

1734. *January.*SIR JOHN HOME of Manderston *against* MARGARET TAYLOR, and her Husband.

No 81.

A TACK let to a woman, secluding assignees, being reducible upon her marriage, it was found, that the letter's accepting several year's rent from the husband was no homologation to bar reduction; because, while the tenant was in possession, he could do no other than take the rent; and the accepting of it from the husband was doing no more than taking payment of what was due to him, without any intention to pass from his privilege of reduction. *See APPENDIX.*

*Fol. Dic. v. 1. p. 382.*1743. *December 14.*FORDYCE, and his Tutor-in-law, *against* The RELICT and younger CHILDREN of FORDYCE.

No 82.

A person in his testament nominated his eldest son to be his executor, appointing him to manage certain tacks, and to account for the profits to his mother. The son survived his father only a year, during which time he accounted to his mother for the rents falling due. On his death, his heir refused to account for the rents, on the ground, that his predecessor's father could not dispose the tacks by testament. The Lords found that the executor had homologated the testament, and therefore repelled his heir's defence.

GEORGE FORDYCE, some time Provost of Aberdeen, did, by his testament, nominate his eldest son and heir to be his executor, and universal intromitter, and further appointed him to manage certain leases of the estate of Marishall, which he had from the York Buildings Company, to make up accounts of his intromission with the rents of the said lands yearly during the subsistence of the tacks, and after deduction of the rent payable to the Company and charges, and of L. 200 Scots yearly for his own pains, to account for the profits to his mother, the relict, for the maintenance and education of the younger children.

After the testator's death, the said eldest son accepted the nomination of executor, confirmed the testament, entered upon the management of the leases, and settled an account with his mother of the rents that fell due the first year after his father's death, in which he debited himself with the produce of the lands, took credit for the rent and charges, &c. and for the L. 200 allowed himself for pains; and the docquet bore the balance to be paid to Mrs Fordyce for the maintenance and education of the younger children.

The eldest son dying before another year became due, leaving an infant son, the tutor refused to account for the next year till he should have a decree for his warrant; and to the process brought against him at the instance of the relict, *objected*, That the Provost could not dispose of the leases or the profits which were thence to arise after his death by testament.

And the pursuer having *replied*, upon the homologation of the defender's father the heir, by the account above-mentioned, the LORDS 'sustained the reply;' although it was argued, that a null right conveyed nothing, and that an heritable right cannot be conveyed by acts and circumstances inferring the

consent of the heir, but only by a direct conveyance in writ; for example, suppose that a man should, in his testament, dispoise a part of his land-estate, and that, after his death, his heir should, on the narrative of such disposition, pay one year's rent thereof to the dispoinee, the disposition would not by such homologation be rendered effectual. For the Lords considered the case of a tack to be different, which, as it requires no particular form of deed to its conveyance, may be supported by an act of the heir, approving his father's deed.

*Fol. Dic. v. 3. p. 273. Kilkerran, (HOMOLOGATION.) No 1. p. 255.*

No 82.

1760. July 15.

CHRISTIAN ANDERSON *against* ANDREW and WILLIAM ANDERSONS.

WILLIAM ANDERSON executed a disposition of his lands of Rashiegrain, in favour of William Anderson, his brother's second son, passing by Andrew, the eldest; burdening him with payment of a legacy of L. 50 Sterling to Christian Anderson, his niece. This disposition was confessedly executed upon death-bed; and therefore William, the dispoinee, agreed to give up the lands to his brother Andrew. For that purpose he executed a deed, by which he renounced and gave up all right or title he could have to the lands by virtue of this disposition, in favour of Andrew. After this renunciation, there follows a clause, bearing, That in case Andrew should think proper to make up his titles upon the procuratory of resignation contained in this disposition, William dispoines to him the lands as contained in the said disposition, and assigns to him the procuratory, &c. He then provides in the following words: 'It is hereby declared, That my granting this present right and disposition to my brother, and his accepting thereof from me, shall not subject him or me to the payment of any of the legacies with which the said disposition is burdened; and particularly, that my said brother shall be obliged to free and relieve me thereof.'

Andrew executed the procuratory contained in this disposition, and was thereupon infeft. Christian Anderson brought a process against both the brothers, for payment of the legacy left to her by her uncle; and the LORDS found Andrew liable, but pronounced no judgment with regard to William.

*Pleaded* in substance for Andrew; That the disposition in question was, to all intents and purposes, null and void: That it was in his power to have brought a reduction of it; in which case, the pursuer's legacy, as well as the rest of the disposition, would have fallen to the ground: That the method he took to make up his titles to the estate, was only intended to save the expense of a service, and by no means to ratify or homologate the disposition: That this was declared in the renunciation itself, where it was particularly provided, that that deed should by no means be understood as an homologation of the le-

No 83.

A person on death-bed dispoined his lands to a younger brother with the burden of a legacy to his niece. The dispoinee, in consideration of the deed being reducible *capite lecti*, executed a renunciation of it in favour of the heir at law, and with the view of saving the latter the expense of a service, he assigned to him the procuratory in the disposition, with a clause providing, that the granting or accepting that right, should not subject either of them to the payment of any legacies. The heir being infeft on this procuratory, the Court found, that having homologated the disposition, he was liable in payment of the legacy.