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

of Mr Steuart, and Alexander Sommervail, as partners, was formed. In the books of that concern, the stock was entered as the property of the company; and the reason why this did not appear in the books of the Glasshouse Company, was said to be a rule which prevented any company from being a stockholder; so that each was obliged to take his stock in the name of a trustee. NO. 3. is preferable to the voluntary assignee of the trustee in the subject of the trust.

In 1796, the company of David Steuart and Company was dissolved, but the concerns were not immediately settled. In August 1797, Mr Steuart borrowed from Francis Redfearn, Esq; £1400 on his own account; in security for which, he assigned to him his share in the Glasshouse stock, standing in his name. On the day the assignment was granted, (23d August 1797) it was completed by intimation.

Alexander Sommervail insisted that he had a preferable claim over this stock, as belonging to David Steuart and Company.

A multiplepoinding was brought in the name of the Glasshouse Company, calling into the field the trustee on the sequestrated estate of Mr Steuart, who had by this time stopped payment, Mr Redfearn and Mr Sommervail.

No competitor having appeared, Mr Redfearn (29th June 1801) was preferred.

Sommervail raised a reduction of the assignation to Mr Redfearn, which was remitted to the process of multiplepoinding, and conjoined with it, and the Lord Ordinary "finds, That the purchase of the stock of the Edin-"burgh Glasshouse Company in question, was made in name of David "Steuart as an individual, and not in name of David Steuart and Compa-"ny: Finds, That Mr Steuart was not only allowed to remain in the quiet "and undisturbed possession of said stock, as absolute proprietor, for a "considerable time after the purchase, but for several years after the com-"pany of David Steuart and Company was dissolved; therefore, and in "respect it is not alleged that the defender Francis Redfearn was *in mala* "*fide* to accept the assignation under challenge, repels the reasons of re-"duction, assoilzies the defender from the conclusions of the action, and "decerns; and of new prefers him in the multiplepoinding to the fund *in* "*medio*, for payment of the sums contained in his interest produced; and "decerns in the preference, and for payment accordingly."

Sommervail having reclaimed, the Court (18th January 1805) "Alter "the interlocutors of the Lord Ordinary reclaimed against: Find the al-"legation of the stock in question having stood in the person of David "Steuart, in trust for David Steuart and Company, relevant to exclude the "assignment granted by David Steuart to the defender Francis Redfearn; "and remit to the Lord Ordinary to proceed accordingly."

NO. 3. Mr Redfearn reclaimed, and

Pleaded: When a moveable right has once been formally vested in any person, as a holder of it, the subject of that right must be held to be his property, and as such is liable to his power of disposal. From circumstances attending the acquisition of such a right, he may lie under collateral and latent obligations to third parties, which, like other personal obligations, may be secured by means of legal diligence; but unless such be used, the right must remain unfettered by any latent claims of others than the debtor. The onerous and *bona fidé* acquirer of such a personal right, by a regular transference from the person who *ex facie* is proprietor, regularly completed by intimation to the debtor, is secure against every latent claim of these parties. Intimation is the solemnity requisite for completing the right of the assignee, and for divesting the original cedent, to the effect of rendering the assignee preferable to all the other creditors of the cedent, and, among others, to those who may have obtained prior assignations from him to this very subject, but which those prior assignees have neglected to complete by intimation, who are, therefore, in no better situation than ordinary creditors of the common author; Stair, B. 1. Tit. 3. § 6.; Bankt. B. 3. Tit. 1. § 6.; Ersk. B. 3. Tit. 5. § 3. The prior assignee may have an action upon the warrandice in the assignation against the cedent; but this cannot affect third parties. Intimation is, in such a case, equivalent to possession of a moveable subject, and must therefore cut off every claim at the instance of mere personal creditors, which every person competing with the assignee, whose assignation is intimated, is held to be, whether he founds his claim upon a prior assignation and declaration of trust, or on any other ground whatever. It is true, that no one can confer upon another a better right in a subject than he possesses himself. If he has no right at all, none can be received from him; and if his right be qualified, the condition on which he holds it, must pass with his conveyance of it, according to the principles in the civil law, "Nemo plus juris in alium transferre potest, "quam ipse habet," and, "Assignatus utitur jure auctoris." But this rule seems to apply merely to questions between an assignee and the original debtor or obligant in the right assigned, who cannot be subjected to a greater extent in favour of an assignee, than he would have been to the cedent; because it is an easy matter for the assignee, before he purchases the right, to make inquiry of the debtor, whether the debt is truly due, or if he has any counter-claim against the original creditor. The rule does not seem at all applicable to questions between an assignee and third parties, whose claim upon the cedent cannot be discovered by any inquiry or investigation. When it is said, that all exceptions competent against the cedent are good against the assignee, nothing more is meant, than that the debtor still may plead all the defences competent to him, against the debt as it stood in

