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

of any dispute betwixt the patron and the church about the admission and collation of a minister, the matter was finally to take end before the General Assembly; and, accordingly, while Presbytery was the established religion in Scotland, there is no example of any such civil process issuing against a presbytery or other church judicature, obliging them to ordain and admit a presentee, or to show cause for their refusal, as was used against the bishops in the time of episcopacy. *3tio*, There was reason to believe, that, in this case, Belton was trustee for Drummelzier, a patron that was not qualified to present by having taken the oaths to the government; and it was not in the power of a patron to evade the law by making such dispositions in trust.

To which it was ANSWERED, *1mo*, That the only design of the declarator was to establish the patron's right against the presbytery, who were by law patrons in case he had failed to present within the six months; and in such a process, to be sure, the presbytery were proper parties. *2do*, That the 7th Act, 1567, plainly related only to the power of examining and admitting ministers, if upon examination they are found qualified, which is certainly wholly in the church; and with respect to it only the appeal lies to the General Assembly, where the matter is to take end; but it cannot be supposed to give an arbitrary right to the church to settle a man other than the presentee, who should have right to the stipend, otherwise the patron's right, reserved by the Act, would signify nothing. Now, as to the church's power of examination and ordination nothing is here concluded: the process only relates to the patron's right to present, and the presentee's right to accept, and whatever be the issue of it, it can never hinder the church to reject the presentee upon trial, or if they please, they may, without giving him any trial, settle another, but then, that other will have no right to the stipend; and this process, is so far as it warns the presbytery of this, and lets them see what they are doing, ought to be reckoned a service to the church, *3tio*, Belton, though he holds this patronage of Drummelzier only during his life, has declared upon oath, before the presbytery, that he was not trustee for Drummelzier. Which the Lords sustained; *dissent.* Arniston, who declared his opinion that an unqualified patron could not elude the law by conveying his right in trust to another. There were other two conclusions of the declarator which the Lords would not meddle with. The one was, that the stipend did belong to the patron till the presentee was settled. This the Lords did not think competent to be declared against the presbytery, who never could have any right to the stipend. The other was, that the presbytery ought to be discharged to moderate a call at large, or settle any other man; because that was interfering with the power of ordination, or the internal policy of the church, with which the Lords thought they had nothing to do.

1749. *June* 13. DUKE of ROXBURGH *against* ———.

* [C. Home, No. 67.]

The Lords in this case found that the Justices of Peace, by virtue of the