FRANCIS REDFEARN, Esq., . . *Appellant;*

WM. SOMMERVAIL and JOHN SOMMERVAIL, and ELIZABETH SOMMERVAIL and HELEN SOMMERVAIL, Representatives of George Sommervail, deceased, which said WILLIAM, JOHN, and GEORGE SOMMERVAIL, were the Brothers and Personal Representatives of Alexander Sommervail, late Merchant in Leith; and CHARLES FERRIER, Accountant in Edinburgh, as Commissioner and Factor for DAVID STEWART and Co., late Merchants in Leith, and for the Representatives of the Partners of that Company, . . } *Respondents.*

House of Lords, 1st June 1813.

LATENT TRUST—JOINT STOCK COMPANY—PROPERTY IN SHARES—ASSIGNATION INTIMATED.—A partner of a mercantile company had a share in a joint stock concern, which he purchased in his own name, and which appeared recorded in the books in his individual name. He assigned this stock, in security of a loan obtained from the appellant, which was duly intimated. After the dissolution of the mercantile company, the representatives and company creditors claimed the stock as a part of the company property. They alleged that the stock only appeared in the individual name of David Stewart, in trust for David Stewart and Co., the joint stock company not permitting partnerships to hold shares: Held that no latent trust or right in equity can defeat an intimated assignation, reversing the judgment of the Court of Session.

David Stewart, a merchant in Leith, stood owner or proprietor of a share in the Edinburgh Glass House Company at Leith. This share was purchased by him, and stood in the books of the company in David Stewart's name alone, and valued as his property at £2000. At the time this share was purchased by David Stewart he was a partner in the concern or house of Allan, Stewart and Co., which partnership had been thereafter dissolved, and a new one was formed between David Stewart and the late Alexander Sommervail, under the firm of David Stewart and Co., which partnership continued until the year 1796, when it was dissolved. The share of the Glass Company remained from the time of its

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original purchase, until the 23d day of August 1797, in the name of David Stewart alone. He acted as exclusive proprietor thereof, without any claim being asserted thereto by any person whatsoever.

Shortly previous to the 23d day of August 1797, David Stewart procured a loan of £1400 from the appellant, and, as a security for the payment of this loan, assigned to him in security the foresaid share or interest in the Edinburgh Glass House Co. at Leith. On the 23d August 1797, the foresaid bond and assignment was duly intimated to the manager of the Edinburgh Glass House Company (Mr. Archibald Geddes,) also a partner of the concern.

After this transaction had been concluded, Alexander Sommervail came forward, for the first time, to claim an interest and preferable claim over that stock, alleging that it belonged to the company of David Stewart and Co., of which firm he was a partner.

A multiplepoinding was then brought to try which had best right to the stock, calling the trustee to the sequestrated estate of David Stewart and Co. (which firm had become bankrupt) as a party, as well as Alex. Sommervail. These parties also raised a reduction against the appellant, to set aside the bond and assignment of the stock as above mentioned, alleging that it only appeared in the name of David Stewart, as trustee for D. Stewart & Co., in obedience to a regulation of the Edinburgh Glass House Company. Thereafter Alexander Sommervail died, and the action was then carried on by the respondents.

Jan. 11, 1803. After some procedure the Lord Ordinary, of this date, pronounced this interlocutor: "Having considered the "mutual memorials for the parties, and whole process, find "that the purchase of the stock of the Edinburgh Glass "House Company in question, was made in the name of "David Stewart as an individual, and not in the name of "David Stewart and Co.; and that Mr. Stewart was not only "allowed to remain in the quiet and undisturbed possession "of the said stock, as absolute proprietor, for a considerable "time after he made the purchase, but for several months "after the copartnership of David Stewart and Co. was dis-"solved; therefore, and in respect it is not alleged that "the defender, Francis Redfearn, was in *mala fide* to ac-"cept the assignation under challenge, repel the reasons "of reduction, assoilzie the defender from the conclusions "of the action, and decern: and of new prefer him in the

"multiplepoinding to the fund *in medio* for payment of the "sums contained in his interest produced; and decern in "the preference and for payment accordingly." On several representations the Lord Ordinary adhered. But, on reclaiming petition to the Court, the Lords were pleased to pronounce this interlocutor: "The Lords having resumed "consideration of this petition, and advised the same, with "answers thereto, alter the interlocutors of the Lord Ordinary reclaimed against, find the allegation of the stock "in question having stood in the person of David Stewart, "in trust for David Stewart and Co., relevant to exclude "the assignment granted by David Stewart to the defender "Francis Redfearn, and remit to the Lord Ordinary to pro-"ceed accordingly." The appellant, in his turn, reclaimed, but the Court adhered.* Jan. 18, 1805. Nov. 22, ——

