1766. *June* 13. WILLIAM DODDS, Messenger in Glasgow, *against* ROBERT WOOD, Baker in Glasgow.

HUSBAND AND WIFE.

The presumption that a purchase made by a wife, *stante matrimonio*, is made with the husband's money, is not an invincible presumption.

ON the 9th March 1755, Ann Alison, the wife of William Dodds, purchased certain tenements in Glasgow, from Andrew Miller, and took the disposition thereof to herself, her heirs and assignees whatsoever.

On the 2d April 1755 Ann Alison was, in these terms, infeft in the tenements thus purchased. In 1756, Ann Alison, with consent of her husband, insisted in a process before the Dean of Guild at Glasgow, for payment of certain repairs laid out upon the common gavel of the foresaid tenements. In this process, it was said, on her part, that she was proprietor of the subjects, and that her husband, William Dodds, had laid out the expense of those repairs. In this process appearance was made for Robert Wood, baker in Glasgow, as trustee for the creditors of Andrew Miller. About the end of the year 1762, Ann Alison died. At that time William Dodds, younger, her eldest son, and heir-at-law, was abroad. In 1763, Robert Wood, baker in Glasgow, as having right to Miller's subjects, insisted, in an action against William Dodds elder, and others, for removing them from the tenements which had been purchased by Ann Alison: This action proceeded upon the erroneous supposition that those tenements were contained in the right derived to Wood from Miller, the common author. In this action, William Dodds, elder, pleaded that the tenements had been the property of Ann Alison, his deceased wife, and were expressly comprehended in her seasine: he disclaimed all right in the subjects, and insisted that he was not the heir of Ann Alison, and that her heirs were the proper defenders. In proof of all this, he appealed to Ann Alison's seasine produced in process. William Dodds, younger, on his return to Glasgow, made up titles, as it is said, to his mother Ann Alison: Certain it is that he conveyed the liferent of the greatest part of the foresaid tenements to William Dodds, his father. William Dodds, younger, sold a small part of the tenements to Robert Wood, and, on the 27th September 1764, granted him a disposition thereof. On the 19th October 1764, in virtue of this disposition, Robert Wood, the purchaser, was infeft. Robert Wood warned William Dodds, elder, to remove: Dodds presented a bill of suspension, which was passed. William Dodds, elder, insisted in an action against Robert Wood, calling for production of the disposition granted by Andrew Miller to Ann Alison; of the seasine following thereon; of the service and infeftment of William Dodds, younger, as heir to his mother; of the disposition granted by him to Robert Wood; and of the seasine following thereon: He concluded, that they should be all reduced, and that it should be declared that he, the pursuer, had the only right to the subjects, in respect that they were purchased by his wife *stante matrimonio*, and must of consequence be presumed to have been purchased with his money, and for his

behoof. The suspension and the reduction were taken to report by the Lord Barjarg, Ordinary.

ARGUMENT FOR THE PURSUER :—

A woman, *vestita viro*, is presumed by the law of Scotland to have nothing of her own. If, during the subsistence of the marriage, she becomes possessed of any money, or purchases any subjects, it will be presumed that the money is her husband's, and that the subjects are purchased for his behoof, unless she prove that the money was her own, or the subjects acquired with her own money not falling under the *jus mariti* of her husband. Thus, money lent or deposited by a wife, *stante matrimonio*, was presumed to belong to the husband, and an action in his name was allowed for repetition of it, 17*th November* 1635, *Fenton* against *Carnegie ;* and 31*st January* 1727, *Rigg* against *Cuninghame*, Dict. vol. i. p. 388. In this last case the husband was not so much as obliged to show that his wife had intromitted with any of his money: but such intromission was presumed, unless the wife could point out a separate fund of her own from which the money might have arisen. Here, the defender, Wood, has not pretended to show that Ann Alison was possessed of any separate fund whatever, and therefore the authority of the foresaid decisions is express in support of the pursuer's plea. The tenements must be presumed to have been purchased with the pursuer's money, and for his behoof. The right, taken in name of the wife and her heirs, could only subsist in her person as a trust for her husband; and, as she could not defeat his right, so neither can her heirs.

ARGUMENT FOR THE DEFENDER :—

The rights of husband and wife, by the law of Scotland, are not founded on presumption: their respective interests are established according to the nature of the subjects in communion. All moveable subjects are, *stante matrimonio*, the property of the husband ; heritable subjects, left exclusive of the husband's right, or subjects in their nature paraphernal, are the property of the wife. The subjects in question, being heritable, were indisputably exclusive of the husband's right. Though purchased *stante matrimonio*, it follows not that the money belonged to the husband, or, if it did, that he can on that account reduce an heritable right to them clothed with infeftment and conveyed to a third party. A wife may have money exclusive of her husband's right, either secured to her by bond, or conveyed by donation, or bequeathed by legacy ; and, although she should alter the form of her security, and convert her right into money, it does not thereby become the property of her husband *jure mariti*, provided that she either vests or intends to vest it in the purchase of an heritable subject. Hence, if it be doubtful what was the former state of money laid out by the wife upon heritable security, that state must be collected and determined by circumstances as they occur ; and from them the money will be held to have been the property of the husband or the wife. In the present case all circumstances concur to show that the money was the property of the wife: The right in the subjects was taken to the wife and her heirs. Of this the husband was not ignorant: In 1756 he asserted that the subjects belonged to her: in 1763 he disclaimed all right in them, and insisted that they belonged to the heirs of his wife: in 1764 he accepted of a liferent-right of part of those very subjects from that heir whose title he now disputes. Had he expressly consented to the disposition in his wife's favour, there could have been no doubt in the question: homologation is equivalent to consent, and acts

