1724. *July* 17.

MONRO of Culrain *against* Mr GEORGE MONRO, Minister of Nigg.

No 94.
Lands were disponed with a clause of return.
The disponer conveyed to a third party, without the clause of return.
Afterwards, he was prevailed on to grant a clause of return in a subsequent deed.
He afterwards repented of this, and granted a simple disposition.
This last was found ineffectual.

THE lands of Auchnagart were, in the year 1585, disponed by Robert Monro of Fowlis to Andrew Monro of Davochartie, and the heirs-male of his body; which failing, to return to the granter and his heirs whatsomever.

George Monro of Milnton, heir to Davochartie, who stood infeft upon a precept of *clare constat* by the Lord Lovat, with consent of Fowlis, did, in the year 1625, dispone these lands to Monro of Contulich and his heirs, without any clause of return, and that conveyance was confirmed by the Lord Lovat, as superior, in virtue of an apprising of the estate of Fowlis, but which apprising was afterwards re-conveyed to the family of Fowlis.

In the year 1626, Contulich conveyed these lands to his son Hugh, who, in *anno* 1653, was infeft upon a precept of *clare* by Fowlis, without any clause of return.

Fowlis, in the year 1669, disponed the superiority and feu-duties of the lands of Auchnagart to Sir George Monro of Culrain, father to the pursuer, and Sir George was infeft in the 1670; about which time the said Hugh Monro, and his son Robert, being in possession of the lands, there arose some disputes betwixt Sir George and them, as if the conveyance by Davochartie to Contulich was void, as being contrary to the terms of the original right above-mentioned; upon which account Culrain pretended, that the feu returned to him as superior: And there was a minute entered into betwixt Sir George and the said Robert, whereby it was agreed, that Robert should be received as vassal in the lands, and that he should take his charter to himself, and the heirs-male of his body; which failing, to return to Sir George and his heirs; and in case of such return, Sir George was to pay 1000 merks to Robert's heir-female or assignee.

In the year 1671, this minute was extended into a contract, which mentioned, 'That, forasmuch as the lands of Auchnagart were disponed in feu-farm by 'Robert Monro of Fowlis to Andrew Monro of Davochartie, and the heirs-'male of his body; which failing, to return to the said Robert Monro of Fowlis 'and his heirs whatsomever; notwithstanding whereof, the lands were disponed 'by Davochartie to John Monro of Contulich, grandfather to the said Robert, 'contrary to the intent and meaning of the tailzie in the said charter, to the 'prejudice of Fowlis, and consequently of Sir George, as come in his place of 'the superiority of the said lands; likeas, since the said vendition of the said 'lands, the same were fallen in non-entry, and several other incumbrances, as 'well for not-payment of the feu-duty, and not-performing of several obligements, rights, incidents, and services to feu-lands, whereby the said lands and 'rights of the same were redeemable upon these heads and other grounds competent to Sir George; for the love and favour he carried to the said Robert, 'and to the memory of his ancestors, and for a sum of money advanced by

'Robert, and other onerous causes; therefore, he not only discharged the said 'Robert, his heirs, &c. of the foresaid non-entry of the said lands, action of 'reduction and improbation above written, upon whatever ground competent 'to him in law; but also he gave, granted and discharged, and let in feu-farm, '&c. reserving always to Hugh the father and his spouse their liferent-right of 'the said lands; and in case the lands should return to Sir George, he was 'bound to pay 1000 merks to Robert's heir-female or assignee, &c.' No 94.

Robert was infeft upon a charter in consequence of this contract, and in the 1679, when he was married to Katharine Ross, he provided her in the liferent of the saids lands of Auchnagart, in case there should be heirs-male of the marriage; but in case there should be none, and thereby the lands should return to Culrain in virtue of the said tailzie, she was secluded from them, and her liferent restricted to other lands.

In the year 1717, Mr George Monro, the defender, was married to ——— Monro one of Robert's daughters, and was by her father assigned to the 1000 merks, which Culrain was by the contract of entail obliged to pay in the event of failure of heirs-male of Robert's body.