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* Opinions of the Judges :—

LORD PRESIDENT CAMPBELL said,—"I think the interlocutor of the Lord Ordinary wrong, *assignatus utitur jure auctoris* clearly applies to this case. The subject *in medio* is the stock in the Glass Work Company; and in a competition between truster and assignee, the truster must be preferred, if the existence of the trust is sufficiently made out, which it seems to be. A declaration of trust, or circumstances inferring trust, do not require intimation. Had this subject been originally Mr. Stewart's, and made over by him to David Stewart and Co., to be held by him in future on their own account, this would have required intimation. But if it was a subject acquired by, and held from the beginning, in trust for them, this required no intimation to divest him, as it truly never was in him, but was merely a trust for the Company. No inconvenience arises from this principle, as every body knows, when he acquires a personal right of any kind—even personal rights of lands,—that he trusts the warrandice of his author, and not to the faith of any record.

"At same time, a *bona fide* payment made to the person in whom the right nominally is, will be sustained, upon the common principle of *bona* and *mala fides*, and, therefore, in so far as dividends have hitherto been made upon their stock to David Stewart, or his assignee, these will be sustained till interpellation take place.

"It is not a case of *bona* and *mala fides*, but of personal or real right.

"As to the case of feudal rights, see the case of Ross, 31st Jan. 1792. In the case of different assignations, the first intimated prevails. In other words, it requires to divest the cedent. This was a regulation superadded contrary to the original and strict principle of law. But it supposes that the cedent had the full right in him, which is not the case here. *Vide* The York Building Company

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In consequence of this interlocutor, the cause went back to the Lord Ordinary, who, in compliance therewith, pronounced this interlocutor:—"The Lord Ordinary having "heard what was stated, holds that the share of the Glass

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about negotiable securities. Bills of lading are negotiable by the practice of merchants."

LORD HERMAND.—I am for altering. I consider which party, by attention to intimation, could secure himself. Sommervail, I think, could have so secured himself; but Redfearn could not. The trust might have been intimated to the Company, or a back bond entered in their books. It is a possible thing that a conspiracy to cheat third parties might so be executed. I wish to know how this would do in Change Alley, in a purchase of stock? The maxim *assignatus utitur, etc.* applies, as argued in the papers to the debtor's defences. The authorities in the books are to be explained in that way. As to lands, I wish to know if an infeftment flowing from an author infeft, is qualified with a latent back bond."

LORD JUSTICE CLERK HOPE.—"I am for adhering. The principle of the decision is, no one can transfer a property which he has not—either in heritage or moveables. Intimation merely puts the assignee in the cedent's place. Thus the right is complete against the cedent; but it does not make the right valid and good if it was bad in the cedent before. As in moveables so in lands. If I am infeft on a disposition from an author infeft, I am secure against the author, and any double rights he may make. But if the author had not the property;—if he was served heir to the prejudice of a nearer heir, will not my right fall with my author? Certainly, —unless prescription has secured it. As to stocks, they are regulated by special statute."

LORD CRAIG.—"I am for altering. I think that Sommervail is barred *personali exceptione.* It was his own fault that his name did not appear as joint owner in the Company books. He cannot therefore plead against this onerous *bona fide* intimation."

LORD BALMUTO.—"I am for adhering. The books of the Glass Company might have been inspected, for, in their books, it is seen that the price was paid by G. Stewart and Co."

LORD BANNATYNE.—"'*Nemo plus juris ad alium transferre potest* '*quam ipse habet, assignatus utitur jure auctoris,*' is a good general rule. Intimation makes the right no better than before. It merely completes the transference. This is true also in real property, except where records interfere, but it does not protect against a radical defect in the right. I am therefore for adhering."

LORD MEADOWBANK.—"I am afraid to speak of this case with too much confidence. It goes deep into principle. The answers drawn by counsel are able. It lays a long train of judgments before us, which I fear to meddle with. I would wish a hearing in the

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"House stock in question was not the property of David "Stewart as an individual, but that the same belonged to "the copartnery of David Stewart and Co., and was a fund "belonging to, and divisible among the creditors of that "company, and therefore decerns in the preference, and "against the said Francis Redfearn." And, on representation, the Lord Ordinary adhered.

Since the above interlocutor was pronounced, George Sommervail died, and the respondents appeared as his representatives.

Against these interlocutors, so far as adverse to the appellant, he brought the present appeal, craving a reversal thereof, and an affirmance of the Lord Ordinary's interlocutor pronounced in his favour of 11th January 1803.

