## SECT. V.

### Effect of a Purchaſer acquiring a Right preferable to that of his Author; and of Onerous Deeds granted by a *Bona Fide* Poſſeſſor.

1741. *February* 21. DRUMMOND *againſt* BROWN and MILN.

No 23.
The purchaſer of part of the ſubjects, contained in a right, cannot, in *bona fide*, take advantage to the prejudice of his author, of any defect he may diſcover relative to the remainder.

WHEN a purchaſer acquires a preferable right to that of his author, it is *triti juris*, that he cannot thereupon recur upon his author's warrandice, farther than to obtain payment from his author of the price paid by him for the preferable right.

But in this caſe a new point was determined, viz. That the purchaſer of one or more ſubjects contained in an adjudication, thereafter acquiring a preferable right, cannot thereupon carry off from his author a ſubject, however ſeparate, contained in the ſame adjudication, but muſt communicate to his author, and conſequently to any deriving right from him, ſuch ſeparate right, upon his author's reimburſing him of the ſum paid for ſaid right.

THE LORDS conſidered that the purchaſer of part of a ſubject contained in a right, may be thereby let into a diſcovery of its defects, and that *bona fides* does not allow that he ſhould profit by ſuch diſcovery, to the prejudice of his author's right to the remaining part of the ſubject.

*Fol. Dic. v.* 3. *p.* 93. *Kilkerran*, (BONA et MALA FIDES.) *No* 1. *p.* 95.

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1749. *February* 9.
CHRISTIAN HERON, Relict of Coltrain, *alias* Stewart, *againſt* AGNES STEWART, and HATHORN her Huſband.

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A perſon, appearing from the records, to be the proprietor of an eſtate, burdened it in terms of his contract of marriage with a liferent infeftment. His right to the eſtate was reduced, but the liferent infeftment remained effectual.

JOHN STEWART, writer in Edinburgh, afterwards deſigned of Phiſgill, intermarried, in the year 1668, with the daughter of Thomas Stewart, Provoſt of Wigton; and, by the contract of marriage, ſhe diſponed to him, and the heirs to be procreated of the marriage, the lands of Glenkirk, a ſmall intereſt ſhe had by her father; and he, on the other hand, became bound to provide her in the liferent of the half, and the heirs of the marriage in fee of all he then had or ſhould acquire during the ſtanding of the marriage; and, on the precept contained in this contract, he was infeft in the lands diſponed by the wife.

Notwithſtanding which, having purchaſed the lands of Phiſgill, he, in 1703, expede a charter thereof under the Great Seal in favour of himſelf and the heirs-male of his body, whom failing, of his own neareſt heirs-male, whom failing, of his heirs and aſſignees whatſoever; and thereon was infeft: And, in the year 1719, he expede a new charter on his own reſignation in favour of himſelf and

No 24. the heirs-male of his body, which failing, to the heirs-female of his body, the eldeſt ſucceeding without diviſion; and this he did in the form of a ſtrict entail, and was thereon infeft.

John Stewart ſome months thereafter died; and William Stewart, his third and then only ſurviving ſon, made up his titles as heir of proviſion by the ſaid tailzie; and again, upon his death without iſſue, Agnes, his eldeſt daughter, ſucceeded, and was infeft as heir of entail to her brother. But this tailzie was afterwards, about the year 1740, reduced, at the inſtance of Agnes, the daughter of his ſecond ſon Robert, when it was found, That both eſtates of huſband and wife being provided, by the contract of marriage 1668, to the heirs of the marriage, John Stewart had no power to make the tailzie 1719, and that the ſame was *contra fidem tabularum;* and which judgment the Houſe of Lords affirmed.

It has been ſaid that Agnes, the eldeſt daughter of John Stewart, ſucceeded upon the death of William her brother. While ſhe was yet in life, but paſt the age of having children, Captain John Coltrain of Drummorel, the eldeſt ſon of Elibazeth, the ſecond daughter of John Stewart of Phiſgill, and as ſuch the preſumptive heir of tailzie, intermarried with Chriſtian Heron, daughter of Heron of that ilk; and, by the contract of marriage in 1728, in contemplation of the marriage, and of L. 500 Sterling of tocher, became bound to infeft her in a liferent of 600 merks out of the eſtate of Drummorel; and in caſe of his ſucceeding to the eſtate of Phiſgill during the ſubſiſtence of the marriage, he diſburdens his eſtate of Drummorel, and becomes bound to infeft her in a liferent of 900 merks out of the eſtate of Phiſgill in caſe of children, and of 1200 merks in caſe of no children of the marriage.

