his claim, he can no longer insist in it, although the other two have taken care to preserve their claims; but where, by one obligation, an individual becomes debtor to three or more creditors, his making payment to one of them, must infer an homologation of the deed *quoad* the whole; because, by so doing, he acknowledges it to be a just deed, and departs from any objection that might lie against it in point of form.

3*tio*, Although the pursuer does now acknowledge his having made payments after his majority to the two defenders, and only disputes his having made payments after that time, to his brother James; and, therefore, insists that he cannot be liable in payment of what is still due to James, his mode of conducting the cause before the Lord Ordinary was very different. His plea was then directed against the shares of the two defenders; and he accordingly admitted, that he had made payments, after his majority, to his brother James. That he cannot now be allowed to retract. But it is the less necessary to insist upon this point, since the payments made to their mother, on her own and the defender's account, must be considered as a homologation of the bond *in toto*; and must, therefore, equally bar the pursuer from bringing it under challenge, so far as concerns the interest of his brother James.

'THE COURT adhered to the Lord Ordinary's interlocutor.'

Act. *R. Macqueen.* Alt. *Wight.* Clerk, *Tait.*

Fol. Dic. v. 3. *p.* 272. *Fac. Col. No* 99. *p.* 255.

1776. *December* 17. RIG *against* DURWARD and THOM.

No 48.
Lease of lands *ubi dolus dat causam*, homologated by payment of rent.

RIG, who was under contract to furnish stones for paving the streets of London, took a lease from Durward of a piece of ground which the latter assured him contained stones of the best quality, and of which the lease had been eagerly requested by many people on that account. Rig held the possession for three years and paid the rent, but after laying out above L. 50 in experiments, found the stones were good for nothing. Durward becoming bankrupt, and having disponed this lease with his other effects to his creditors, Rig brought a reduction of the same on the head of fraud. The defence was, homologation, by continued payment. THE LORDS repelled the reasons of reduction. *See* APPENDIX.

Fol. Dic. v. 3. *p.* 272.