ficient evidence of the arbiters having differed, that the oversman undertook the office. I would never overturn decreets-arbitral upon niceties of form. But I doubt as to the reference, as it is not a probative deed: such reference is, in effect, a new submission, and ought to have all the solemnities of a submission.

PRESIDENT. Lord Gardenston requires too much form in decreets-arbitral, while at the same time he would support the informal. The reference is an *actus legitimus*, and would have been good, even in the shape of a minute.

KAIMES. As to the case in Dalrymple, I presume the decreet-arbitral *there* was very iniquitous, and that the Court laid hold of every objection.

On the 19th January 1773, the Lords found the letters orderly proceeded; adhering to Lord Stonefield's interlocutor.

Act. Ilay Campbell. *Act.* W. Campbell.

1773. *January* 20. DOCTOR JOHN ROEBUCK and Company *against* WILLIAM and ALEXANDER STIRLINGS.

PRIVILEGE.

[*Fac. Coll. XIII. p.* 218; *Dictionary, App. I.; Privil. No.* 2, *Note.*]

AUCHINLECK. The Ordinary did properly in passing the bill, without stopping the works, for the cause is not clear.

ALEMORE. It is a rule in law that every man is entitled to continue in possession of his rights till he is put out in form of law. There is no doubt of the king's power of granting the patent. Roebuck is in possession of the patent: he must not be turned out *brevi manu*, which he would be in a certain degree, were Messrs Stirlings allowed to prosecute their works.

GARDENSTON. I cannot agree to that part of the interlocutor which allows the work to go on. The very purpose of a suspension of a *novum opus* is to keep matters entire. There is no hardship in this, but there would be in the contrary.

KAIMES. Admitted that he could not recollect the ground of his interlocutor.

PRESIDENT. If other people *are de facto* in possession of the same sort of work, why stop Stirling?

MONBODDO. If this were not *novum opus*, there might be difficulty.

JUSTICE-CLERK. The interlocutor of Lord Hailes was right as it related to the buildings. The interlocutor of Lord Kaimes was wrong as it related to the work. Roebuck and Company have done all that they could to certify and interpel: other persons who have got into possession may possibly not be stopt but by declarator; Messrs Stirling may be by suspension.

On the 10th January 1773, " the Lords remitted to the Ordinary to pass the bill," in whole altering Lord Kaimes's interlocutor.

Act. A. Crosbie. *Alt.* A. Lockhart.

1772. *November* 20. PETER MACDONELL *against* DUNCAN CARMICHAEL and MESSRS BELL and RAINIE.

PERSONAL AND REAL.

In personal rights *fraus auctoris nocet successori.*

[*Faculty Collection, VI.* 75; *Dict.*, 4974.]

THE Court had no doubt that Carmichael was guilty of a gross fraud. The only question was, as to the assignation for onerous causes by Carmichael to Bell and Rainie.

PITFOUR. When the question is as to the conveyance of heritable rights, after infeftment, fraud does not affect singular successors. Neither does it in the transference of bills, and of moveables; in the one case, from the security given to records, and in the other from necessities of commerce and society. But, in personal rights, I always understood that the exception of fraud is competent. This distinction is well laid down in Lord Bankton's *Institutes*, quoted for Macdonell.

KAIMES, Many grounds of exception are good against a purchaser. Rainie's right might possibly be sustained to the extent of the money actually advanced by him; but it is to be considered that he did wrong to have any concern in this affair, for he might have been satisfied, from the assignation, that Carmichael was merely a trustee, and he ought not to have dealt with him as proprietor.

MONBODDO. There is no doubt that an assignation of a personal bond is challengeable upon any personal exception.

PRESIDENT. In the assignation of personal rights one purchases *periculo et utitur jure auctoris.* Great fraud would ensue were another rule introduced.

COALSTON. Macdonell was a weak man, and did very rash actions, both in granting the factory and the assignation; but here the question is not with Carmichael, but with a singular successor. A creditor taking an assignation is liable, but not a purchaser. Our decisions are not uniform. There was a distinction in the Roman law between what was *labes realis* and what not; *here* no *labes realis* in the sense of the Roman law.

On the 20th November 1772, the Lords sustained the reasons of reduction, and found expenses due against Carmichael, but not against Bell and Rainie.

Act. R. M'Queen. *For Bell and Rainie,* D. Dalrymple, R. Stonefield.

Non liquet, Coalston.