Pleaded for the Appellant.—Although it may be true that the share of the Glass House Co. in question was purchased with, or out of the funds of Allan, Stewart and Company, or of David Stewart and Company, yet it is not disputed that the same stood in the name of David Stewart only; that he received and gave discharges in his own name alone for the dividends and profits in respect of it; that he attended the different meetings of the Glass House Company, and exer-

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case. But my general notion is, that a property may be so transferred by tradition, as not to be qualified by the author's latent obligations such as are in themselves personal, not touching the reality of the right. An ancient maxim has crept into practice, that an assignee is to be held as procurator for the cedent, and so liable for all exceptions. But if that is true, there was no occasion for the act 1621, for every personal creditor could have competed with the favoured assignee. However, the principle was established, that obligations *relative* to the *jus crediti* do qualify that trust. But I think this is wrong, unless the obligation is made real by diligence. The question therefore is, Is the obligation such as qualifies the right and *jus disponendi* in the holder? As to this case, I doubt if trusts, in any case, are to be held as real. I rather think they are in their own nature *personal.* By the rules of the Glass Company, shares of stock could be held by an individual only, and Redfearn had right to the share in question; and, upon principle, I hold that a conveyance of any subject, real or personal, being delivered, transfers the whole right, qualified only by intrinsic qualities, but not by late qualities."

Vide President Campbell's and Hume's Collection of Session Papers.

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cised every other act of ownership of and over such share; and that no deed or other instrument was ever executed by him, declaring any trust of it in favour of Allan, Stewart and Co., or David Stewart and Company, or by which he, David Stewart, was in any manner restrained from the full and free disposal of the same. 2d. No intimation was made at the office of the said Edinburgh Glass House Co., or to or with the acting partner or manager thereof, previous to the intimation made by the appellant, of the aforesaid assignment to him of any interest, either legal or beneficial, claimed by the said partnership of David Stewart and Co. in the foresaid share of the Glass House Company. 3d. The appellant had not, at the time he advanced and paid the £1400, or when the foresaid assignment was made and executed, or when the same was intimated at the said office, any notice whatever that any person, other than the said David Stewart, had any interest in, or claim upon the aforesaid share of stock of the said Glass House Company; And, besides, the appellant could not, by any reasonable diligence or inquiry, have ascertained or discovered such latent interest or claim, if any there were. 4. If it be admitted that the share in question formed a part of the partnership property of the said David Stewart and Company, yet, as the appellant is advised, one partner may by law, without the consent of any of his partners, dispose of the partnership property for a valuable consideration; and the sale made by him will be good as against his partners, unless the person to whom it is made know that the transaction is fraudulent, and done with a view to apply the money produced by such sale to other than partnership purposes; and it has not been pretended that the appellant knew that such bond and assignment were fraudulent, or made with any improper view or design. The cases quoted by the respondents, and the authorities of Stair, Erskine, and Bankton, are totally inapplicable.

Pleaded for the Respondents.—By the law of Scotland, with the exception of privileged securities, and those which pass by indorsement, an assignee to property not connected with land is liable to every latent qualification inherent in the right of the cedent. The rules of the Roman law, *nemo plus juris ad alium transferre potest quam ipse habet*, *assignatus utitur jure auctoris*, directly apply to this; and, therefore, as the stock in question was not the property of David Stewart, but was held by him in trust for David Stewart and Company, no right to it granted by him can be effectual

to the prejudice of the creditors or partners of that company. Every person who transacts with the holder of a moveable subject, takes his risk of the possessor's title, and, in addition to reliance on his honesty, the law gives a claim of warrandice against him.

Precisely the same principle regulates the transmission of incorporeal personal rights. A factor sells goods for his constituent, and takes a bond for the price, payable to himself, the bond notwithstanding is the property of the constituent; A bond may be assigned by the creditor in it, and the creditor may, at the same time, take a back bond qualifying the right of the assignee, this back bond is effectual against every after transference by him; the assignee is like the holder of a corporeal subject lent or pledged to him. These principles must decide the present case, in which the stock was placed in the name of David Stewart, merely in obedience to a regulation of the Glass House Company. It being so vested, it gave no opportunity of deceiving others, which may not be alleged in every case where a latent defence or exception is founded on. And the doctrines laid down by Stair, B. i. tit. 10, § 16, Erskine, B. iii. tit. 5, § 10, and Bankton, B. iv. tit, 45, § 3, go to support this as the law applicable in this case.

