SECT. XIII.

Fraus Auctoris nocet Successori.

1772. *November* 10.

PETER and MARY M'DONELLS, *against* DUNCAN CARMICHAEL Merchant in Edinburgh, and MESSRS BELL and RANNIE Merchants in Leith.

No 64.
In personal rights, *fraus auctoris nocet successori.*

THE pursuers brought a reduction of an assignation granted by them, as of date 9th July 1770, in favours of Duncan Carmichael, to a bond of 5000 merks, bearing date 4th July 1770, owing them by Mr Fraser of Balnain, in consequence of a transaction made by Carmichael, for their behoof; and, 2dly, of a translation executed by Carmichael of his right to said bond, in favour of Messrs Bell and Rannie, dated September 6th 1770.

The general grounds of reduction, *quoad* the assignation to Carmichael, were fraud, circumvention, facility, lesion, and the vitiosity of a transaction executed *remotis arbitris*. With respect to Bell and Rannie, the challenge was laid upon the rule in law, *resoluto jure dantis, resolvitur jus accipientis*.

In the course of the procedure, the nature of the transaction between Carmichael and the other defenders Bell and Rannie, and that full value was *bona fide* given by them for the translation in question, was explained by Mr Rannie, upon oath.

Carmichael himself, who was appointed by the Lord Ordinary to appear personally before him, in order to undergo an examination, deserted the cause, and absconded. The Lord Ordinary then allowed a joint proof to both parties of their respective allegations; and, having reported the cause, upon mutual informations for the pursuers and Bell and Rannie, the Court pronounced the following judgment:

'THE LORDS sustain the reasons of reduction; and find Duncan Carmichael, another of the defenders, liable in the expenses already incurred; but find, that Messrs Bell and Rannie are not liable in any part of said expenses.'

Pleaded by Bell and Rannie in a reclaiming petition; without minutely investigating whether the pursuers have or have not been defrauded by Carmichael, in the conveyance of Balnain's bond by them to him; although that conveyance were a fraudulent deed, still the onerous translation of Balnain's debt to the defenders cannot be affected by Carmichael's fraud; for that the defenders hold the general rule of law to be, that the fraud of a cedent does not defeat or impair the right of the onerous assignee.

In questions of a feudal nature, the rule of our municipal law is the only one to which we can have recourse; but the case is very different with regard to personal contracts, and those general contracts and transactions which prevail in every state, and in every age where commerce and the intercourse between man and man takes place. In such transactions as these, the great source of our law is the Roman jurisprudence; and it may safely be affirmed, that wherever no reasons, arising from the peculiar circumstances of our own state, give occasion to different rules, the Roman law, in personal questions and contracts, is the law of Scotland. And, with regard to the Roman law in this matter, Voet, *tit. De doli mali et metus exceptione*, § 2. lays it down, from undoubted authorities there cited, to which many more might be added, that *dolus auctoris non nocet successori, nisi in causa lucrativa*; the fraud of an author does not injure the right of an onerous singular successor. No 64.

So standing the rule of the Roman law, where notions of commerce, and the indefeasible transition of rights from one person to another were much less understood than among us, it must be matter of just surprise if a contrary rule shall be understood to prevail in our law, which boasts so much of its care and strict attention to the rights of singular successors.

It is admitted by the pursuers, that our law does coincide with this invariable maxim of the Roman law in various particulars; as in the case of land-rights, transference of moveables, and onerous indorsations to bills. An exception, however, is set up with regard to personal rights, *nomina debitorum*, upon the authority of Stair and Bankton, viz. that the fraud operates even against the right of an onerous assignee. But, if it shall appear that these authors have been led to lay down an erroneous position, from an analogy to another principle of law, which rests upon a very different footing, the weight arising from their opinions will evanish.

