No 82.

consent of the heir, but only by a direct conveyance in writ; for example, suppose that a man should, in his testament, dispone 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 disponee, 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.

1760. *July* 15.

CHRISTIAN ANDERSON *against* ANDREW and WILLIAM ANDERSONS.

No 83.
A person on death-bed disponed his lands to a younger brother with the burden of a legacy to his niece. The disponee, 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.

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 disponee, 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 dispones 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 burden-'ed; 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. gacies: That Andrew had a separate right to the lands, which he virtually made use of when he compelled William to grant the renunciation in question.

Answered for the pursuer; That deeds executed upon death-bed are not *ipso jure* null, but only reducible at the instance of the heir: That William, by conveying the procuratory to Andrew, subjected himself to payment of the legacies; and Andrew, by accepting of this conveyance, became bound as his successor whatsoever. He undoubtedly accepted of the deed, because he took infeftment on the precept of sasine therein contained; and upon that title possesses the lands of Rashiegrain to this day: That the declaration contained in the disposition cannot be regarded; for that the defender cannot pretend to take advantage of the disposition, and at the same time refuse to submit to the burdens therein contained.

"In respect that Andrew Anderson made up his titles to the lands upon the disposition in question, and possesses thereupon, therefore find him liable to the pursuer in payment of the legacy of L. 50 Sterling, with annualrent and penalty, as contained in the disposition made by Rashiegrain."

Act. *Sir David Dalrymple.* Alt. *Swinton.* Clerk, *Kirkpatrick.*

P. M. *Fol. Dic. v.* 3. *p.* 272. *Fac. Col. No* 233. *p.* 426.

SECT. VIII.

Homologation of part, whether Homologation of the whole.

1607. *March* 4. LORD INCHAFFRAY *against* OLIPHANT.

No 84.

A DECREE arbitral being partly *ultra vires*, this nullity will not invalidate the decree so far as *intra vires*, nor will the parties obtempering the decree, so far as effectual, be understood a homologation of that part which is null.

Fol. Dic. v. 1. *p.* 382. *Haddington, MS.*

*** See this case, No 1. p. 5063.

1662. *November* 22. PRIMROSE *against* DUIE.

No 85.
Homologation of a decree arbitral

PRIMROSE having pursued a reduction of a decreet arbitral betwixt him and Duie, the said Duie *alleged* homologation of the decreet, by acceptance