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.

NO. 4.

When the execution of this plan was begun, the trustees of Heriot's Hospital, the superiors of the ground, had been in the practice, where one area was feued out, to pay the half of the mutual gable when the house was finished. This was done with the view of having the street finished with the more expedition; and the Hospital had an opportunity of being indemnified when the next area was feued out.

gable, and the other became bankrupt without paying for his proportion of it. The former was found to have a preferable claim to the expense of the gable upon the price of the property adjoining, and forming a part of the bankrupt's estate.

The Hospital altered this arrangement; and exposed certain lots with the following condition:—"1*st*, That the purchasers of the several lots "shall be bound and obliged to carry up the respective buildings to the "level of the street, and to complete the cellars and side pavement, between "and the term of Candlemas 1804, and to have their houses completely "roofed in between and the term of Martinmas 1804, and that under the "liquidate penalty of L. 100, to be paid to the treasurer of the said Hospi-"tal by the purchaser of each lot, over and above performance, 2*d*, That "the exposers are not to be at any expense for building mutual gables, "but the purchasers shall have their recourse for the half of any mutual "gables, upon the persons purchasing the adjoining area, who shall be "bound to pay the same when the said contiguous purchaser begins to "build, with interest thereafter."

Two conterminous areas were purchased; the one on the east by Robert Smith, the bankrupt,—the other, on the west, by William Wallace, the pursuer. Smith was not infeft.

On his area the pursuer built a dwelling-house, of which the gable and garden-wall were mutual with his neighbour Smith; and Smith became bankrupt, without either paying the proportion of this mutual wall due by him, or building a house on his area.

Mr Osburn Brown, having been appointed trustee on the sequestrated estate, exposed the subject to sale, under a declaration, that "half of the "mutual gable on the west is to belong to the purchaser;"—the defender thus taking on himself the question respecting the expense of the mutual gable. The pursuer became the purchaser. The trustee refused to prefer the pursuer for the half of the mutual wall; upon which he raised an action for the price; and the cause having been debated before Lord Craig, Ordinary, the following interlocutor was pronounced, (11th December 1806.)—"On hearing parties, find, that although there is a debt due to "the pursuer for the erection of the gable in question, yet he has no pre-"ference on the subjects in question therefor."

The Court differed in opinion from the Lord Ordinary. By the plan prescribed to the feuar, any person building a house in this situation must erect a mutual gable. This proceeds not on any contract with the con-

NO. 4. terminous heritor, but from the necessity of his situation. The ground on which the mutual gable stands is common, mutual, and indivisible; and therefore there is no room for the maxim, *inædificatum cedit solo*. The gable, in fact, was the property of Wallace the builder, till paid for; and till then he had a right to prevent Smith, or his trustee, from using it, or adjecting to it any building.

The Court altered the interlocutor of the Lord Ordinary; and found the pursuer entitled to retain the price or cost of erecting one half of the gable in question; and, on advising a reclaiming petition, and answers, adhered, 21st June 1808.

Lord Ordinary, *Craig*. Act. *Geo. Jos. Bell*. Alt. *D. Douglas* et *J. Harrowar*.
Agent *Rich. Cleghorn & J. Os. Brown*. Clerk, *Ferrier*.

J. W. *Fac. Coll. No.* 57. *p.* 215.

1808. *June* 22. WILLIAM MARTIN *against* JANET PATERSON.

NO. 5.

Circumstances in which a reservation in a disposition entering the sasine, and making part of the investiture, did not constitute a real burden on the lands.

ON the 23d day of August 1785, Joseph Mundell conveyed his moveable funds to Messrs Gordon and Goldie as trustees. He likewise executed a disposition of his landed property in favour of his nephew, William Johnston, and his heirs, under burden of the sum of L. 800, payable to his trustees, to be applied in terms of the trust. After a narrative of love and favour, the disposition proceeds, "Likeas I, by these presents, with and under the reservations, burdens, provisions, and conditions under-written, "give, grant, alienate, and dispone from me, and all others my heirs and "successors, after my decease, to and in favours of the said William Johnston, his heirs, executors, and disponees whatsoever, absolutely and irredeemably, without any manner of reversion, redemption, and regress, "All and Whole, &c. In which lands and others above disponed, I here"by bind and oblige me, my heirs and successors, duly and validly to in"feft and seise the said William Johnston and his foresaids, with and un"der the burdens, provisions and conditions after expressed."

The first of these burdens and conditions is thus expressed, "Providing "always, as it is hereby expressly provided and declared, that the said "William Johnston and his foresaids, by their acceptation, shall be bound "and obliged to make payment to Thomas Goldie of Craigmuie, commis"sary of Dumfries, and John Gordon, farmer at Newbridge, trustees "named and appointed by me, of the sum of L. 800 Sterling, to be by "them applied in terms of a trust-right and conveyance executed by me "in their favour, of even date with these presents, and that against the "term of Whitsunday or Martinmas that shall be one full year after my