The illustrations which most of them give to their general positions, is founded upon this, that all defences competent against the original creditor, in a moveable debt, which can be proved otherwise than by his oath, continue relevant against even an onerous assignee. The defenders do not dispute that this is a maxim of the law of Scotland; and the meaning of it is neither more nor less than this, that if the original debtor in a bond has extinguished the debt by payment, either in whole or in part, or has any other relevant defence by compensation, or otherwise, the cedent cannot, by a transference of his right, render the condition of the debtor worse, or give to the assigneee more than was in himself. This doctrine rests upon this plain principle, *nemo in alium transferre potest plus quam ipse habet*; and it would be unjust, if the cedent, by his act and deed, in which the original debtor had no concern, could create or revive a debt against the original debtor.

But the case here is altogether different. The pursuers do not rest their plea upon the sole act and deed of the cedent, of which they had no knowledge, and in which they had no concern. They admit the transaction, as it now, *ex facie*,

No 64. appears, but found on some extraneous circumstances attending the conveyance granted by them, which, however available to bar Carmichael himself, *personali exceptione doli*, ought not to operate against an onerous singular successor. The justice of the case rather suggests, that the person who says he has been defrauded, and who is best able to point out the circumstances of the fraudulent transaction, should have recourse against the person with whom he did transact, than that onerous singular successors should be subject to a loss, because they confided in the united acts of two persons who had confidence in each other.

But, further, the mere opinion of authors, however respectable, unless supported by the analogy of law, by strong expediency, or by a *series rerum judicatarum*, are never held as decisive of the law of any country. Stair gives no authorities or decisions in support of his opinion. The statute 1621, cap. 18. quoted by Bankton, contains a most explicit declaration of the sense of our legislature, that the Roman law was the law of Scotland, and that neither the *actio* nor *exceptio doli* can operate against an onerous singular successor; neither will the decision Scot against Chiesly, No 8. p. 4867. support the opinion laid down by him. On the other hand, there is a decision collected by Stair, Crichton against Crichton, No 17. p. 4886. which rests entirely upon the principle which the defenders contend ought to decide this case.

Answered, Although, in the particular instances recited by the defenders, either for the sake of commerce, or the security derived from the records, the rule of law does obtain, that *dolus auctoris non nocet successori*; yet, a very different rule does apply to the case of a purchaser of a *nomen debitoris*, or any other right merely personal. A man, in that case, does not purchase upon the faith of records, but he relies upon the faith and credit of the person with whom he contracts. The rule of law falls to be applied, that *unusquisque debet scire conditionem ejus cum quo contrahit*; in all such cases, a purchaser *utitur jure auctoris*; and, upon this principle, it is an established rule in the law of Scotland, that the same objections that are good against the cedent, are likewise good, even against the most onerous assignee.

This doctrine is accordingly very clearly laid down by Stair, lib. 3. tit. 1. § 20.; Bankton, v. 2. p. 191. § 8.; and, as it is undeniable that the assignation's having been elicited by fraud and circumvention, would be a good ground of challenge, in a question with Carmichael himself; so, to deny to the pursuers the same ground of challenge, in a question with the defenders, who derive their right singly from Carmichael, would be absolutely inconsistent with the principles above stated, and which hitherto have been understood to be fixed in the law of Scotland. The defenders *utuntur jure auctoris*; and the right of their author being annulled, their right must fall of consequence. In the case of personal rights, the law of Scotland makes no distinction, whether the exception to the right arises from fraud, or from any other act or deed of the party, which would have afforded a just ground of challenge in a question with the cedent. Whatever affords a good ground of challenge against the cedent, will

be likewise a good ground of challenge against the assignee. Stair, lib. 4. tit. 40. § 21.; Bankton, v. 1. p. 259. § 65. No 64.

The doctrine here laid down is clearly founded in the analogy of law; for, as it is admitted by the defenders themselves, that payment or compensation is as relevant against an onerous assignee as against the cedent, and, as they do admit, in the general, that the cedent cannot, by a transference of the right, render the condition of the debtor worse, or give to the assignee more than was in himself, it will not be easy to assign a solid reason why, consistently with that principle, it should be in the power of the cedent, by assigning away the right, to deprive a third party of challenging that right upon the head of fraud.

