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and neglect in bringing the action, or making any demand, for so many years after the death of the parties originally concerned, and of all others who could have thrown any light upon those matters.

Judgment, April 21, 1749.

After hearing counsel, "it is ordered and adjudged, &c. that the said petition and appeal be "and is hereby dismissed this House; and that the "several interlocutors complained of be, and the "same are, hereby affirmed."

For Appellant, *William Grant, C. Erskine.*

For Respondent, *W. Murray, Alexander Lockhart.*

AGNES STEWART and HUSBAND, - *Appellants;*
CHRISTIAN HERON, - - *Respondent.*

30*th May*, 1749.

PERSONAL AND REAL.—BONA ET MALA FIDES.—An onerous singular successor is not affected by a latent and personal ground of challenge, to which his author's right is subject.

[Elchies *voce* Fraud, No. 21, Mor. 1705.]

No. 82.

THE entail of the lands of Physgill having been set aside as being *contra fidem tabularum nuptialium*, (*supra* No. 71), and Agnes Stewart, the heir under the marriage contract, having been found entitled to the estate, and having entered into possession of it, the present question arose between her and her husband (the appellants) on the one part, and Christian Heron (the respondent) widow of the heir of entail, whose right had been set aside, on the other. During the life-

time of her husband, and while the feudal title which he had made up to the lands of Physgil under the entail of 1719, remained unchallenged, the respondent had been infeft by him in a liferent annuity out of these lands, in virtue of an obligation contained in their marriage contract.

In order to establish her right to this annuity, upon the death of her husband, the respondent raised an action of poinding the ground before the Sheriff of the county, against the tenants of the lands, upon her liferent infeftment, which, having been removed into the Court of Session, was converted into an action of mails and duties against Agnes Stewart and her husband, and the tenants. The Lord Ordinary (Kilkerran) reported the case to the Court, and their Lordships found, (9th February 1749) "That the obligation entered into by John "Coltraine, (afterwards John Stewart of Phisgill,) "in the marriage settlement betwixt him and the "pursuer, whereby he was bound to settle upon "her a liferent provision to the extent of L.50 "Sterling yearly, was onerous on the part of the "said pursuer, and rational upon the part of the "said John Coltraine; and that, he having imple-"mented the same, by granting the liferent infeft-"ment to that extent, when he was in the right of "the fee and property of the estate of Phisgill, and "his right subject to no challenge from any thing "that did or could appear on the records; That "infeftment was likewise just and onerous, and "does subsist in her person, notwithstanding of the "reduction afterwards brought against the right "and title of the said John Coltraine, upon the la-"tent personal obligation contained in the contract "of marriage entered into, *Anno* 1668, betwixt

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"John Stewart, writer in Edinburgh, and Agnes "Stewart his spouse, whereby he was bound to "settle the estate he should acquire in favour of "the heir whomsoever of the marriage, and not-"withstanding the decree obtained in that reduc-"tion, setting aside the right of the said John "Coltraine, which the Lords found cannot hurt the "said onerous liferent settlement made to the pur-"suer by her said husband, while he stood in the "full right of property of the estate conform to the "infeftments and investitures thereof." The Court adhered (22 Feb.)

Entered, March 2, 1749.

The appeal was brought from these interlocutors of 9 and 22 Feb. 1749.

Pleaded for the Appellants:—The claim of the respondent is barred, *re judicata*, in consequence of the judgment in the former action, John Coltraine her husband having urged in her right, as well as in his own, the same arguments which are now maintained: At all events, the judgment in the former cause is a strong precedent upon the point in dispute in the present question. The entail 1719, which is the foundation of the respondent's claim, being reduced and set aside, as fraudulent, and *contra fidem tabularum nuptialium*, all subsequent rights dependent thereon must fall according to the rule, *resoluto jure dantis resolvitur jus accipientis*.

John Stewart (the entailer) being infeft in his wife's estate, upon the disposition contained in their contract of marriage, 1668, and his infeftment being duly recorded in the proper register, every person contracting upon the faith of these records must thence have discovered, that the estate was limited and secured to the heir of the marriage,

and consequently, that John Stewart was thereby disabled from granting any voluntary gratuitous deed, to the prejudice, and in fraud of that marriage settlement.

Therefore the respondent's claim as a *bona fide* purchaser, upon the faith of the records, is without any proper foundation. The entail 1719, was her husband's only title to the estate; that was plainly a gratuitous voluntary deed of settlement by John Stewart, without any just or necessary cause, in fraud of his own marriage contract. John Stewart's infeftment 1668, proceeding upon the marriage contract, did clearly point out the limitations he was under in favour of the heir of that marriage, and it is an established point, that the most onerous purchaser from one whose right appears *ex facie*, or is by law presumed to be gratuitous, (as in deeds between conjunct and confident persons,) can be in no better case than the person from whom he purchases.

Pleaded for the Respondent:—John Coltraine, the respondent's husband, at the time of granting the liferent provision to her, was in full possession of the estate, and had the property thereof legally and completely vested in him, so that in point of law nothing can be clearer, than that, notwithstanding any previous latent obligations, he might have sold the estate to a purchaser for a valuable consideration, and would have forfeited the same in case he had been guilty of any act, incurring a forfeiture.

The respondent was truly a purchaser of her liferent provision for a full and valuable consideration, without any notice of the said contract of 1668.

Although the entail was reduced by reason of

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the contract of 1668, yet, that personal contract cannot affect the right of a purchaser, not having notice of it, who claims under a deed executed by a subsequent heir of entail, while he was in the undisputed possession of the estate, under a title then unimpeached; and which appeared, from all the entries upon record, to be liable to no objection.

Judgment, 30 May 1749.

After hearing counsel. "It is ordered and adjudged, &c. that the interlocutor complained of be affirmed."

For Appellants, *W. Murray, A. Lockhart, C. Maitland.*

For Respondent, *A. Hume Campbell, C. Erskine.*

MARGARET CAMPBELL and HUSBAND and OTHERS (daughters of Archibald Campbell of Shirvane,) } *Appellants.*

ALEX. CAMPBELL of Shirvane, *Respondent.*

1st June 1749.

HEIR and EXECUTOR.—Where the real and personal estate are conveyed to different heirs in virtue of different deeds, each containing a general clause, obliging the persons favoured, to pay all the granter's debts—Held, that such clauses do not alter the ordinary rules of liability between heir and executor.

[Elchies, *Voce* Tailzie No. 31. Kilk. p. 231. Falc. Mor. 5213.]

No. 83.

ARCHIBALD CAMPBELL of Shirvane, granted a conveyance (28 May 1733) of his executory and