

mistake, *non suum recipit*, though a like sum is due him by another. It is only where there is no error, and the debt is paid by a *negotiorum gestor*, for the debtor, that the creditor is said, in the civil law, *suum recipere*, l. 2. 6. *de cond. ind.* But, when that does not appear, *alienum recipit*: For the debt due to him by one, can give him no title to the money of another.

That no donation was meant in this case, is evident from the transaction, and the words used by the pursuer when the payment was made.

Observed on the Bench; It makes no difference whether the payment was made from error of law or of fact; it is sufficient that it proceeded from mistake; and, when payment is made *sine causa*, it will be presumed to have proceeded from error, and not donation, unless the contrary can be proved. The payment is made *sine causa*; for, after the lapse of seven years, there was no obligation, natural or civil, on the cautioner.

THE LORD ORDINARY found the defenders liable, conjunctly and severally, to repeat and pay back the sums libelled.

THE COURT adhered to the Lord Ordinary's interlocutor, on advising a reclaiming petition and answers; and again adhered, on advising a second petition and answers.

Act. *Ilay Campbell.*

Alt. *Rae, Rolland.*

*Fol. Dic. v. 3. p. 157. Fac. Col. No 41. p. 70.*

1792. November 14.

WILLIAM KEITH *against* CHARLES GRANT, RICHARD MOLESWORTH, and Others.

SIR ALEXANDER GRANT of Dalvey purchased the barony of Clava, and certain lands near the borough of Nairn, from James Rose. Sir Alexander took infeftment in the lands of Clava, but his right to the Nairn lands remained personal at his death.

In 1771, he granted an heritable bond for L. 10,000 over his whole purchase, to Archibald Grant of Pittencrieff, by whom it was disposed in trust to Colquhoun Grant, writer to the Signet.

Sir Alexander having died much in debt, his brother Sir Ludovick entered heir to him *cum beneficio inventarii*; and, in 1783, he disposed the whole of the said estate to Mr Keith, accountant, in trust for his brother's creditors.

The trustee, in 1786, sold the barony of Clava to Charles Gordon, at the price of L. 6800.

In 1787, he sold the Nairn lands for L. 5000 to David Davidson, who, with the approbation of Mr Keith, and in consequence of minutes of the creditors, paid the price to Colquhoun Grant, in part of the above heritable bond.

Mr Gordon, in 1788, again sold, for L. 5400, the barony of Clava, except the lands of Fleeness, to Mr Davidson, by whom L. 5000 of the price were paid to

No 11.

No 12.

*Condictio indebiti* takes place where a party obtains a preference in a ranking to which he is not entitled, although he has got no more than payment of his debt.

No 12. Colquhoun Grant, to further account of the same bond, and interest due upon it. This payment was also authorised by Mr Keith.

Soon after these transactions, Mr Keith having for the first time discovered, that Sir Alexander Grant had never been infeft in the Nairn lands, and that, therefore, the infeftment on the heritable bond, as *quoad* them flowing *a non habente*, could only affect the barony of Clava, brought an action, concluding, that Messrs Davidson and Gordon should be decerned to pay to him the price stipulated for their respective purchases, or if the Court should be of opinion that the payments made to Colquhoun Grant were sufficiently authorised, that his representatives should be compelled to repeat all they had received, or at least the price of the Nairn lands.

Messrs Gordon and Davidson had by this time brought an action against Mr Keith, and all concerned, the object of which was, to have it declared, that the payments made to Mr Grant should *pro tanto* discharge them of the price of their purchases, and that Mr Keith, on receiving the balance, should be ordained to grant them proper titles.

In these actions, which were conjoined, appearance was made for Charles Grant, the general disponee of Colquhoun Grant, and by Richard Molesworth, as acting for the representatives of Grant of Pittencrieff, who

*Pleaded*; 1st, The payment of the price of Clava is liable to no objection. And, with respect to the price of the Nairn lands, however defective as to them the infeftment on the heritable bond may be, yet the payment having been authorised by Mr Keith, it cannot now be recalled. Sir Alexander Grant's heirs are at least personally bound for the whole L. 10,000, and interest; and as Colquhoun Grant only received L. 10,000 in all, neither his heirs nor the heirs of Archibald Grant can be subjected to any claim of repetition. The *condictio indebiti* does not lie where a person only gets payment of what is truly owing to him; Stair, b. 1. tit. 7. § 9.; 12th June 1713, Creditors of Muirhead against Hamilton, No 7. p. 2928.

But, 2dly, Even allowing that Archibald Grant's sasine in the Nairn lands may have been originally invalid, the defect was removed by the infeftment in these lands obtained by Sir Ludovick, the heir of Sir Alexander, whereby in the eye of law he became *eadem persona cum defuncto*. For the maxim *jus superveniens auctori accrescit successori* applies not only where the *auctor* himself acquires the supervening right, but also where it is acquired by a person liable in absolute warrandice of the deed; Dirleton's Doubts, *voce Jus Superveniens*, and Stewart's Answers; Bank. b. 3. tit. 2. § 16. and 17.; Stair, b. 3. tit. 2. § 2.; Ersk. b. 2. tit. 7. § 4.; 15th February 1665, Boyd against Tenants of Cairsluth, *voce* WARRANDICE; 1st December 1676, Lindsay against Grierson, *voce* JUS SUPERVENIENS, &c.

