1749. *February* 7. MRS STEWART of Phisgill *against* HAWTHORN.

[*Kilk.* 6, *Personal and Real; Elch.* 21, *Fraud*; *C. Home, No.* 59.]

The late Captain John Stewart of Phisgill's right to that estate being reduced upon a contract of marriage as old as the year 1664, as being *contra fidem tabularium nuptialium*, which provided the estate to the heirs whatsoever of the marriage, whereas he possessed it as heir-male, by virtue of a contrary destination—(See the decision, January 4th, 1748 *Hawthorn* against *Stewart*),—

The question here occurred how far a jointure granted by the late Captain Stewart to his lady, could subsist after his right was reduced. It was allowed in this case, or at least but faintly controverted, that the lady and her friends, in accepting of this jointure, were *in bona fide*, and knew nothing of the ground of reduction upon which the estate was afterwards evicted: it was likewise allowed that the provision to the wife was onerous, at least so much of it as was granted before the marriage; for as to the additional jointure after the marriage, that was set aside as gratuitous. So that the question here was reduced to an abstract point of law, how far a man's right being reduced upon an antecedent provision in a contract of marriage, the rights flowing from him to onerous and *bona fide* contractors fell of consequence. It was argued for the affirmative, that it is a general maxim of law, *quod resoluto jure dantis resolvitur jus accipientis*; and this is founded upon another maxim, absolutely clear and incontestible, namely, *quod nemo plus juris in alium transferre potest quam ipse habet.* In this case Stewart of Phisgill was found to have no right to the estate, consequently he could grant none to his wife, nor can *bona fides* make a right good that is in itself defective: it can do no more, either according to our law or the Roman law, than give a right to the fruits or give the benefit of a possessory judgment: that Captain Stewart was just in the case of a putative heir, a younger brother, for example, who had served himself heir while his brother was abroad, his right being reduced within the years of the vicennial prescription at the instance of the true heir, all the rights flowing from him, however onerous or *bona fide* acquired, will fall of consequence: in like manner Captain Stewart was only the putative heir; the true heir was Mr Hawthorn's lady, who having reduced the right of the false heir, the right flowing from him must fall of course. And as to the argument from the security of the records, which would be very defective if the widow's claim in this case should be set aside,—the answer to that is very plain; that whatever defect there may be in the records it must be supplied by the legislature, who, if they please, may appoint all provisions of succession in such contracts of marriage to be recorded; but till that is done the judges must determine according to the principles of law and the nature of rights, in the same way as in the case put of a putative heir, whose right being reduced, the purchasers from him will in vain appeal to the faith of the records. And this way of considering the widow's right in this case, as proceeding *a non vero domino*, will answer all the objections on the other side, which consist chiefly of examples of rights being saved when the author's right was reduced,—for in all those cases the right proceeded *a vero domino*, who really had the right in

his person, only liable to exception or quarrel; and therefore the rights flowing from him were sustained as flowing *a vero domino.*

To which it was ANSWERED, that the lady agreed perfectly with the other party in the general principles laid down by him, viz. that rights proceeding *a non vero domino* could not subsist after the author's right was reduced, and that *bona fides* could not validate a right that was in itself defective; but she differed extremely in the application of these principles,—for she maintained that Captain Stewart her author was the *verus dominus*: that he only being the heir of the investiture, was in the right of the subject; and that the heir of provision in the contract of marriage had no more than a claim of debt upon it: and this is evident from the consequence of the reduction brought at the instance of that heir, which was not that he could immediately serve himself heir, (as in the case put of the putative heir,) and enter into possession, but the only effect of the reduction was that the possessor's right was set aside, and he decerned to denude and convey in favour of the reducer; which if he did not do them the remedy was an adjudication in implement; all which plainly supposes that the right in this case was vested in Captain Stewart, liable only to challenge upon the contract of marriage, which gave only a personal right noways affecting or qualifying the real rights to the lands. For in all such cases we must make a distinction betwixt grounds of reduction arising from and inherent in the nature of the right reduced, and those that are extrinsic to the right, arising as in this case, from personal obligations noways qualifying or affecting the right. The common law as well as our own law furnishes us with many examples of both kinds. By that law, *si creditor pignus pignori dederit,* in that case, if the first debt was paid, and consequently the right of the first creditor resolved, the right of the second fell of consequence, because the ground of reduction of the first creditor's right was inherent in the nature of it. In the same manner, *si emphytutus canonem non solverit,* and upon that ground his right was reduced, any right flowing from him would fall of course, because the regular payment of the canon was a quality modifying his right. But on the other hand, suppose only a personal paction, which does not qualify the right to the subject, but only lays an obligation upon the person, such as a *pactum de retrovendendo,* in case of sales; that, by the Roman law, would not be found real against purchasers or singular successors, though it would be a good ground for evicting the subject from the person himself with whom the paction was made. In the case likewise of a lesion *ultra dimidium;* that, it is well known, will afford a good ground of reduction against either of the parties contractors that has got the undue advantage, but will not operate against acquirers from them; for this plain reason, that the right of property was in them pure and unlimited. And, to give one instance more from this law, a donation among the Romans might be revoked *propter ingratitudinem donatarii*; but the rights flowing from him were safe, because he was the *verus dominus* and his right noways affected by his supervenient ingratitude, but only he laid under a personal obligation to restore the thing gifted. And this distinction, as it is founded in the nature of things, obtains in the Scots law: Thus, if an author's right is reduced upon the head of recognition in ward-holdings, or *ob non solutum canonem* in feu-holdings, all rights flowing from him will fall of course, because these grounds of reduction are qualities and modifications of the right, inherent in it, and not extrinsic to it. For the

