NO. 1. holds even without paction. A reverser, when he redeems a wadset, is bound in equity, over and above the wadset-sum, to pay every farthing he is due the wadsetter upon any separate account; and the equitable defence of retention, calculated to lessen the number of processes, will preserve the wadsetter in possession till this piece of justice be done him. According to this rule, the defence insisted on for the wadsetter is undoubtedly good against Mackenzie of Assint. But will it be good against Assint's creditors, or against an onerous purchaser? Even an eik to a reversion protects only against the reverser, whose debt it is, and not against a purchaser, *multo minus* an ordinary debt. Retention is an equitable remedy, introduced to save multiplicity of processes; and there is neither equity nor expediency to sustain it against a purchaser.

Sel. Dec. No. 128. *p.* 184.

1805. *March* 6.

Sir ROBERT PRESTON *against* the Earl of DUNDONALD's Creditors.

NO. 2.

A feus out a piece of ground to B, who again dispones it to C, stipulating by a separate deed, a right of pre-emption in favour of A. C's right remaining personal, A's right of pre-emption is found to qualify C's right, and available against creditors at a judicial sale of his estate.

IN 1745, Sir George Preston of Valleyfield feued out a small piece of ground called Kirkbrae, to General James Cochrane, absolutely and irredeemably. The right was completed by infeftment, (27th November 1748). General Cochrane sold the property to his brother Charles, who, of the same date (30th June 1750) with the disposition in his favour, executed a back-bond in favour of the General, by which he bound himself and his heirs, that before disposing of this subject, it should be offered to Sir George or his heirs at the sum of L. 307 : 13 : 4 Sterling.

Charles Cochrane was never infeft in this property; but he had previously (25th June 1749) executed a disposition of the estate of Culross, and in general of *acquirenda* as well as *acquisita*, in favour of the Earl of Dundonald.

The Earl made up titles to the estate of Culross, by obtaining from the Crown, of whom it held, a charter of adjudication, in implement of the disposition 1749, and taking infeftment on it; but the Earl's right to Kirkbrae remained personal.

In 1780, the Earl's affairs having become embarrassed, Sir Charles Preston, the son and heir of Sir George, brought an action before the Court, for having the above-mentioned clause in favour of his family made effectual. In this action the Court (20th December 1781) found, "That the tenor of "the back-bond and obligation libelled on, ought to be inserted in all the "subsequent titles and investitures of the piece of ground in question." (See No. 22. p. 6569). Decree of non-entry was also obtained by Sir Charles against the Earl.

An action of sale having been brought, an order was obtained from the Court for exposing to sale the estate of Culross, including Kirkbrae. NO. 2

Sir Charles petitioned the Court, in virtue of his claim to the reversion of Kirkbrae, provided by the back-bond, and secured by the decree 1781, stating, that the lands consequently could not be exposed to sale, and praying that they might be struck out of the order for sale.

The Court (9th February 1797) found, "That the petitioner has right to "redeem the lands of Kirkbrae, on payment of the sums mentioned in the "prayer of the petition."

Lord Dundonald reclaimed; but his petition was (8th July 1797) refused, without answers. Upon advising a second reclaiming petition, memorials were ordered.

Upon advising these, the Court (21st November 1798) found, "That the "right of pre-emption claimed by Sir Charles Preston, in virtue of the "back-bond, is not a real burden upon the lands of Kirkbrae, and conse-"quently cannot be effectual against creditors; and therefore, that these "lands must be sold for payment of the debts due by the common debtor, in "terms of the act of roup."

A reclaiming petition for Sir Charles was (7th December 1798) refused, without answers.

The judicial sale having proceeded, the lands of Kirkbrae were sold along with the others.

Sir Robert Preston having succeeded his brother Sir Charles, presented a petition of appeal against the judgment of the Court. The cause was by the House of Lords, (13th April 1802), "remitted back to the Court of Session "in Scotland, to review the interlocutors complained of; and particularly, "to find whether the back-bond given by Charles Cochrane, (30th June "1750), as mentioned in the pleadings, is not a real burden on the lands of "Kirkbrae, it having been found by the interlooutor of 20th December "1801, that the tenor of the back-bond and obligation libelled on, ought to "be inserted in all the subsequent titles and investitures of the piece of "ground in question, which, by the decree of the Court of Session, in a pro-"cess of non-entry, remains in the superior's hands, together with the mails "and duties thereof, and will so continue, ay and until the lawful entry of "the righteous heir; and also to find, whether the terms of said back-bond, "supposing it a real burden, are not sufficient to entitle the appellant to a "pre-emption."

When the cause came back to the Court, memorials were ordered, and a hearing in presence took place, when it was (9th July 1803) found, "That "the back-bond given by Charles Cochrane, 30th June 1750, is a real bur-"den on the lands of Kirkbrae, and therefore find, That Sir Robert Preston

NO. 2. " has right to redeem those lands, upon payment of the sums mentioned in " the petition."

The common agent for the creditors and the purchaser reclaimed, and

Pleaded: By the judgment 1781, the Court seem to have guarded against giving any deliverance upon what effect this back-bond would have upon the rights of parties, if inserted in the investiture. The object was merely to ascertain the obligation, such as it was, and to ordain that this should appear in the future titles, whatever might be its legal effects. Now, even although it had been inserted in the investitures, it would not have been effectual against creditors; for it was an obligation, not originally executed in favour of the granter of the feu, but was taken by the vassal from his disponee, and, in all its terms, conceived merely as a personal obligation *ad factum præstandum* upon the part of the granter. There is no clause which could entitle the family of Valleyfield to secure it upon the lands; nor is it guarded by any nullity in case of contravention, nor declared to be a burden or condition of the grant.

