No 16. granted to a wife in implement of her contract of marriage, is valid, though not confirmed.

THE LORDS repelled the allegeance, and found the relict's infeftment null, and not sufficient to defend her possession.

Fol. Dic. v. 1. p. 194. Stair, v. 1. p. 643.

1760. *December* 11.

JOHN GRIEVE, servant to Dr George Grieve, physician in Peebles, *against* JOHN WILLIAMSON, Cordiner in Peebles.

No 17.
Where a disposition is granted to one, and the heirs-male of his body, a charter granted by the superior, without resignation, confirming the disposition to the disponee in liferent, and to his son in fee, with infeftment following thereon, will not constitute the son fiar.

JAMES WILLIAMSON of Cardrona, by disposition, anno 1706, for love and favour, and other causes, disponed to Mr John Williamson, school-master in Peebles, and the heirs-male of his body, or the heirs-male of the descendants of his body, which failing, to return to the granter's heirs, certain burgage tenements in the burgh of Peebles, and five acres of land in its neighbourhood, holding feu of the Earl of Traquair.

These five acres were neither resigned in terms of the procuratory, nor was infeftment taken in virtue of the precept of sasine; but in 1709, a charter was granted by the Earl of Traquair, the superior, which confirms the disposition by Cardrona, *in omnibus capitibus et singulis clausulis*, &c. *secundum formam et tenorem ejus in omnibus punctis*. At the same time, this confirmation is not granted to Mr John Williamson, as sole fiar, in terms of Cardrona's conveyance, but thus: *Prædict. Magistro Joanni Williamson, in vitali reditu, et Jacobo Williamson ejus filio, in feodo.* Immediately after this, there is a clause of *novodamus* in the same terms; and the charter concludes with a precept of sasine for infefting the father in liferent, and the son in fee.

Upon this charter, infeftment soon followed; and the sasine bears delivery to have been made to the father and son personally; and that the father, *pro semet ipso, et in nomine ejus filii, instrumentum petiit*, &c.

From this time, down to the 1735, Mr John Williamson, the father, continued to possess as fiar; and, in that character, granted infeftments of annual-rent out of the lands. But the eldest son, James, having then died, John Grieve, one of his personal creditors, brought a process against John, the second son, as lawfully charged to enter heir to his deceased brother; and, upon John's renunciation, obtained a decreet *cognitionis causa*, of date the 9th of January 1736; and thereafter proceeded to lead an adjudication.

Upon this, Mr John Williamson, the father, executed a disposition in favour of his son John, reserving his own liferent, and containing a substitution and return in conformity with Cardrona's disposition, and assigning him to the unexecuted procuratory, and precept therein contained; but soon thereafter, he was himself infeft upon the said precept, and appeared for his interest in the

process of adjudication brought by John Grieve; in which a decreet was obtained upon the 13th July 1736, reserving all defences *contra executionem*. No 17.

Immediately after this, Mr John Williamson, the father, brought a process of reduction against the Earl of Traquair, of the above-mentioned charter and sasine, on account of their being disconform to Cardrona's disposition; and accordingly obtained a decreet, reducing the same, upon the 18th of January 1737.

Mr Williamson having died a few years thereafter, he was succeeded by his son John; who continued in the undisturbed possession for a considerable time; but, at last, was called as a defender, alongst with his tenants, in a process of mails and duties, brought at the instance of the above-named John Grieve, upon the decreet of adjudication obtained in the year 1736.

The defender produced Cardrona's disposition, and his father's infeftment, the disposition by his father to himself, and the decreet of reduction, obtained against the Earl of Traquair; and *contended*, That these were sufficient to exclude the pursuer.

Answered for the pursuer, 1*mo*, The decreet of reduction obtained against the Earl of Traquair, who was the only defender called, can have no operation to the prejudice of any other person; and, of consequence, cannot affect the right that stood in James Williamson, or cut off the interest of his creditors, or any claiming under him.

2*do*, As James Williamson stood upon record infeft in the fee, the pursuer was *in bona fide* to contract with him; and therefore cannot be injured by any subsequent reduction of his right. And a similar judgment was pronounced by the Court, in the case of Mrs Stewart of Phisgil, whose infeftment was sustained, although her husband's right to the lands was set aside. *See* GROUNDS and WARRANTS.

3*tio*, The charter by the Earl of Traquair was sufficient, although it had contained no clause of *novodamus*, to vest the fee in James, by confirmation; seeing that, by the terms of Cardrona's disposition, no more than a liferent seems to have been intended to be given to the father.

4*to*, The clause of *novodamus* in the charter, with the sasine following upon it, made a proper and legal feudal investiture of the property in James.