same reason a reversion, either *in græmio* or in a bond properly recorded, will afford a ground of reduction that will operate against all rights flowing from the party whose right is reduced: And likewise, if there is any essential nullity in the sasine, or otherwise in the constitution of the right, then the rights flowing from it cannot subsist as proceeding from one who truly is not on the right; and this is precisely the case of the putative heir, so much insisted on by the other party, whose service is reduced at the instance of the true heir; for it is plain that there was an essential nullity in his right: he was not the *verus dominus*, but on the contrary the true heir was the *verus dominus*, being in the feudal right, and having no more ado after setting aside the retour of a false heir, but to serve himself heir in the lands, which as was observed before, Mrs Hawthorn in this case cannot do; and that clearly shows that she has no right to the lands but only a personal obligation, which is a ground of eviction. On the other hand, by our law and by the Roman law, wherever the ground of reduction does not arise from the nature of the right, but is extrinsic to it, there, onerous acquirers from the person against whom the reduction lies are safe: for example, in the case of a reduction competent upon the head of fraud, though the right of the fraudulent person be reduced, the *bona fide* purchasers from him are safe; and this is the case of the purchasers from the interjected confident person, upon the Act 1621, which in this respect does not enact any new law but is declaratory of the common law. Another example is the case of a disposition in trust, where the trust is constituted by a bond apart; there, if the trustee sells the estate, the purchaser will be safe, though there can be no doubt but the trust-bond gives a good ground of action against the trustee; yet as that is but a personal obligation, and as the real right to the lands is in the trustee, pure and unlimited, he can convey it to onerous purchasers: And, in general, no personal obligation whatever concerning lands can be valid against any other than the party contracting; and it will be no argument against this that bonds of reversion, which are no other than personal obligations upon purchasers to give back the lands upon certain conditions, were effectual against singular successors even before the Act of Parliament 1617, requiring them to be recorded; for that was by virtue of a particular statute, viz. Act 28th Ja. III., without which bonds of reversion would have been no more effectual against singular successors than a bond of trust is by our law, or a *pactum de retrovendendo* by the Roman law.

Thus far the case has been argued upon the common principles of law, according to which it is shown that the lady ought to be preferable; but the argument in her favour will appear still stronger if the particular constitution of this country with respect to the records is attended to: For though in some cases the records be deficient, and that is a defect which not the judge but only the legislature can supply, yet it is an argument that must undoubtedly have weight in this case, that if the lady's right is not found valid, hardly any person that contracts with a landed gentleman is safe, because he can never be sure but that a contract of marriage may be produced providing the estate to a series of heirs different from those of the destination by virtue of which the present possessor holds the estate. This to be sure would be a very gross defect in our records, and such a one as the other party

can instance none parallel to; for in the case of redeemable rights, it appears from the records that they are so, so that a purchaser of such rights is warned and must take his hazard of their being redeemed; and the case of the putative heir as has already been shown, is quite different from the present: But we call upon the other party to give us any example of a provision of succession or any personal obligation whatever, not appearing upon record and yet being effectual against a *bona fide* purchaser. There are cases where there appear upon the records burdens affecting lands, but as they are not sufficiently limited and ascertained, creditors may notwithstanding of such warning contract securely; as, in the case of a disposition with the burden of debts in general, or with the reserved faculty to alter if it does not appear from the records what particular debts the subject is burdened with, or that the reserved faculty was habilely exercised, purchasers from the disponee will be safe, though in such cases the records at least give them warning that they have something to fear. Now in this case would it not be extremely hard that purchasers from Captain Stewart, to whom the records give no warning at all, should not be safe? And, *lastly*, in the case of Mackerston, this point was expressly determined,—where it was found that, supposing Mr M'Dowall's right to the estate of Mackerston had been reduced on the old tailyie 1684, (which is the case exactly parallel to the present,) Mr M'Dowall's liferent by the courtesy would have been saved to him as acquired for onerous considerations: And the Lords in that case went so far as to find that even the right of the children of a marriage would be saved, as onerous.

The Lords found, unanimously, that the lady in this case had right to her jointure of L.50 constituted before the marriage, notwithstanding the reduction of her author's right.

1749. *February* 26. HAY of Belton *against* PRESBYTERY of DUNSE.

[*C. Home, No.* 65.]

A declarator was brought at the instance of Mr Hay, as patron of the parish of Dunse, against the presbytery of Dunse, to have it found and declared, 1*mo*, that he was patron of the said parish. 2*do*, That he had presented a person who was duly qualified to accept, (by taking the oaths to the government,) and had accepted. 3*tio*, That the presbytery had no right to present *pro hac vice tanquam jure devoluto*. The occasion of this process was the presbytery's appointing a moderation at large notwithstanding of the presentation, upon which the patron appealed to the synod, and at the same time brought this process. It was objected on the part of the presbytery, 1*mo*, That they were not proper contradictors in a question concerning the right of patronage, and that a declarator of the right against them could have no effect against the heritors, in a question concerning the vacant stipend, or against the crown or any other competing patron. 2*do*, That by the 7th Act *an.* 1567, the admission and examination of ministers were declared to belong solely to the church; and in case