So it happened that Agnes died in 1732, whereupon he ſucceeded as heir of entail to her; and having made up his titles accordingly, he, by a deed referring to his foreſaid contract of marriage, provided his wife in a liferent out of the eſtate of Phiſgill of 1200 merks in caſe of children, and 1500 merks in caſe of no children; whereon ſhe was infeft in 1734.

Upon the death of John Coltrain, *alias* Stewart, who was killed at the battle of Preſton, September 21. 1745, Chriſtian Heron, his relict, purſued an action of mails and duties upon her liferent-infeftment on the lands of Phiſgill; wherein compearance having been made for Agnes Stewart, now of Phiſgill, and her huſband, the argument will in a great meaſure appear from the pointed interlocutor pronounced upon report, by which

THE LORDS found, 'That the obligation entered into by John Coltrain of 'Drummorel, afterwards John Stewart of Phiſgill, in the marriage-ſettlement 'between him and Mrs Chriſtian Heron the purſuer, whereby he was bound to 'ſettle upon her a liferent to the extent of L. 50 Sterling yearly, was ONEROUS 'upon the part of the ſaid Chriſtian Heron, and rational on the part of the ſaid 'John Coltrain, *alias* Stewart; *and that he having implemented the same*, by 'granting the liferent infeftment to that extent, *when he was in the right* of fee

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'and property of the eſtate of Phiſgill, and his right ſubject to no challenge 'from any thing that could appear upon the records, that infeftment was like-'ways juſt and onerous, and does ſubſiſt in her favour, notwithſtanding the re-'duction afterwards brought againſt the right and title of the ſaid John Coltrain 'upon the latent perſonal obligation contained in the contract of marriage enter-'ed into in *anno* 1668, between 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 whatſoever of the marriage, and notwithſtanding the de-'cree obtained in that reduction ſetting aſide the right of the ſaid John Coltrain, 'which the Lords found cannot hurt the ſaid onerous liferent-ſettlement made 'to Chriſtian Heron, the purſuer, by her ſaid huſband, while he ſtood in the 'full right of property of the eſtate, conform to the infeftments and inveſtiture 'thereof.'

An interlocutor ſo full, that it in a great meaſure points out, and at the ſame time obviates the arguments pleaded for the defender from the common-law and act 1621: As to the common-law, the maxim that *resoluto jure dantis resolvitur et accipientis*, holds only in three caſes; 1*mo*, In extinguiſhable rights; 2*do*, Where the third party prevailing againſt the author has the preferable feudal right; or, 3*tio*, Where the author's right is intrinſically null, againſt which the records cannot ſave; as where his ſervice happens to be erroneous: But the preſent caſe is different, where the feudal right was habily veſted in the author, and only ſubject to a perſonal challenge; for then the purchaſer on the faith of the record is ſafe. And as to the act 1621, though it is true that the acquirer is *particeps fraudis*, where he ſees the defect of his author's right, yet that was what the purſuer could not ſee in this caſe: For though ſhe ſaw her author's right from his grandfather to be a gratuitous ſettlement of ſucceſſion, yet ſhe could not ſee any thing on record to hinder the grandfather to make that ſettlement, as he ſtood in the abſolute right by the charter and infeftment 1703, and that his obligation in the contract of marriage 1668 was a latent deed which ſhe nor any purchaſer could know of.

*** This judgment was affirmed on an appeal to the Houſe of Lords.

*Fol. Dic. v.* 3. *p.* 92. *Kilkerran,* (PERSONAL and REAL.) *No* 6. *p.* 389.

*** D. Falconer reports the ſame caſe:

JOHN STEWART, writer in Edinburgh, by his contract of marriage 1668, with Agnes, daughter of Thomas Stewart, Provoſt of Wigton, in conſideration of the diſpoſition of Provoſt Stewart's eſtate to him, and the heirs of the marriage, became bound to provide the fee of all he had, or ſhould acquire during the marriage, to the heirs to be procreate thereof.

John Stewart acquired the eſtate of Phiſgill, and 1719 made a tailzie thereof, which he completed by infeftment, to himſelf and the heirs-male of his body;

No 24. which failing, to his heirs female, and the heirs male of their bodies, without diviſion; with other ſubſtitutions; ſecluding Agnes the daughter of the deceaſed Robert Stewart his ſon: And dying, was ſucceeded by William a younger ſon than Robert, who was infeft 1720; and was ſucceeded 1727 by Agnes the daughter of John the tailzier; who was ſucceeded 1732 by John Coltrain of Drummorel, ſon of Elizabeth her ſiſter, who then took the name and title of Stewart of Phiſgill.