Thereafter Robert likewise disponed the lands of Auchnagart to Mr George the defender; and Robert having died without heirs-male of his body, Culrain insisted in a reduction of that disposition, as granted *a non habente*, in prejudice of the clause of return in favours of Culrain, contained in the contract 1670 and 1671 above recited.

It was *pleaded* for the defender, That he had raised reduction of these two contracts and the charter following thereupon, in so far as relates to the clause of return, upon the following grounds, 1*mo*, That the same were impetrated upon suggestions that were false in fact, whereby the said Robert (an illiterate young man) was induced to enter into them without the concurrence of his father, who was then alive, and the only proprietor of the estate at the time.

The causes of entering into the said contract appeared from the above narrative, and being false, were so many circumstances of imposition: As, 1*mo*, That the provision of return in the original charter was contravened by the disposition to Monro of Contulich, whereby the feu was forfeited. This did not hold; for though the alienation was in prejudice of the clause of return, yet no ground of challenge arose thereby to the superior, because the Lord Lovat, who was at that time possessed of the superiority, had confirmed it. The *second* cause of the contract, That the lands had been in non-entry, was refuted from a sasine in *anno* 1653, proceeding on a precept of *clare* by Fowlis the then superior, to Hugh, Robert's father, who was alive at the time of these contracts. The *third* cause, That the feu-duties and the other services were not paid, on which account the vassal's right was reducible, was neither relevant nor true, because an irritancy of that kind is purgeable by payment at the bar; and as the feu-duty was very small, so it appeared by a receipt in process, dated 1673, that it was paid up till the 1669. The *last* cause mentioned in the contract was, That

No 94. Culrain, as having right to the superiority, had also right to the clause of return, and consequently was entitled to defeat the vassal's right by actions of reduction, improbation, &c. So far was it otherways, that though the alienation to Contulich were null, yet the lands would have returned, not to Culrain, but to the heirs of Fowlis the original granter of the fee; for the disposition of the superiority to Culrain could not carry the benefit of the clause of return.

2*do*, It was farther *objected* for the defender; That the charter 1671, containing the clause of return, was null, as proceding *a non habente*, &c. for Hugh the proprietor was then alive, and never, so far as appears, granted any renunciation which could enable Sir George to grant, or his son to take such a charter.

3*tio*, Though clauses of return have a greater force than mere destinations, when it appears, or is presumed, that they were agreed to for onerous causes; yet when they are purely gratuitous, they have no stronger effect than a common destination of succession, which never hinders the vassal to alienate or alter: And since, by what has been said, it appears that Robert yielded to the clause of return mentioned in the said contracts and charter, without any just or onerous cause, it was in his power to alter the succession, which he has done by the disposition to the defender.

It was *answered* for the pursuer, That as the defender lays his reason of reduction singly upon fraud, yet he qualifies no circumstances of circumvention, but endeavours to infer it from a pretended concealment of facts; and yet there is not one point of fact that Sir George could have concealed, which was not equally obvious to Robert Monro; nor is there any reason to think that Robert did not advise with his father when he entered into this transaction; neither is there the least evidence brought that any one fact has come to knowledge now, that was not known to Robert in the years 1671 and 1679, the time of his own contract of marriage; or in the year 1717, when he assigned to the defender the 1000 merks payable upon the return. Nor can the bargain be reduced on pretence that Sir George misrepresented points of law, for he was as unskilled in these matters as Robert, and both of them might have been in a mistake; so that the whole strength of the reason of reduction amounts to this, that Sir George misrepresented the legal effects of a charter which both parties had before them. More particularly it was *answered* to the *first* circumstance abovementioned, That as it was not in Milnton's power to dispone the feu to Contulich, in prejudice of the clause of return in the original charter, so Lovat's confirmation could not help the matter, because he being only an appriser, and ignorant of the clauses in the vassal's charter, it was granted *periculo petentis*, so that he had no power to alter or dispense with any condition in the original contract; and the charter of confirmation contained a clause, *salvis et reservatis juribus nobis et prædecessoribus nostris debit*: &c. In the *next* place, Let the effect of the confirmation be what it will, it was a paper in Robert's own hands, so that Sir George could not conceal it; and even though neither party had

