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

and payment of a precept directed to him by Primrose, for payment of a part of the sum contained in the decreet, bearing expressly to be in satisfaction of a part of the decreet; which was found relevant, and admitted to Duie's probation; for proving whereof, Duie produced the precept, acceptance, and discharge.—It was *alleged*, That the writs produced proved not to the homologation of the decreet as to the article controverted, being the freight of a vessel, which Duie offered to prove to have been decerned to have been within the third part of the just avail, and the precept bore payment of five dollars, decerned for the deterioration of the tackling, by virtue of a promise.

No 85.
quoad one of many articles, not sufficient to homologate the whole.

THE LORDS having considered the decreet arbitral and precept, found it proved not the homologation as to the point in question, because the decreet contained diverse heads. The precept bore to pay the deterioration of the tackling, and bore expressly, that the same was uncontraverse, and founded upon the defender's promise.

Fol. Dic. v. 1. *p.* 383. *Stair, v.* 1. *p.* 144.

1663. *February* 21. ANNA WARDLAW *against* FRAZER of Kilmundie.

No 86.
An heir having paid part of a legacy of an heritable bond, the whole legacy was sustained, though otherwise null.

ANDREW WARDLAW having a wadset upon some lands of the Lord Frazer, the debtor raises suspension of multiplepoinding against Anna, sister and heir to the said Andrew Wardlaw, and Frazen of Kilmundie, pretending right by a legacy from the defunct to the said sum.—The heir *alleged*, That it could be liable to no legacy, being heritable.—The defender *answered*, 1*mo*, The legacy was made *in procinctu belli*, where there was no occasion to get advice of the formal and secure way of disposing of the wadset, but the will of the defunct appearing *in eo casu*, it must be held as effectual as *testamentum militare in procinctu*, which needs no solemnities. 2*dly*, The heir's husband hath homologated the legacy, by discounting a part thereof.—It was *answered*, That no testament whatever can reach heritable rights with us. 3*dly*, That the homologation of the husband cannot prejudge his wife nor himself, *quoad reliquum* not discounted.

THE LORDS found the heirs had only right, except in so far as the husband had homologated the legacy, which they found to prefer the legatar to the whole benefit the husband could have thereby *jure mariti*, but not to prejudice the wife thereafter. See TESTAMENT.

Fol. Dic. v. 1. *p.* 382. *Stair, v.* 1. *p.* 186.

1682. *January*. ERSKINE *against* ERSKINE of Balgownie.

No 87.
A person on death-bed executed a

SIR JOHN ERSKINE of Balgownie having granted a bond of provision to his wife's children, whereby every one of them was provided to 2000 merks, and