John Coltrain 1728 married Chriſtian daughter to Patrick Heron of that ilk, with whom he received in portion L. 500 Sterling, and became bound to infeft her in an annuity, to be uplifted out of the eſtate of Drummorel of 600 merks Scots: And, 'in caſe he ſhould at any time ſucceed to the eſtate of Phiſgill, 'he freed the lands of Drummorel of the ſaid annuity, and obliged him to in-'feft her in an annuity of 900 merks in caſe of children, out of the eſtate of 'Phiſgill.'

Agnes, the daughter of Robert, married John Hawthorn of Over-Airies; and they purſued a reduction of the tailzie, and John Stewart's ſervice and infeftment thereon; in which they prevailed: But he, during the ſubſiſtence of his title, had granted to his lady 'an yearly liferent proviſion of the full fourth 'part of the free rents of the lands and barony of Phiſgill;' for which ſhe was infeft in the whole eſtate; becauſe it was provided by the tailzie, that none of the heirs ſhould grant to their ſpouſes any annuities to be uplifted forth of the ſaid eſtate, but they ſhould be infeft in the lands themſelves, or ſo much yearly rent; ſo that they might receive the ſame, and the ſucceeding heirs of tailzie not be bound for payment thereof, nor the lands afterward affected therewith.

Upon the death of John Stewart, who was killed in his Majeſty's ſervice in the battle of Preſton, his lady purſued a mails and duties, as a *bona fide* onerous purchaſer from the perſon in the right.

*Pleaded* for the defender, It is a maxim, that no perſon can convey to another a greater right than is in himſelf: John Coltrain was not proprietor of the eſtate, and therefore could not lay a burden upon it; and ſuppoſing the purſuer's *bona fides*, that can never make valid a title *a non domino: bona fides* does not make a right; as neither can the oneroſity of the purchaſe be of any conſideration. However there was no *bona fides;* a proceſs of exhibition of old John's contract of marriage was raiſed in his own lifetime, in which John Coltrain was called, as was William Stewart, who after poſſeſt the eſtate; but he ſerved himſelf tutor at law to Agnes his niece, and on that title got up from her agent the proceſs, upon his receipt, and by theſe means ſhe was, by her tutor and relations, kept out of her eſtate. It is true, this proceſs does not now appear; nor is it clear, by the receipt, it related to the contract of marriage; but that it did, is made evident by the oath of the agent for this family, taken in the proceſs of reduction; and the contract itſelf was recovered out of the charter-cheſt of Phiſgill, to which the purſuers of the reduction were directed by the oath of Heron,

taken in an action of proving the tenor thereof. Neither was this purſuer's acquiſition onerous, as her huſband was not poſſeſt of the eſtate at the time, and might never have poſſeſt it, but provided her out of his own eſtate: The obligation to give her an annuity out of Phiſgill was conditional, on his ſucceeding to it; which muſt be underſtood of his ſucceeding juſtly, not of ſucceeding in fact by a bad right, which he could not hold. It is plain that the eſtate being evicted, he cannot be liable in warrandice on this obligation, which therefore cannot be reckoned onerous. No 24.

*Pleaded* for the purſuer, She founds no claim on her *bona fides*, but on a conveyance from the perſon in the right; and only uſes that, with the oneroſity, to ſave from the reduction which lay againſt her huſband, and gratuitous or *mala fide* purchaſers from him. Old John Stewart was proprietor of the eſtate, under a perſonal obligation, which did not diſable him from diſponing; he accordingly made the tailzie, and was infeft upon it, to which her huſband ſucceeded; and when ſhe contracted he was undoubtedly the true and only *dominūs* of the ſubject, having power to contract thereon, and only liable, as repreſenting the tailzier, in a perſonal obligation. It cannot be pretended the purſuer is not in *bona fide*, whatever ſome of the heirs of Phiſgill might have been in; and even, with reſpect to them, it does not appear the proceſs of exhibition related to the contract of marriage. The purſuer's right is onerous, notwithſtanding that, if the eſtate of Phiſgill had been evicted before it was granted her, no warrandice might have followed on the obligation for it; ſince, in order to a claim of warrandice, not only muſt there be oneroſity, but the warrandice muſt be contravened. She acquired, by her contract of marriage, a right to have the annuity on his ſucceſſion, and it was his ſucceſſion on the tailzie was the condition of the obligation, which, when it happened, was the onerous cauſe of the right granted her. *Lastly*, That a marriage contract was a ſufficient onerous cauſe to validate the diſpoſition of an eſtate made by the perſon in the feudal right, who lay under a perſonal obligation to denude, was found in the caſe of the eſtate of Mackerſton. *See* PERSONAL and REAL.