After hearing counsel,

LORD REDESDALE said,—

"My Lords,

"This appeal relates to a certain portion of the stock of a Glass House Company, established at Leith, which stood in the name of David Stewart. It was said that this stock was originally the property of the mercantile company of Allan, Stewart and Company, and afterwards of the company of which Stewart and Sommervail were partners. This last company was dissolved in 1796.

"In August 1797, Stewart applied to Redfearn for a loan of £1400, and proposed to give in security this Glass House stock. This was agreed to; and, accordingly, Redfearn took his bond and assignation of the stock in security, in the following terms. (Here his Lordship read the quotation of the assignation in the appellant's case.)

"This assignation was duly intimated to the Glass House Company; and, if the stock was the property of David Stewart, this assignation would have vested it in Redfearn for all the purposes intended by the deed.

"Sommervail sometime afterwards claimed the stock as part of the partnership funds of David Stewart and Co.; and the Glass

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House Company thereupon instituted a multiplepoinding to see who was truly entitled to it.

" In this process, the Lord Ordinary, on the 29th of June 1801, pronounced this interlocutor. (His Lordship read it.) After this interlocutor was pronounced, a representation was offered by Sommervail, stating that the stock belonged to David Stewart and Co.; the Lord Ordinary directed parties to be heard on this, but Sommervail did not appear, and decree in absence went against him.

" Sommervail afterwards brought an action of reduction for reducing the assignation granted to Redfearn. This was remitted to the Lord Ordinary (Craig) before whom the multiplepoinding depended. Sommervail having afterwards died, his representatives were made parties to the action.

" On the 11th of January 1803, the Lord Ordinary pronounced this interlocutor. (Here his Lordship read the same). The Sommervails presented a reclaiming petition against this interlocutor, and, on the 18th of January 1805, the following interlocutor was pronounced. (Here interlocutor read.)

" The cause thereupon went back to the Lord Ordinary, and, on the 23d of June 1807, this interlocutor was pronounced by his Lordship. (The same read.) And his Lordship, on the 20th of February 1807, adhered to that interlocutor.

" The *extent* to which this sentence goes, as to the reduction of the assignation, does not very clearly appear, whether it was meant to be an absolute or a limited reduction. If it was meant to be absolute, it was unfounded, in so far as David Stewart's interest in the stock, as an individual, was concerned. But whatever qualification may have been intended, I conceive the interlocutors appealed from are not founded on the principles of law applicable to this case.

" It is clear, that by the law of Scotland, an assignation intimated, denudes the assignor of all right in him to the thing assigned. If the debtor has any thing which is good against the debt, THAT is good also against the assignee.

" I have seen no case, nor dictum of any writer, which goes the length of saying, that an assignation duly intimated could be defeated by any latent right in equity such as that claimed for David Stewart and Co. in this case. The case seems to be altogether a new decision, and on new principles. We should not be inclined to ratify these to the prejudice of a *bona fide* assignee without notice, unless we are bound so to do. It appears that the judges thought the former decided cases so applicable to this, that they found the principle on this case.

" There is nothing to this extent in the passages cited from Lord Stair in the respondents' case. (Here his Lordship read the same.) When Lord Stair says, that all exception against the cedent would be good against the assignee, *even compensation itself*, this sufficiently

explains his meaning. It is the business of the assignee to learn the true condition of the cedent, as between the debtor and him.

"The authority of Lord Bankton is of the same description. (Here his Lordship read the quotation from Bankton from the respondents' case.) It is manifest that this applies also to a defence against the demand. This, if good against the assignor, would be good against the assignee.

"Mr. Erskine goes to the same effect. (The quotation from Mr. Erskine read.) All these are cases of exception to the demand in the person of the assignor; none of them, therefore, are applicable to this subject. The argument on the decided cases is to be answered in the same way. It is not necessary to enter into them.

"Some argument was used in this case, as to the law in the case of stolen goods; and the case of a horse stolen, and not sold in market *overt* was founded on. But the vendor of stolen goods has no title to them except what he makes by a sale in market *overt*.

"The goods here were Stewart's, but bound, as it is said, by a secret obligation, which could not be known unless he intimated it himself. Conceiving that there is nothing in the text writers, nor in the decided cases, to found the present judgment, I find the law of Scotland as to assignations clearly against the present decision.

"The right of Sommervail was merely one to compel an assignation to be made for the purposes of the partnership of which he was a member; the Glass House Company did not permit stock to be held by a partnership, and he could only claim that it should be assigned to a common trustee.

"By the law of Scotland, an assignation not intimated, will not be good as against an assignation duly intimated, though posterior in date to the first. In the same manner, an arrestment is good against an assignation not intimated.

