for an onerous consideration, the superior is entitled to make the most he can of it, and has accordingly an obvious interest to insist that it shall not be defeated in the manner which is now attempted *. No. 3.

*3dly*, The rules by which strict entails are construed, cannot be extended to the present question. As entails are generally gratuitous destinations in favour of the granter's nearest relations, the restraint upon alienation imposed by them ought to be less favourably regarded, than where, as in this case, it arises from an onerous *bonâ fide* contract. Clauses of pre-emption were accordingly effectual by the civil law against the purchaser and his representatives; *L.* 12. *De. Præscript. verb. L.* 2. *Cod. de Pactis*; and with us, if they are engrossed in the seisin, they are also good against third parties; Bankton, B. 2. Tit. 11. § 50.; 6th March 1767, Irving against the Marquis of Annandale, No. 71. p. 2343.

Besides, if a clause, irritating the rights granted to the purchaser, were necessary, it occurs in the present instance. For the clause not only irritates the vassal's charter and infeftment, in the case of his contravening it, but also "all that may follow thereon," which last words can bear no other interpretation than deeds or obligations in favour of third parties, by which he may attempt to defeat the right of the superior.

The Court first ordered a hearing in presence, and afterward memorials.

One Judge thought, that the clause of pre-emption in question was essentially different from the general clause *de non alienando* in feudal investitures, which had been abolished by 20th Geo. II.; that this was a special covenant between a seller and a purchaser, which contained nothing illegal or *contra bonos mores*, and being duly published to third parties by its insertion in the investiture, it ought to receive full effect.

The rest of the Court, however, on the grounds stated for the respondent, were clearly of opinion, that it fell under the 20th Geo. II.; and that the case, 6th March 1767, Irvine against the Marquis of Annandale, No. 71. p. 2343. had been ill decided.

The Lords refused the desire of Mr. Farquharson's petition.

For the Petitioner, *Lord Advocate Dundas, Hay, Geo. Ross. Ch. Hope, Keay.* Alt. *W. Robertson.* Clerk, *Home.*

*R. D.* *Fac. Coll. No.* 202. *p.* 463.

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1802. *May* 21. STEWART *against* STEWARTS.

No. 4.
What is to be understood by the term "*personal representatives*"

JOHN STEWART, victualler in London, in the year 1769, executed a settlement, leaving his effects in the first instance to his son; failing whom, one half

* Although it was necessary for Mr. Farquharson's plea, that he should contend that he had a right to purchase the lands at the price which his authors received, yet he at the same time signified his willingness to give twenty-four years purchase of the present rental.

No. 4. in the clause of a settlement?

to be given to his wife and her relations, and the other to his brother James, or, in the event of his death, to his personal representatives.

John Stewart died about the year 1776, leaving a widow and one son. His brother James next died; thereafter John's son, without issue; and, last of all, his widow; so that the succession to one-half of his effects opened to the personal representatives of his brother James, by the terms of the settlement.

In the year 1795, about four years previous to his death, James Steware executed a testament, by which, upon a narrative of his resolution "to settle "his worldly affairs in his own lifetime, so as that all difference among his "children, anent the succession to him in his means and effects, after his death, "might be prevented, he nominated and appointed John Stewart, his eldest "lawful son, to be his sole executor, and universal intromitter with his whole "goods and gear, debts, sums of money, household furniture, and other "moveables whatever, that might pertain or be owing to him at the time of "his decease, in virtue of bonds, bills, or any other manner of way; together "with the vouchers and instructions of the said debts," &c. "all which the "testator thereby left and bequeathed to his son John, with power to give up "inventory, confirm testament, and do every thing thereanent that any other "executor can, or may do, by law; with and under the burdens, legacies, "provisions, and reservations therein mentioned."