the person of the cedent. It is admitted, that a posterior assignation first intimated, is preferable to a prior one which has not been intimated; but there seems no difference between this case, where the person conveys a right which he once had, but which he had previously given away, and one who conveys a right which apparently stands in his person, but which, by a latent trust-deed, is held for behoof of others. In both cases, the simple form of intimation would have prevented the wrong, and in both the safety of commerce demands, that the same rule should be adopted. The decisions which have been quoted, may all be reduced to two classes, equally remote from the present case; such as relate to questions between the assignee and the common debtor, and such as arise between the trustee and the mere personal creditors of the common debtor, not his onerous assignee whose right is completed by assignation. The mere personal creditors of the trustee can attach the subject only *tantum et tale* as it stood in his person; but in the other case, the cedent is completely divested of every right which he had; and a complete and absolute title to it is vested in the person of his onerous assignee, to the effect of giving him a preferable right over a prior assignee, who has neglected to complete his right by intimation, but for whom the cedent may very well be said to stand in the character of trustee. NO. 3.

If effect be given to latent personal claims, at the instance of third parties, the commerce of all kinds of stock, and other moveable securities will be greatly injured; and it never can be necessary for an intending purchaser of such a right, to do more than to inquire if the subject really be vested in the person of his author, and if the debtor has no counter-claim against him.

Answered: When any person holds a subject in his possession, which is not his property, no act of his can transfer the property to another, to the prejudice of the real owner. When his right in it is limited, every right which he grants must be burdened with the limitations under which he holds it. Property in moveable corporeal subjects, can, by the law of Scotland, be transferred in no other way than by actual delivery; but possession and property are by no means inseparable. A subject may be in possession of a person who is not entitled to exercise a single act of property, as the real owner may resume the possession whenever he thinks proper. In all cases where any one transacts with the possessor of a moveable subject, he runs the risk of finding that he holds it on such terms as do not entitle him to make it his own, or to dispose of it. He must trust to the character of the party with whom he deals. In the same manner, and even *a fortiori*, in incorporeal personal rights, the mere possession of the nominal right affords no more than a presumption regarding the property of it, and consequent right to transfer it to another. The person who is really the

NO. 3. proprietor, has alone the right of disposal. In incorporeal rights, an assignation intimated is equivalent to delivery of a moveable corporeal subject; but, in both, the nature of the right so transferred, depends upon the right vested in the former holder of it. If he be proprietor, the transference of possession completes the transference of property. If the cedent was truly unlimited proprietor, his assignee is secure by intimation; but if he be merely possessor of the document of debt, he may transfer the possession of it to another, which is all that he has; but he cannot transfer the property which he has not. The qualifications and exceptions which affected the right in his person being radical and intrinsic, must pass along with it into whatever hand it comes, for the real proprietor can never be thereby excluded from vindicating his own right, the rule being, *Assignatus utitur jure auctoris.* The right to this stock never belonged to Mr Steuart, but was a mere trust in him from the beginning, for his creditors; and as a trust does not require *intimation* to give it full effect, the right of the trusters was all along complete. Feudal rights stand on a different footing, on account of the faith due to the records; Stair, B. 1. Tit. 10. § 16.; B. 4. Tit. 1. § 21.; Bankt. B. 4. Tit. 45. § 34., § 402.; Ersk. B. 3. Tit. 5. § 10.; Keith against Irvin, 23d December 1635, No. 21. p. 10185.; Street against Hume, 9th June 1669, No. 4. p. 15122.; Gordon against Skein, 6th July 1676, No. 1. p. 7167; Monteith against Douglas, 8th November 1710, No. 26. p. 10191.; Sir James Baird against Creditors of Murray, 4th January 1744, No. 15. p. 7737.

The Court "adhered."

Lord Ordinary, *Craig*, Act. *Solicitor-General Blair*, *Douglas*.
Agent, *Jo. Wauchope*, W. S. Alt. *Hay*, *Thomson*. Agent, *Jo. Anderson*, W. S.
Clerk, *Mackenzie*.

F. *Fac. Coll. No.* 224. *p.* 508.

1808. *June* 21.

WILLIAM WALLACE Pursuer, *against* JOHN OSBURN BROWN, Writer to the Signet, Trustee for the Creditors of Robert Smith, Builder in Edinburgh, Defender.

NO. 4.
Of two conterminous proprietors, one built a mutual

WHEN that part of the New Town of Edinburgh, consisting of Heriot-Row, and lying to the north of Queen Street, was projected, a plan was adopted, which contained the elevation of each house, and obliged the builders to have mutual chimney tops and gables.