The doctrine is also clearly founded in expediency; and it would lead to strange consequences, if the contrary doctrine were to hold: For, supposing that a bond, or other deed, is elicited by the grossest imposition, if the creditor can get any person to advance money to purchase the right, he runs off with the money, and the person imposed upon is left without the possibility of redress. On the other hand, it can be attended with no bad consequences, that the fraud of the cedent should be good against the onerous assignee; because it is the duty of every person to consider with whom he contracts. In the purchase of every personal right, the purchaser can have no earthly security to rely upon, except the credit and good faith of his author.

Where a series of decisions have run counter to the opinions even of the most eminent writers in our law, it may be a good reason for rejecting their opinions upon these points; but, where the decisions of the Court are silent, the opinions of our lawyers must be considered as of the highest authority; because, where the writers upon our law have laid down the law in any particular, and where, in the course of ages, no decision of the Supreme Court is to be found upon the point, it is the strongest declaration possible of the sense of the whole nation, and that they had acquiesced in such opinions as law.

At the same time, in any cases that have occurred, the decisions of the Court have gone agreeably to the opinions above laid down. The decision, Scot *contra* Chiesly, &c. observed by Stair, is certainly a decision in point.

The like judgment was given in 1742, Burden *contra* Whiteford;* and still more lately, 6th March 1755, Irvine *contra* Osterbie and Others, No 26. p. 1715.; and, as to the case Crichton *contra* Crichton, where it is said the contrary was found, it does not at all apply to this case.

The statute 1621 does not afford the smallest argument against the doctrine now maintained by the pursuers. In the present case, the pursuers are insisting for reducing an assignation elicited from them by Carmichael, as not being their deliberate act or deed, or rather not their deed at all, but impetrated from them by the grossest fraud and circumvention. And the pursuers do contend, that the assignation itself being set aside, as not being their deliberate act and deed, the right of the defenders should fall of consequence; whereas the deeds that

* Examine General List of Names.

No 64. are the object of the statute 1621, are not supposed to be elicited by fraud and circumvention, but to be deliberate acts and deeds of the granter. The right of challenge is not there given to the granter, as supposing him to be circumvened, but to the creditors of the granter, who were meant to be defrauded both by granter and receiver. And all that is established by the statute is, that the foresaid remedy, introduced in favour of the creditors of the granter, should not be extended against an onerous purchaser. As the subjects did truly pass from the true proprietor by his own free and deliberate act and deed, the legislature, in giving this relief to the creditors, did not think it proper to cut down the right of a *bona fide* purchaser. And, indeed, there was no necessity for carrying the remedy so far; because, as the statute does suppose, and indeed does only support the right of a purchaser who paid a full and adequate price, it was equally beneficial to the creditors to give them access to the price as to the subjects themselves; so that there is truly no similarity between the cases mentioned in the statute, and such a case as the present; and there is no arguing from the one to the other.

Lastly, The civil law is improperly resorted to in cases that are clearly decided in our own law; at the same time, if this question were to be determined by the principles of the civil law, it would fall to be determined against the defenders. There was a plain distinction laid down in the civil law between the case of *dolus dans causam contractui*, and *dolus incidens in contractum*. In the first case, the contract was null and void; the property was not transferred; and, consequently, the right of a *bona fide* purchaser behoved likewise to fall.

It is clear, that, in this case, *dolus dedit causam contractui;* and, therefore, according to the decision of the civil law, the contract was null and void. The right was not thereby transferred from the pursuers to Carmichael; and, if so, he could never give an effectual right to the defenders. The rule of law must strike against them, that *nemo plus juris in alium transferre potest quam ipse habet.*

'The Lords adhered.'

Act. *R. M'Queen.* Alt. *Da. Dalrymple & Sol. Dundas.* Clerk, *Campbell.*

Fol. Dic. v. 3. p. 247. Fac. Col. No 29. p. 75.

No 65.
An assignee to an English bond, transferable by indorsation, is affected by the frauds of his authors.

1786. *March* 9.

Abraham Delvalle, and Others, *against* The Creditors of the York-Buildings Company.

The bonds issued by the York-Buildings Company being payable to one of the clerks, or his assigns by indorsement, passed from hand to hand by blank indorsation.