John Stewart, tenant in Fianich, the eldest son of James Stewart, conceiving himself to be the sole personal representative of his father, proceeded to take possession of the succession, devolving upon the family by his uncle's settlement. But doubts having arisen whether this succession belonged to him exclusively, or in common with his brothers and sisters, a process of multiplepoinding was brought, in which the elder brother pleaded:

By the term Personal Representatives, according to the law of England, where this settlement was framed, is to be understood those who represent a man after his death, or, in other words, those who succeed to his personal estate, either in terms of his latter will, or by law, if he should die intestate; Jacob's Law Dictionary, *vocibus* PERSONAL, REPRESENTATION. Executors are therefore synonymous with personal representatives; and as John Stewart was appointed by his father's settlement his sole executor, he is entitled to any legacy devised to his personal representatives.

Answered: The term personal Representatives, includes the whole children of James Stewart, who by law become successors to him in his moveable estate.

An executor is quite different from a representative, being a trustee for the management of the moveable estate of a person deceased, accountable to the creditors, legatees, and representatives of the testator; Act (preamble) 1617, C. 14; Gordon against the Laird of Drum, Dec. 21, 1671, No. 86. p. 3894; Campbell against Burdon, Dec. 1, 1791, (not reported.) By the law of England, likewise, as illustrated by numerous decisions, representatives are clearly distinguished from executors; 3. William's Reports, 40; Godolphin Orph.

Leg. 259; Act 22. et 23. Car. II. C. 10; 1. Jac. II. C. 17. § 7.; Green *ver.* Howard, Hilary Term, 1779; Pickering *versus* Stamford, August 2, 1797, Vesey *junior* Reports. Farther, the settlement of James Stewart can only be understood to dispose of what was his own property; but the funds here *in medio* never were vested in him, and did not devolve upon his family till many years after his death. The terms of his will likewise shew, that he was disposing merely of his own effects, and had no contemplation of this eventual legacy. See PROVISION TO HEIRS AND CHILDREN, Sect. 5. *et seq.* No. 4.

The Lord Ordinary reported the cause, and the Court unanimously sustained the claim of the younger children.

Lord Ordinary, *Methven.* For Eldest Son, *Connell.* Agent, *Ja. Robertson*, W. S.
Alt. *Williamson.* Agent, *Geo. Andrew.* Clerk, *Gordon.*

*Fac. Coll. No. 42. p. 86.*

1805. *December* 3. BROWN *against* HENDERSON.

No. 5.
A general conveyance of "all debts," does not convey debts secured by infeftment.

ANDREW HENDERSON, schoolmaster in Kilmarnock, on the 12th of June 1799, executed a disposition and deed of settlement, by which "he disponed, "conveyed, and made over, to and in favour of Janet Brown my spouse, in "the event of her surviving me, in liferent, during all the days of her life, for "her life-rent use allenarly, and to and in favour of Andrew and William Hen- "derson, my sons, equally between them, share and share alike, in fee and "property, their heirs or assignees, not only all and sundry goods, gear and "debts, sums of money, household furniture, bed and body clothes, and whole "other moveable effects whatsoever, pertaining and belonging, or due and "addebted to me at the time of death, with the whole rights, title deeds and "securities of said heritable and moveable subjects, grounds and instructions "thereof, and whole clauses therein contained, with all that has followed or "may follow thereon, and particularly without prejudice to the generality "foresaid, all and whole that lot of ground at the Braehead of Kilmarnock, "measuring," &c.

Janet Brown, the widow, and William Henderson, the youngest son, contended, that two heritable bonds for £.500 and £.150, upon which infeftment had been taken, were comprehended under this settlement, while the eldest son Andrew insisted he was entitled to succeed to them as heir-at-law.

The case was reported to the Court; and the pursuers

Pleaded: The intention of the testator, which is the only rule for explaining ambiguous expressions, was clearly to make a general settlement of his whole fortune; and it is perfectly plain, that he understood he had conveyed all his heritable as well as his moveable funds. Thus, after mentioning the moveable