of homologation, weaker than those above mentioned, have been held equivalent to consent.—Thus a husband, by subscribing *witness* to a ticket of a few lines granted by his wife, was held to have consented thereto.—*Fountainhall, 6th January* 1686. Thus a husband, pleading before an arbiter on a submission entered into by his wife, was barred from objecting nullity to that submission, *26th January* 1735, *Telfer* against *Hamilton of Grange.* Thus also a woman, *vestita viro*, having purchased a tenement and taken the right thereof to herself in liferent, and to a daughter of a former marriage in fee, the husband's consent was inferred from his giving seasine thereon as bailie.—Stair, *29th January* 1668, *Brown* against *Happiland.* Were such presumptions not sufficient, many fatal consequences would ensue, destructive of the common intercourse and trust between man and man; for how can third parties, after the lapse of many years, be able to point out the particular money with which a wife has acquired an heritable subject? They know that a wife may have subjects exclusive of the husband's right; they see that an heritable right to a subject stands vested in her and her heirs, and that by a public infeftment known to her husband. This is all the knowledge that purchasers can have, and from such knowledge a presumption arises that the subjects were purchased with the proper effects of the wife, and by her habilely conveyed to her heirs. But, even supposing that the purchase-money had belonged to the husband, this will not avail the pursuer in his action of reduction. Upon that supposition the money may be considered as *donatio inter virum et uxorem*, and so revocable; hence the right of the pursuer will resolve into a personal claim against the heir of Ann Alison, for re-delivery of the money; but his right can never come in competition with the real right of the defender which is clothed with infeftment. The complete real right in the subjects can no more be set aside as flowing from a *donatio inter virum et uxorem*, than it could be set aside by any personal back-bond granted by the wife or her heir. Besides, the real right did not flow from the husband, but from Miller, of whom the wife acquired it.

Reply for the pursuer:—

The most express homologation could not hurt the pursuer's plea. Had he homologated, a preceding *donatio inter virum et uxorem* might have been inferred; but such donation, however homologated or ratified, is in its own nature revocable. Further, in the two actions 1756 and 1763, the pursuer had no occasion to distinguish betwixt his own right and that of his wife: His plea, that the subjects had been sold by Miller, was equally conclusive, whether the right was in him or in his wife; and his founding upon his wife's infeftment, in an argument with third parties, did not imply any acknowledgment that the subjects were acquired by her money and for her behoof. The case *Brown* against *Happiland* is not in point; for there the fee was not taken to the wife, but to a third party. A right taken to a third party could never accresce to the husband; and therefore, if he witnessed such right, and objected not, he must be presumed to have consented to it: but, when a right is taken to the wife herself, the husband needs not object, because he knows that it will accresce to him, or that he may at any time recal it as a *donatio inter virum et uxorem. 2dly*, As to the allegation that the pursuer's claim does at any rate resolve into a personal claim against the heir of the wife, and that the purchaser from that heir is secure;—It is answered, That as every purchase made

by a wife is presumed to have been made with the husband's money, unless the contrary is proved, so the purchase itself does accresce to the husband; nor can the wife, or her heir, dispose of it without the consent of the husband; and if it shall be supposed that the pursuer consented to the right conceived in favour of his wife, then it is plainly a *donatio inter virum et uxorem*, which is at all times revocable, even against a singular successor, from the wife or from her heirs. 3*dly*, There is no resemblance between this case and that of a latent unrecorded back-bond. Such latent back-bond cannot qualify or limit an infeftment upon record, and thereby prejudice a purchaser. But, here, the pursuer's plea is founded on a quality inherent in the nature of the right, which bears to be granted to a wife *stante matrimonio*: the records give security against burdens and incumbrances not recorded, but they give no security against objections to the validity of the author's title.

"The Lords repelled the reasons of reduction; found the letters orderly proceeded, and found expenses due."

Act. R. M'Queen. *Alt.* Alex. Murray. *Reporter.* Barjarg.

OPINIONS.

AUCHINLECK. Here there is a trick committed by Dodds: he suffers the subject to be considered as belonging to his wife till after the sale, and then he claims it as belonging to himself.

PITFOUR. The presumption that a purchase made by a wife, *stante matrimonio*, is made with the husband's money, is not an invincible presumption. Here, as the husband pleads upon the wife's right, he must hold by the narrative of the right, namely, that she had paid the money.

KAIMES. If the wife had got the money from the husband, the money might have been recalled by the husband; but it does not from thence follow that the subject purchased with such money might also have been recalled by the husband; much less can the subject be recalled from a singular successor acquiring for a price.

PRESIDENT. After the husband's repeated acknowledgments that the subject belonged to the wife and her heirs, there is no place left for repetition.

1766. *June* 13. ALEXANDER MUDIE *against* JOHN OUCHTERLONY and the OTHER CHILDREN of the deceased Alexander Ouchterlony, Provost of Aberbrothock.

PROOF.

One person having purchased, at a Public Sale, a House for another, by verbal order, a proof was allowed by witnesses, of facts tending to shew that the order had been given.

[*Faculty Collection, IV.* 60; *Dictionary*, 12,403.]

PATRICK Spink was proprietor of certain tenements in the burgh of Aber-