"The rule of law is, that assignations are preferable according to the dates of their intimations. This clearly explains the meaning of the maxim, '*Utitur jure auctoris.*' The author is not fully divested without intimation; then, when a first assignation is not intimated, and a second assignation is granted with intimation, the second assignation, in that case, will be preferred. The reason is, because the assignee could have no better right than his author. This demonstrates, that the principle so much relied on does not apply to the present case.

"An argument was used on the case of an executor assigning a debt belonging to his testator. But there, every person must know that there was a trust, and that he would be bound by it.

"In my opinion, Sommervail can be in no better case than one who had an assignation not intimated. But Redfearn's assignation was intimated, and therefore to be preferred. It would be absurd to say that Sommervail could be better with this right which he

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claimed, than if he had had an actual assignation, but not intimated.

"Upon the whole, I am of opinion that the interlocutors complained of ought to be reversed, and that the interlocutor of the Lord Ordinary, of 11th January 1803, which decided in favour of the appellants, ought to be affirmed.

LORD CHANCELLOR (ELDON) said,—

"My Lords,

"After what has been stated, I shall not enter into this case at large, but I must make some few observations upon it.

"The question here arises as to the right of a company carrying on business in Scotland to a certain portion of the stock standing in the name of an individual member of the firm, and which, according to the rules of the company in which the stock was vested, could only stand in one name. The question comes before us, as to the right of the first mentioned company, in competition with an individual who had obtained an assignation of this stock, and his assignation duly intimated.

"Mr. Leach objected to our looking into the articles of partnership in this case; but when we were discussing what was the law of Scotland as to personal rights, it was absolutely necessary to see whether the right of which we were treating was of a personal nature or not.

"Upon looking into those articles, I find that the partnership began in 1756, with a certain number of shares, for a term of twenty-one years; and afterwards, for an indefinite term, if eight partners agreed. The property of the company was both heritable and moveable—they had houses, stock in trade, and debts.

"The portion of stock of the Glass House Company, which is the subject of the present question, could therefore only be considered as wholly personal in this way, that every individual partner had a right to withdraw from the partnership, and to demand the value of his stock.

"The competition here is between one claiming the stock under an assignation intimated to the Glass House Company, who were the debtors; and those claiming as the *cestui que trusts* of the individual who granted the assignation.

"The case may almost be decided upon this point. Even if the trust had been declared, the Glass House Company might have said, We have nothing to do with your bargains in any other partnership concern, only one person can be joined with us; an assignee must be approved of by our Company, and nothing can be vested in him but a right to call for the value of the stock.

"The question here is not one depending between the debtor of Stewart and the assignee of Stewart; but between a creditor of

Stewart and those claiming under an alleged equity in the person of Stewart. This disposes of the argument of the case of an assignation by an executor. In such case, the assignee must know that a trust existed, and was bound to look to it; an assignee could have no such knowledge here. It was a latent trust, of which the debtors, the Glass House Company, knew nothing. What is said about its appearing from the books of that Company, that part of the price was due by Stewart and Co., appears to prove nothing as to their knowledge of any equity in Stewart.

"How can you apply the doctrine of the decided cases here? The ordinary cases are well known. A grants a bond to B, and B assigns it to C. If any set off, or ground of compensation, was good to A against B, it will also be good to A against C, the assignee, because *utitur jure auctoris*. And what is the hardship of this? Absolutely there is none. For C might have known by inquiry, and with common caution, what objections were competent to A.

"The same rule applies as to back bonds. If a back bond is granted, the assignee of the subject to which the bond relates is bound to take notice of it.

"I looked with anxiety into the cases, to see if an assignation with an intimation had ever been defeated by a right in equity such as this; but I found none such. I think the doctrine, in the present case, as it stands decided by the Court below, goes the length of saying that the shares of the stock of a mercantile company in Scotland cannot be assigned. How could any assignee protect himself, by any diligence or inquiries, against a claim like this, which was absolutely latent? If this doctrine were confirmed, I don't see how any person could be in safety to purchase property of this kind in Scotland.

"But if this be the law, we have nothing to do here with any inconvenience that may attach to it. It is only the Legislature that can give a remedy in such case.

"But I find nothing in the text writers on the law of Scotland, or cases, which should place this latent right in equity higher than if there had been an equal assignment. I therefore concur in the opinion that the judgment should be reversed."

It was ordered and adjudged that the interlocutors complained of be, and the same are hereby reversed; and it is further ordered that the original interlocutor of the Lord Ordinary of 11th January 1803 be, and the same is hereby affirmed; and that the defender in the action of reduction be assoilzied.

For Appellant, *J. Johnson.*

For Respondents, *Sir Samuel Romilly, David Douglas.*