5*to*, Supposing the charter liable to objection, as being disconform to the disposition, such objection was only competent to John Williamson, the father; and as he homologated the alteration, by accepting of the charter, and by taking it *propriis manibus*, which supplied the want of a resignation, he could not afterwards retract. It was in his power to vest the property in his son in this manner; and as he actually did so, he could not thereafter take the fee from him, or out of his *hereditas jacens*, either by a new infeftment in his own favour, or by a disposition to his son John. And so in effect it was found in the case of Cubbison against Cubbison. *See* GROUNDS and WARRANTS. There, a father having received a disposition to himself, his heirs and assignees, with a precept of sasine; and having afterwards taken a charter from the superior, who was

No 17. also the disponer of the lands, to himself in liferent, and his son in fee, thought proper to bring a reduction of the same, as being granted without any warrant. But it having been *urged* for the son, That in the sasine, the father was said to have received the symbols of infeftment as attorney for his son, and that in a bond granted by the father, the son was designed by the lands contained in the charter, the LORDS found, That the charter and sasine, without any warrant, joined with the circumstances above-mentioned, were sufficient to establish the fee in the son.

Replied for the defender. To the *first ;* The Earl of Traquair, who granted the erroneous charter, was the only person who could properly be called in the reduction. For James Williamson having died without issue, the defender was his immediate representative ; but he had, before that time, renounced to be heir to him, in the pursuer's process of constitution.

To the *second ; Resoluto jure dantis, resolvitur jus accipientis.* James Williamson could communicate no better right to another than he had himself. And the case of Phisgil is by no means applicable to the present. Phisgil was not only infeft, but in the unchallenged possession of the estate ; when his lady was infeft in security of her jointure, she contracted upon the faith of his being proprietor of the estate of which she saw him possessed ; and her infeftment created a real lien upon the lands for the most onerous cause. On the other hand, James Williamson never was in the possession, and the pursuer received no infeftment or real security from him. He was only a personal creditor ; and his adjudication of the lands, as *in hereditate jacente* of James, could give him no right to them, in the event of its appearing that James had no interest in them himself.

To the *third ;* The disposition by Cardrona was granted to John Williamson, and the heirs-male of his body, without mention of liferent or fee in the one or the other ; and no instance can be given, where such a grant was ever found to devise the fee to the issue of the disponee, and only the liferent to himself.

To the *fourth ;* The clause of *novodamus* is an intrinsic nullity of the right, as being altogether without warrant. A superior may, indeed, enlarge the right of the vassal by a new grant ; but it never has, hitherto, been alleged, that by an arbitrary act, he could deprive his vassal of what was formerly conferred upon him, and transfer it to another. Supposing that resignation had been made by Cardrona, in the terms of his disposition, it could not be maintained, that the superior could have given the new investiture in different terms. But here the case is still stronger ; for no resignation was made at all ; and the superior took it upon him to give away the property of lands over which he had no power, the fee being full at the time.

To the *fifth ;* In the *first* place. There is no legal evidence of any homologation on the part of the father. His acceptance of the charter is no otherwise instructed than by the instrument of sasine, which bears his receiving infeftment for himself and son. But this is only the assertion of a notary ; and the inconveniencies would be great, if the bare attestations of notaries, produced

at distant periods, were to be conclusive as to the interest of parties in land-rights. Besides, it is not denied, that the father, from the date of the charter down to his son's death, acted not as a naked liferenter, but as absolute fiar of the subject; which shows, that he did not consider it as giving more than a *spes successionis*; and he no sooner discovered the contrary, than he gave the strongest testimony of his repudiating these erroneous rights, by taking a new infeftment on the precept in Cardrona's disposition, and obtaining a decreet of reduction of the charter and sasine. No 17.

In the *next* place, even supposing the father's acceptance of the charter fully instructed, no right could thereby be vested either in his or his son's person.—The fee at that time was completely established in Cardrona. He had indeed granted a procuratory and a precept. The procuratory, however, never was executed; consequently Lord Traquair could grant no charter of resignation, nor convey the fee to any person whatever by a clause of *novodamus*. Again, no infeftment had been taken upon the precept; so the charter of confirmation was premature and inept. But, even supposing infeftment had at that time been taken in virtue of the precept, the confirmation would be warranted no farther, than in so far as it was agreeable to the precise terms of such infeftment; and, as it deviated from Cardrona's disposition, by giving the fee to the son in place of the father, it was *ultra vires* of the superior; and therefore void and null.

Lastly, The case of Cubbison will by no means apply. For, 1*mo*, In that case, the real right of the lands was truly in the superior's person at the time of granting the charter. 2*do*, The circumstance of the bond shewed the father's homologation of it in a strong manner. And, 3*tio*, The presumption arising from the notary's assertion, was confirmed into the most positive evidence, by the father's admission of the fact.

'THE LORDS sustained the defence, and assoilzied from the mails and duties.'

Reporter, *Justice-Clerk.* Act. *Macintosh.* Alt. *Rae.*

Fol. Dic. v. 3. *p.* 162. *Fac. Col. No* 258. *p.* 477.