No 68.

obligatory; likeas there was a reduction raised upon these reasons, 1*mo*, That it was subscribed in *mærore et luctu*, she being induced by her husband who was then a-dying; 2*do*, It was *donatio inter virum et uxorem*, and so revocable; 3*tio*, The L. 1000 left in testament was but a legacy, which could not be paid, the debts being greater than the moveables. It was *answered* to the *first*, That no deeds granted *in luctu et ob reverentiam maritalem*, were reducible by our law, which being a general case, the LORDS reserved to be debated *in præsentia*. To the *secoud*, It was *answered*, That the subscribing of the testament, bearing the disposition of a liferenter's right of a tenement of land was in favours of the daughter, and not of the husband, and so was not *donatio inter virum et uxorem*. To the *third* it was *answered*, That the L. 1000 being for the provision of a bairn, the mother having both subscribed to the same, and confirmed the testament, did make herself liable, and could not exhaust the inventory by any debts due to herself by contract of marriage. THE LORDS did find, that the mother subscribing as to her liferent right in favours of her own daughter, albeit in her husband's testament, it was not *donatio inter virum et uxorem*, and could not be revoked; but for the L. 1000 left by the father, they found that it was a legacy, and that the mother having consented to it, did not prejudge her as a lawful creditor by her contract of marriage, and that it could only be due *deductis debitis*.

Gosford, MS. No 375. p. 184.

1671. *November* 30. HOME *against* CORSAR.

No 69.

The receiving two years' duty as a tack-duty, found not to infer homologation of the right as a tack, which was contended to be a wadset.

UMQUHILE Alexander Dickson by a contract betwixt him and Robert Corsar, for the sum of 400 merks, wadsets his lands of Stanifauld, and in the same right there is mention made of a tack, or tack-duty during the non-redemption. Thereafter he infefts Anna Home his wife in liferent of the same lands. She pursues Corsar to remove, who *alleged* absolvitor, because he possesses by a tack set by the husband before her infeftment, which right the pursuer hath homologated, by granting two several discharges, mentioning and relating this right as a tack. The defender *answered*, That this right produced being clearly a wadset, having all the clauses ordinary in wadsets, though in one place it mentions a tack, yet that is only of the teinds of the lands, and so it being an imperfect right, on which no infeftment followed, and not being a clear tack, it cannot defend against the pursuer's real right by infeftment. 2*do*, Albeit it were a clear tack, yet it is null, having no determinate ish, but to endure during the not redemption, which may be perpetual; and such tacks have not been sustained by the Lords against singular successors, and if sustained, they would be of dangerous consequence; for thereby lands might be set for sums equivalent to the value, which would be known by no register; and as to the homologation, it can operate no more than as to the years discharged, and can-

not import a consent to this right in all time coming; and though the discharge do mention this right as a tack, an erroneous designation cannot operate against the tenor of the writ; and as a superior receiving a feu-duty, may yet quarrel and impugn the vassal's right as to years subsequent, and will not be excluded by homologation upon receipt of the feu-duty, so may the pursuer quarrel this right, though she hath received two years duty. No 69.

THE LORDS found, that the two years discharges did import no homologation as to years subsequent; but as to the question, whether a tack having no other ish but till a sum were paid, should be valid against a singular successor, there were decisions produced out of Durie for either party, which seemed contrary, yet the Lords did not determine the point, but found the defender's right was no tack.

Stair, v. 2. p. 14.

1673. *February* 11.

ADAM CALDWALL *against* MARGARET CALDWALL and CHALMERS her Tutor.

No 70.
Receiving of bonds by a minor after majority and getting payment, is no homologation of a decree of exoneration at the tutor's instance, if the decree be reducible, but the tutor will be obliged to account *de novo*.

In a reduction of a decreet of exoneration obtained at the instance of Margaret Caldwall and William Chalmers her tutor, as representing her father, who was tutor to the said Adam, and died during the time of the tutory, upon this libelled reason, that the said Adam was not compearing either by his tutor or his procurator employed by them, but the said William Chalmers being tutor for the said Margaret, who, as representing her father, was liable to count and reckoning, did only give in the charge and the discharge whereupon the decreet of exoneration was founded, in which charge there being many material articles omitted, the pursuer being then minor, ought now to be reponed against the same, and the defenders ordained to count and reckon *de novo*. It was *alleged* for the defender, That reduction could not be sustained, because the pursuers had homologated the decreet since his majority, in so far as the defenders being decerned to deliver three bonds of borrowed money taken by the deceased tutor in name of the pursuer, which were found to be the only means belonging to him, he accordingly did receive the same from William Chalmers, and got payment of the sums therein contained. 2*do*, The reduction being chiefly against Margaret Caldwall, who was then an infant, and is yet under tutory, it were against law and reason to ordain her to count *de novo* for her father's intromissions, which is impossible for her to know; so that the reduction can only be sustained against Chalmers, (who had received a factory to uplift these sums of money), upon deeds of malversation alleged committed by him. It was *replied* to the *first*, That the receipt of the bonds was only from Chalmers, who had received a factory to uplift the sums of money, he having retained the same after the decreet, and the saids bonds being uncontrovertedly the pursuer's, his receiving payment after his majority, of the sums which were only a