

No 9.

which now subsists. It is evident, that, according to the defender's plea, a popish heir might, by withdrawing himself into foreign parts, be altogether exempted from taking the *formula*; were this plea sustained, the provision made by the statute 1700, for the security of the protestant religion, would be rendered ineffectual.

"THE LORDS repelled the objections proponed against the service, and allowed the service to proceed."

Act. Miller.

Alt. Sir J. Stewart, Ferguson.

Clerk, Justice.

D.

Fol. Dic. v. 4. p. 38. Fac. Col. No 187. p. 278.

\* \* \* This cause was appealed :

The House of Lords "ORDERED, That the interlocutor complained of be affirmed, with this variation, after the words, "repel the objections proponed "against," that the words, "proceeding in," be inserted."

1761. December 20.

ROBERT MAXWEL *against* SIR THOMAS MAXWEL of Orchardtoun.

No 10.

Proof of popery allowed, after the papist's death, to affect the rights of a party contracting with him.

THE estate of Orchardtoun stood devised to heirs-male.

Sir Robert Maxwel of Orchardtoun was twice married; of his first marriage he had a son, afterwards Sir George; and of the second marriage, a son named Mungo.

In his contract of marriage with Mungo's mother, he had bound himself, 'That all and whatsoever lands he should happen to conquest and acquire during the marriage, he should take the rights thereof to himself and her in life-rent, and the heirs to be procreated of her body in fee.'

But, disregarding the right of his eldest son, under antient investitures of the estate, and certain other rights in his person, and likewise the right of his second son under the contract of marriage, he, in the year 1727, disposed his estate to trustees, for the use and behoof of the heirs, male and female, to be procreated of Mungo's body. Soon thereafter he died.

At Sir Robert's death, Mungo had a son, Robert Maxwel, then an infant.

Mungo lived and died a papist; but the *formula* having never been presented to him, he had no opportunity of refusing to take it.

Upon Sir Robert's death, there were the following parties who had claims to his estate, Sir George, as eldest son, Mungo, as heir under his mother's contract of marriage, and Robert, under Sir Robert's trust-settlement; but a contract of agreement betwixt Sir George and Mungo was entered into in the year 1727, whereby Sir George agreed to accept of one part of the estate, and Mungo agreed to accept of the other. In this deed, Mungo signs for himself, and, as taking burden for his son Robert; he accepts, in full satisfaction of all

right, title, or claim, which he or his son had by the decease of Sir Robert; and he renounces and conveys in favour of Sir George, all right, title, &c. conveyed in favour of him Mungo, or his issue by his deceased father.

At this time, it was agreed, though not expressed in the deed, that the fee of Mungo's share should be secured to his son Robert; which was accordingly afterwards done by Sir George's making up titles to the estate, and then conveying Mungo's share to Mungo in liferent, and Robert in fee. This transaction was thought at the time beneficial for Mungo and Robert, as it secured them from the hazard of Sir George's getting the whole estate upon a competition.

Mungo died some years after this transaction; and, when Robert came to be of age, he brought a reduction against Sir Thomas Maxwel, son to Sir George of this transaction, as done to the prejudice of his right under his grandfather Sir Robert's trust-settlement.

Sir Thomas's defence was, That Mungo Maxwel, by his mother's contract of marriage, had a right of succession to the estate of Orchardtoun, which Sir Robert had no power to disappoint by a gratuitous trust-disposition to another: That, as Sir Robert had not settled the estate agreeable to the provisions of that contract of marriage, no service as heir of provision was necessary to Mungo's taking the estate: That, the right accrued to him as a *jus crediti*, he being the heir *designative* of the marriage; upon which right he could transact or dispose of it at pleasure: And that accordingly he had, in the transaction of the year 1727 conveyed to Sir Thomas all the right that was in himself.

*Answered* for Robert Maxwel; Mungo Maxwel having been a papist, was precluded, by the statute against papists, from succeeding at all to the estate of Orchardtoun; and therefore Sir Thomas could not in his right plead an objection to the title of another person.

*Replied* for Sir Thomas; It is unjust to allow a proof of popery after the papist's death, to affect the rights of parties contracting with him; because, if the objection had been made during his life, he had it in his power to purge the irritancy by taking the *formula*.

"THE LORDS found it proved, That Mungo Maxwel, the pursuer's father lived and died a papist; and therefore, that it is not now competent to Sir Thomas Maxwel, in his right, to set aside the trust-disposition in the year 1727, by which the estate was settled upon the pursuer."

*Act. Advocatus Lockhart, Montgomery.*  
Clerk, Kirkpatrick.

*Att. Ferguson, W. Stuart, John Dalrymple.*

*J. M.*

*Fol. Dic. v. 4. p. 38. Fac. Col. No 71. p. 161.*

1783. July 15. PETER ROSE WATSON against ELISABETH GORDON.

No 11.

A papist may succeed to a lease of lands.

It having been provided by act 1701, c. 3. 'That no person or persons professing the popish religion should be capable to succeed as heirs to any person