*Replied*, The purſuer does not claim as purchaſer from a gratuitous aſſignee, but from a falſe and putative heir, who not having right, could convey none.

THE LORDS, 7th February, 'Found, that the obligation entered into by John 'Coltrain of Drummorel, afterwards John Stewart of Phiſgill, in the marriage 'ſettlement betwixt him and Chriſtian Heron, 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 Chriſtian Heron, and rational on the part 'of the ſaid John Coltrain *alias* Stewart; and that he having implemented the 'ſame, by granting of the liferent infeftment to that extent, when he was in 'the right of fee and property in the eſtate of Phiſgill, and his right ſubject to 'no challenge, from any thing that did or could appear upon the records, that 'infeftment was likewiſe juſt and onerous, and did ſubſiſt in her favour, not-

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'withſtanding the reduction afterwards brought againſt the right and title of the 'ſaid John Coltrain, upon the latent perſonal obligation, contained in the con- 'tract of marriage entered into, *anno* 1668, betwixt John Stewart, then writer 'in Edinburgh, and Agnes Stewart his ſpouſe, whereby he was bound to ſettle 'the eſtate he ſhould acquire, in favour of the heirs whatſoever of the marriage; 'and, notwithſtanding the decreet obtained in that reduction, ſetting aſide the 'right of the ſaid John Coltrain, which the Lords found could not hurt the ſaid 'onerous liferent ſettlement made to Chriſtian Heron, the purſuer, by her ſaid 'huſband, while he ſtood in the full right of property of the eſtate, conform to 'the infeftments and inveſtitures thereof.'

*Pleaded* in a reclaiming bill, The right given to the lady is diſconform to the obligation in her contract of marriage, which was to grant her an annuity of 900 merks; whereas there is given her a liferent of a fourth part of the free rents of the eſtate, which cannot be ſupported by the obligation. The tailzie incapacitates the heirs to grant any annuities to their ſpouſes, but ſolely liferent rights to the extent of one-fourth of the eſtate; and the contract itſelf provides, that no clauſe in it ſhould be effectual, that was contrary to the ſanctions of the tailzie, on which account the form of the lady's right has been varied; but then it is not what the huſband bound himſelf to grant; neither is it a right agreeable to his powers by the tailzie, which reſtricted him to the conſtitution of a ſpecial locality, and is in itſelf anomalous, and cannot be ſuſtained, being a liferent of the fourth part of the free rents of the whole lands, and an infeftment in the whole eſtate in ſecurity thereof.

THE LORDS refuſed and adhered.

*D. Falconer, v. 2. No 59. p. 61.*

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1760. *December* 4.

AGNES STEWART of Phiſgill, and JOHN HATHORN her Huſband, *againſt* The CHILDREN and CREDITORS of CAPTAIN JOHN STEWART, *alias* COLTRAIN, of Drummorel.

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A ſubſequent ſuit aroſe out of the caſe above. The granter of the liferent had, before acquiring the eſtate, afterwards evicted, given ſecurity to a certain extent on another eſtate. To that extent the purſuer of the reduction obtained relief.

JOHN STEWART of Phiſgill, in 1668, ſettled his eſtate, in his contract of marriage, to the heirs of the marriage; and his eldeſt ſon having died without iſſue, the purſuer, Agnes Stewart, only child of Robert, the ſecond ſon, who alſo predeceaſed his father, became the heir of the marriage, entitled to take the eſtate, upon her grandfather's death, under the ſaid contract.

John Stewart, however, in 1719, executed a deed of ſettlement in the form of a ſtrict entail, whereby he diſinherited his grand-daughter Agnes, and provided his eſtate of Phiſgill to his own ſurviving ſons and daughters *ſeriatim*, and their iſſue.

John Stewart ſoon after died; and was ſucceeded, in virtue of this entail, by William, his third ſon; who having likewiſe ſoon after died without iſſue, was