known any thing of the paper, yet that could never overturn a transaction that was otherwise fair, for transactions are not to be opened, because of *instrumenta noviter reperta*. 2*do*, As to the non-entry and feu-duties, though these facts are thrown into the narrative of the contract 1671, yet they had no influence in the transaction which was settled before in 1670, in which there was no mention of them; for it proceeded only upon Sir George's claim, in virtue of the clause of return. The throwing in the story of non-entry, &c. has proceeded from Robert's anxiety to have all claims, whether real or nominal, discharged: The lands might have been said to have fallen into non-entries, according to the notion parties had at that time, viz. that they were unlawfully alienated, in which view they were in non-entry from the death of Davochartie the original proprietor. As to the feu-duties, the receipt in the year 1673, two years after the last of the contracts, and in consequence of it, could never instruct that they were paid, but was rather a proof that they were not, but came then to be discharged in consequence of the final settlement; and if they had been paid, the receipts of payment, as well as Hugh's infeftment and precept of *clare constat* (if he had one) behoved to be in Robert or his father's hands, and so he had more access to know these facts than Sir George. No 94.

As to the *last* circumstance, That the benefit of the return belonged to the heirs of Fowlis, and not to Sir George, it was *answered*, 1*mo*, That this feu was of the nature of the old military feus, granted principally out of love and favour, and limited to the feuer and the heirs-male of his body, upon the failure of whom the lands returned to the superior, not as heir to the vassal, but in right of superiority, and *jure non decrescendi*, the *dominium directum* being in the superior, which came to be the full and absolute property after the expiring of the feu-right by the failure of the heirs-male; and therefore the return did not operate in favours of Fowlis, but of Sir George, who, by purchasing the superiority, had the *dominium directum*. 2*do*, Whatever was in the point of law, there was at least no concealment of the fact: The charter was before the parties, and if they, being doubtful concerning the import and effect of it, transacted the matter amongst themselves, to avoid a trial at law, was not this a proper transaction? And can it be reduced upon the pretence that Robert was in a mistake as to the right? Upon the whole, as there neither was fraud nor concealment of facts on Sir George's part, so there appears to have been amongst the parties a dubiety both as to facts and points of law, which to this day are disputable: They themselves transacted the matter by mutual concessions, Robert agreeing to accept of a charter with the clauses of return in it; and Sir George, on his part, yielded to pay 1000 merks, in case the return should take effect, which he was not obliged to pay upon the footing of the original feu.

It was *answered* to the 2*d* defence, That since Robert acted as proprietor in entering into the contract, it was to be presumed, *in re tam antiqua*, that he had a right from his father to do so; and the rather, that had it been otherwise, the father would have quarrelled it, since the contract 1671 was not latent, but

No 94. registrate that same year. To the 3*d* it was *answered*, That the clause of return having entered into Robert's investiture in consequence of a transaction, that was a most onerous clause, and therefore could not be elided by a gratuitous deed in favour of the defender Robert's son-in-law.

It was further *pleaded* for the pursuer, as a separate answer to the reasons of reduction, That there was in this case not only a long acquiescence and a prescription of the action of reduction, but express deeds of homologation, namely, Robert's contract of marriage in the year 1679; where, though he had provided his wife in the liferent of these lands, yet in the case of the return's taking place, through failure of heirs-male of his body, she was expressly secluded from these lands, and her liferent restricted to others; and Robert his assigning to the defender, in the year 1717, the 1000 merks payable to Culrain, upon the return's taking place, was a further homologation of the transaction, not only by Robert, but also by the defender, who accepted of the said assignation.