The back-bond is not such a right of reversion as the law acknowledges, and, by registration, makes effectual against singular successors; for it was never to be in the power of the supposed reverser, to use his right of reversion, so long as the wadsetter had no compulsitor, by requisition and diligence, to oblige the reverser to pay the money advanced and take back the lands.

The back-bond, therefore, is not a reversion, but imposes a limitation upon the vassal's power of alienation. It creates a kind of entail, burdening the right of the heir in possession, in favour of the superior and his heirs. Every such right must be strictly interpreted, and can only be enforced against third parties by irritant and resolutive clauses; Ersk. B. 2. Tit. 5. § 28.; B. 2. Tit. 3. § 13.; Stirling against Johnston, 4th January 1757, No. 70. p. 2342.

But, although the right to the lands was only personal in Lord Dundonald, it does not follow that his right, and all who derive through him, must be affected by this back-bond, which is admitted to be merely personal, because it has not been inserted in the investitures. If, however, when it had so been inserted, it would not have been good against the real right; while it remains personal, it cannot, for the same reason, be good against a personal right in the lands. Besides, in all personal rights, there seems to be a distinction between the grant of a right and the obligation to grant it. The one is effectual against singular successors, the other is not. The obligation in question is plainly of the latter description, importing a personal obligation upon the grantee and his heirs, in case of a sale, to offer the subject to the superior, but this has been attempted without burdening the lands,

or qualifying the right in such a manner as to be effectual in a question with any other parties than the granter and his heirs. No. 2.

Answered: It never was doubted, that one person may acquire a right in behalf of another; and the party in whose favour it is stipulated, is as completely entitled to the benefit of it, as if it had been acquired by his own stipulation.

When such an obligation is inserted in the investitures, as by the decree in 1781 it ought to have been, it necessarily becomes a real burden or quality of the right, and thus effectual against the whole world. The Court did not declare it to be a real burden, because, strictly speaking, it could not be so, while it was not inserted in the investitures; but it was declared, that the right to the lands could not be made real, without the right of pre-emption being made real also. A condition for payment of debts which, in its own nature, has no connection with the lands disponed under this burden, may be made real; still more must conditions become real when inserted in the investitures, which directly relate to the lands themselves, and are necessarily connected with them, such as that of pre-emption, which can only be implemented by means of the lands. A clause *de non alienando*, formerly was real and effectual against singular successors, when inserted in the investiture: It required no irritant or resolutive clause to give effect, but operated directly as a real quality or burden of the right. A conditional right of reversion, to take effect when the disponee chooses, or finds it necessary to sell, which is the description of a right of pre-emption, is just as valid and legal, and as effectual on the existence of the condition, as a right of reversion which is unconditional, which, when incorporated in the right, it never was doubted, qualifies it without irritant and resolutive clauses. Entails which depend altogether on the will of the proprietor, without any contract with any other person, necessarily must contain irritant and resolutive clauses; but reversions arise *ex contractu*, constituting a distinct right in the person of a certain individual and his successors, which belongs to them, and is their property, just as much as the *dominium* of the lands, under its burdens and qualities, is the property of the fiar. It might be equally well maintained, that rights of servitude or liferent, or even a security for debt constituted by way of real burden in the infeftment of the property, cannot be effectual without irritant and resolutive clauses.

But the right to those lands was entirely personal; and by the very nature of such rights, they must be subject to every condition, quality and exception, in the person of a singular successor, to which they were liable in the person of the original holder of the right. No person can take the right otherwise than it is: Being a mere *jus crediti* it cannot possibly be different in the assignee, from what it was in the original creditor; Ersk. B. 2. Tit. 3. § 48. It is not here merely an unilateral personal deed, where there

NO. 2. may be a distinction between the granting of a right and an obligation to grant it, (though contrary to the opinion of Stair, B. 2. Tit. 9. § 6.); but it is a mutual contract. While it remains personal on both sides, and unimplemented, it is clear, that the right of pre-emption cannot be defeated, unless it can be made out, that one party to a mutual contract, or his assignee, may take the benefit of that contract, while it still remains *in nudis finibus contractûs*, without implementing the mutual clauses to the other party, or those in his right.

" The Lords (6th March 1805) find, That Charles Cochrane, who granted the back-bond in question, in favour of Sir George Preston, had only a personal right to the lands of Kirkbrae, which never was completed by infeftment, either in his favour or in that of his successor Lord Dundonald: Find, That the said back-bond never was inserted in the title of the said lands, though ordered to be so by the interlocutor of this Court, in 1781: Therefore find it unnecessary to determine whether, if the back-bond had been so inserted in the titles, and infeftment had followed, it would or would not have constituted a real burden on the lands: But find, That the personal right in Charles Cochrane, and his successor Lord Dundonald, did remain qualified by the condition in the said back-bond in favour of Sir George Preston; and that the adjudication led by the creditors of Lord Dundonald, can only attach the said personal right, subject to the said condition: Find, That such interest as Lord Dundonald has in said lands, is properly comprehended in the summons of sale; and therefore find, That Sir Robert Preston has now right to redeem said lands, on payment of the sum of L. 307: 13: 4, mentioned in said back-bond; and decern accordingly."

Act. *Solicitor-General Blair, Ross, Maconochie.* Agent, *Ja. Thomson*, W. S.
Alt. *Williamson, Gillies.* Agent, *Rob. Watson.* Clerk, *Menzies.*

Fac. Coll. No. 204. p. 456.

1805. *February* 22. SOMMERVAILS *against* REDFEARN.

NO. 3. A personal right being held in trust, the truster

IN the books of the Edinbugh Glasshouse Company, stock to the amount of L. 2000 stood in the name of David Steuart. At that time, he was a partner in the firm of Allan, Steuart and Company; which copartnership having been dissolved, a new one of David Steuart and Company, consisting