

PERSONAL OBJECTION.

10445

1710. February 25. LADY ABOYNE against Her TENANTS.

No 21.

AN appeal was given in by the Lady Aboyne, now Lady Kinnaird, who competing on her life rent infestment, it was *replied*, Offers to prove by your oath, you are paid of all bygones preceding 1709; and she deponing that she had received sundry partial payments from the factor, but could not particularly condescend on every article, this being *ignorantia affectata in facto proprio et recenti*, they held her as confest, and presumed she was paid all, and decerned against the Tenants; and she craving to cover them by an universal infestment, the Lords repelled her allegiance; whereupon she gave in an appeal.

Fountainhall, v. 2. p. 573.

1711. June 28.

SIR WILLIAM BAIRD of Newbyth against MR ALEXANDER MORTIMER Minister of the Gospel, and ALEXANDER DEUCHAR Writer in Edinburgh.

No 22.

IN the competition of the real right creditors of Sir Robert Forbes advocate, Alexander Deuchar being infest in Sir Robert Forbes' lands in Newbottle, February 25th 1709, in a yearly annualrent corresponding to 10,000 merks, contained in an heritable bond granted to him by Sir Robert in December 1708; Mr Deuchar claimed to be preferred to Sir William Baird whose infestment is posterior to Deuchar's.

It was found not to be a personal objection against the first annual-renter, craving preference that he was cautioner for the common debtor to the other annual-renter, in the original moveable bond, in corroboration of which the heritable bond was granted.

*Alleged* for Sir William Baird; Mr Deuchar cannot be preferred to him, because he is *correus debendi* with Sir Robert Forbes for the debt contained in Sir William's infestment; and so *personali objectione* must be set by till Sir William draw his payment.

*Answered* for Mr Deuchar; Whatever might be pretended for a *non repugnata* in him, upon any infestment granted to him by Sir Robert Forbes for relief of Sir William Baird's debt, in which case Sir William's getting payment out of Sir Robert's effects, would operate Deuchar's relief as effectually as could be done by such an infestment granted to himself; and whatever might be pretended for such a *non repugnata* in Deuchar, against any infestment granted by himself to Sir William Baird, which he as granter would be obliged to warrant; yet here Alexander Deuchar, who is debtor to Sir William Baird only by a personal bond, and creditor to Sir Robert Forbes by an infestment upon an heritable bond for a distinct debt, is sufficiently founded in law to claim preference thereupon, to the posterior infestment granted by Sir Robert to Sir William, which Deuchar lies under no obligation to warrant or make effectual, as being the deed of another. And if such an exclusive exception against Deuchar founding upon his real right, were competent to Sir William upon the

No 22.

pretence of his being a personal creditor to Deuchar for the debt he Sir William competes upon, these absurdities would follow, *imo*, If Sir Robert Forbes had granted infeftment to Sir William Baird out of Mr Deuchar's land, Mr Deuchar could not hinder Sir William to poind his ground upon such a null infeftment, granted a *non habente potestatem*; because forsooth Deuchar is conjunct debtor with the granter; *2do*, Sir William Baird might, upon the very personal bond, though no infeftment had followed upon Sir Robert's bond of corroboration, debar Deuchar from using the benefit of the infeftment granted to him by Sir Robert Forbes; seeing no infeftment, and infeftment a *non habente* have the same effect in law; and so it is that the infeftment granted by Sir Robert Forbes to Sir William Baird, after the granter was denuded by a prior infeftment in favours of Mr Deuchar, for a different debt was clearly a *non habente*.

*Alleged* for Mr Mortimer; He being infeft in Sir Robert Forbes' lands, as creditor to him and Alexander Deuchar and Mr George Leslie for 3100 merks, must be preferred to Sir William Baird, albeit his infeftment be registered a day before Mortimer's, because Alexander Deuchar did by his holograph letter, July 14th 1709, declare Mr Mortimer preferable upon his heritable bond and infeftment to Mr Deuchar himself, and that the former should be paid yearly of his annualrent until his principal sum were paid before the latter;—which letter imports an obligation upon Deuchar to prefer Mortimer to his infeftment, and to give him a formal disposition and assignation, July 2. 1677, Sinclair against Couper, *voce* VIRTUAL; Nov. 30. 1710, Mackie *contra* Paton, *IBID.*;—and though that obligation doth not formally denude Deuchar in favours of Mortimer, yet it doth sufficiently enervate and take off any personal objection against the impugning Sir William Baird's infeftment, upon the priority of Mr Deuchar's heritable right, and Mortimer might thereupon adjudge, in implement of Deuchar's right.

THE LORDS found, that the personal obligation by Alexander Deuchar to Sir William Baird hindered not the effect of Deuchar's real right, and therefore preferred Deuchar to Sir William, and Mortimer to Deuchar for the annualrent of the sums contained in Mortimer's infeftment.

*Fol. Dic. v. 2. p. 81. Forbes, p. 512.*

1712. January 31. EARL FORFAR, *against* GILHAGIE.

No 23.

THE LORDS refused to allow the heir of provision of the granter of a charter, to quarrel the same for want of infeftment, in an improbation at his instance; but repelled him, even in the first instance, upon his being *subsidiarie* liable to warrant the right, without necessity to call the heir of line, *quia lites non sunt multiplicandæ*.

*Fol. Dic. v. 2. p. 81. Forbes. Fountainhall.*

\* \* \* This case is No 47. p. 7820, *voce* JUS TERTII.