It was *replied* for the defenders, That the contract 1671 being founded upon false and feigned reasons, was a sufficient evidence of circumvention; and if it be voided on that account, it cannot be supported upon the principles of transaction or homologation, when the granter of them continued to be in the same error that led him into the transaction. In the present case, as Robert's error at the beginning is instructed by the circumstances above-mentioned, so his continuance in it is presumed, unless it be proved that he was undeceived: Nor can there be any pretence of a prescription, because it could not run but from the time that the clause of return took place; and the reduction was in effect no other than a defence against the substitution: Nor has the defender homologated Culrain's right, by accepting of the assignation to the 1000 merks; because, in that very deed, Robert empowers him to reduce, quarrel, and impugn, all contracts, obligations, &c. and wills that the benefit thereof may return to him.

It was *duplied* for the pursuer, That as there is no evidence of circumvention at the beginning, so the contracts 1670 and 1671 appear to be fair transactions *de rebus dubiis*; and suppose there were less dubiety in the case than there is, yet still, if it was doubtful to the parties, it was a proper transaction, otherwise there never could be one; for always one of the parties has the right, but his uncertainty about it, and desire to shun a process, is the foundation upon which transactions stand; and it is absurd to pretend, that the pursuer must prove that the party homologating knew particularly that he had been defrauded; for the homologation of a deed, and the subsequent acquiescence in it, and in the homologation for more than forty years, establishes a sufficient proof in law that the homologator understood the nature and condition of his own deeds. To pretend to consider whether the deeds be void in themselves, abstracting from there being a transaction, is to separate a thing from itself; for the question is anent the reduction of deeds, which the pursuer insists were a plain transaction, and which contain mutual concessions by the parties to one another, in order to

shun a plea: And the reservation to the defender to quarrel all contracts, &c. could never concern the lands in question, since, by that deed, the defender got no right to them, nor had he thereby any title vested in him to quarrel the contract 1671. No 94.

THE LORDS repelled the reasons of reduction of the contract 1670 and 1671, at Mr George Monro's instance against Culrain, and sustained the reasons of reduction of the disposition in favours of Mr George Monro minister, and decerned, reduced, and declared in Culrain's reduction, he consigning 1000 merks before extract; and assoilzied from the reduction at Mr George Monro minister his instance against him, and decerned.

Reporter, *Lord Pencaitland.* Act. *Arch. Hamilton, sen. & Ro. Dundas Advocatus.*
Alt. *Dun. Forbes & Cha. Erskine.* Clerk, *Dalrymple.*

Fol. Dic. v. 3. *p.* 273. *Edgar, p.* 89.

1744. *July* 20. LIDDEL and the other Creditors of DICK, Competing.

No 95.
In a competition among creditors, an heritable bond was objected, to as wanting some of the necessary solemnities. Answered, The debtor had homologated it by assigning to the creditor the rents of his lands, in which assignation he had recited the heritable bond. The Lords repelled the defence of homologation.

AN heritable bond granted to David Liddel for 16,600 merks, docqueted thus, 'Written by William Wishart notary at Fintry, and subscribed before 'these witnesses, the said William Wishart and Thomas Wishart,' being objected to as null, in so far as it did not design both the witnesses; the creditor pleaded homologation by an assignation by the granter to him of the mails and duties of the lands contained in the heritable bond for payment of his annualrents, which fully recited the heritable bond, and fell to have been part of it, written of the same date with the heritable bond, by the same writer, and signed by the same witnesses, and wherein both their designations are expressed thus, 'Written by William Wishart notary in Fintry, and subscribed before 'these witnesses, the said William Wishart, and Thomas Wishart his son.'

But it was nevertheless found competent to the creditors competing to object the nullity of the heritable bond.

It was a point upon which the Judges are not of one opinion, how far deeds, void for want of solemnity, are capable of homologation. Although there be some decisions sustaining it, yet it was never found in any case that homologation was good in a competition.

Fol. Dic. v. 3. *p.* 274. *Kilkerran,* (HOMOLOGATION.) *No* 2. *p.* 255.

*** This case is reported by C. Home:

THE said David Liddel being creditor to Andrew Dick by an heritable bond, in order the more easily to obtain payment of his debt, purchased an assignation to a minute of sale of Dick's lands, from one Forrester, whereby Liddel became debtor to Dick in the price of the lands. Dick's creditors having used