*Answered* for Mr Keith; 1st, The brocard *repetitio nulla est ab eo qui suum recepit* is misunderstood. It relates merely to the case of a person voluntarily interposing to pay the debt of another, where, although he should have done so from mistaken motives, the civil law gives him no claim of repetition, if the mo-

ney was due by the true debtor. But where a person pays the debt of another, upon the erroneous supposition that he lies under an obligation to that purpose, the competency of the *condictio indebiti* was never disputed; *Voet, l. 12. tit. 6. § 9.*; 5th August 1778, Carrick against Carse, No 11. p. 2931.

2do, As Sir Alexander Grant never was infeft in the Nairn lands, there was no feudal right in him which could accresce *successori*. It is therefore impossible his heir can be considered as *eadem persona* with him as to that property, so as to make the right now in him accresce to the heritable bond. Sir Ludovick in fact does not represent Sir Alexander in these lands. He is successor in them, not to his brother, but to James Rose. He is a singular, not an universal successor. Sir Alexander, as to the real right of these lands, was in effect a stranger, and continued till his death a mere creditor to Rose for the property.

Although it may be true negatively, that where a person is *not* bound in absolute warrandice *jus superveniens non accrescit*, it will not hold positively, that in all cases where the person is bound in absolute warrandice, the *jus superveniens* does accresce. Two sorts of rights may here be distinguished. Personal rights, which pass by a mere dispositive act, and real rights, constituted by infeftment. With respect to the *first*, where the *jus supervenit* to any person bound in warrandice, it may accresce, because the will of the party is all that is requisite in order to convey. But this cannot hold in landed property, where certain solemnities are necessary to accomplish the transfer, such as sasine given by the author to the successor. Where indeed a person who is not *in titulo* at the time gives infeftment to another, and is himself thereafter vested in the feudal right, the *jus superveniens* does accresce. All the necessary solemnities here concur, although there has been a little irregularity in point of time. But when the infeftment flows from a person who, at no future period, acquires the feudal right, there is an essential defect in point of solemnity which never can be supplied. All the authorities quoted on the other side apply to the accretion of heritable rights, where sasine is not necessary, such as the casualties of non-entry and liferent escheat.

THE LORD ORDINARY reported the cause on informations.

*Observed* on the Bench; The *jus superveniens* cannot accresce in the present case. If an author, after giving infeftment, is himself vested in the feudal right, his title becomes complete both in form and in substance, and this new acquisition of right is communicated to all his former deeds. But a sasine obtained *a non habente* is altogether inept, and cannot be cured by any supervening right in his heir. In personal rights, the law holds an obligation to convey, and a conveyance to be the same; and therefore every person liable in absolute warrandice is bound to grant the conveyance. But in heritage, although an heir, whose ancestor conveyed, having only a personal right, is liable in warrandice, and is obliged to give an infeftment; still that infeftment cannot proceed on the precept granted by the ancestor, who never acquired any right

No 12. which entitled him to grant that warrant. The circumstance of Sir Ludovick having entered heir *cum beneficio*, does not in the least affect the case.

The rule, *Nulla repetitio, &c.* applies only where the debt was due *jure naturali*. Here the obligation on the trustee to pay to Colquhoun Grant the price of the Nairn lands, was altogether *civilis*, and contrary to his duty to the other creditors. Mr Keith had no title *qua* trustee to apply the funds in any other manner than as the law directs.

The interlocutor of the Court was as follows: 'Find, That Archibald Grant of Pittencrieff's heritable security was only effectual as to the barony of Clava, but not as to the Nairn lands and fishings; and therefore, that his representatives, in so far as they have received payment of more than the purchase-money of said barony, must repeat the same to the trustee for the creditors of the common debtor; assoilzie Messrs Davidson and Gordon from the action at the instance of the trustee, in so far as payments were made to Mr Colquhoun Grant of the prices of their respective purchases; and upon payment of the balance thereof, find, that Mr Keith is bound to grant a disposition of the lands of Clava to Mr Davidson, and a disposition to Mr Gordon of the lands of Fleeness, in terms of the articles and conditions of sale.'

A reclaiming petition for Molesworth, and another for William Keith, were refused, without answers, on the 4th December 1792.

Lord Reporter, *Hailes.*

For Mr Keith, *Maconochie, M. Ross.*

For Charles Grant, *R. Craigie.*

For Messrs Davidson and Gordon, *Rolland et Alii.*

For Molesworth, *Archibald Grant, junior.*

Clerk *Sinclair.*

R. D.

*Fol. Dic. v. 3. p. 157. Fac. Col. No 1. p. 1.*

See APPENDIX.