No 85.

rior right in his person. If he has not denuded himself of these other rights *habili modo*, they will still remain with him, and may be afterwards conveyed by him, or carried off by legal diligence. *See* 18th March 1631, Laird of Clackmannan against Laird of Allardyce, *voce* IMPLIED ASSIGNATION.

The decisions founded on by the real creditors do not apply. In the case of the Sheriff of Tiviotdale, the right under which the party claimed was an absolute right of property, and was therefore justly found to comprehend a right of reversion. In the case of Beg, there was likewise an absolute right of liferent granted; and, in the case Sinclair against Coupar, an assignation to mails and duties in all time coming was very properly found to imply an obligation to grant a formal conveyance of the lands; because nothing else than a right of property could be meant or intended by it. The other cases proceeded entirely upon a mistaken idea, (which was understood to be the law, until it was corrected by the judgment of the Court in the case of Bell of Blackwoodhouse against Garthshore 1737, No 80. p. 2848.;) that a simple conveyance was suffi- to denude the granter, if his right was only personal. None of these decisions, therefore, apply to the present case.

'THE LORDS preferred the real creditors.'

For the Real Creditors, *Johnston.* For the Personal Creditors, *Wight et M'Queen.*

A. W. *Fol. Dic. v. 3. p. 155. Fac. Col. No 141. p. 327.*

1783. *January* 22. EARL of LAUDERDALE *against* EARL of EGLINTON.

No 86.

In a competition between the singular successor of a reverser, entitled to redeem upon an elusory prestation, and the heir of the nominal fiar; the singular successor preferred.

THE Earls of Lauderdale and Eglinton having both laid claim to the patronage of the parish church of Dundonald, their respective pretensions came to be tried in mutual processes of declarator.

The titles of both claimants were derived from one source, the family of Abercorn, but were thus differenced:

In 1742, John Earl of Lauderdale was *infeft* in his patronage, among other subjects contained in a charter under the Great Seal, purporting to have proceeded on a disposition, granted by James Earl of Abercorn; the charter and sasine, but not the disposition, were produced. It did not, however, appear that these subjects had ever, from that time downward, been transmited by any of the posterior title-deeds of the family of Lauderdale; the present Earl having made up his title by adjudication on a trust-bond.

On the other hand, the Earl of Eglinton connected his title with that of the Earl of Angus, as disponee of James Earl of Abercorn. The Earl of Angus, indeed, did not obtain a charter of those subjects for eleven years subsequent to the date of that on which Lord Lauderdale's claim was founded; but then the right was regularly transmitted from him to Lord Eglinton, by an uninterrupted series of titles, extending through the whole intermediate period.

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It is farther to be remarked, that in the register of reversions a copy of a bond of reversion was found, granted by John Earl of Lauderdale the day after the date of the disposition in his favour, obliging himself and his heirs, on receiving, at any time, payment of a double angel of gold, or 20 merks, to redispone the subjects to Lord Abercorn, his heirs and assignees.

With respect to the exercise of the patronage in question, the parties were more on an equality; the right of neither appearing to have been followed by any proper act of possession; although Lord Eglinton and his predecessors had all along possessed the other subjects which were conveyed to them together with the patronage.

The question, therefore, which occurred between these parties, and on which the Court ordered a hearing in presence, was, Whether, in these circumstances, the prior right of Lord Lauderdale, or the posterior one of Lord Eglinton, should, *in hoc statu* at least be preferred.

Pleaded for the Earl of Eglinton: It was merely a conveyance in trust, which the Earl of Abercorn executed in favour of John Earl of Lauderdale in 1642. Of the nature of this trust the bond of reversion granted by him is a full proof; the tenor of that obligation, as improbation is not proponed against it, being, by the extract produced, sufficiently ascertained, in terms of the statutes of 1469 and 1617.

Although therefore no direct evidence has been discovered to prove actual redemption, and even though it were supposed that none had taken place; yet it is thus manifest, that, notwithstanding the conveyance, the true or substantial right remained unimpaired with the disponer; whilst the right of Lord Lauderdale, subject to an unlimited power of revocation, consisted barely in a name. That reserved faculty, almost the only thing implied in the transaction, has been secured by the bond of reversion; and, if not likewise stipulated in the charter produced by Lord Lauderdale, it is because, at that period, powers of revocation were not deemed to be effectually retained in settlements or conveyances, by the insertion of any clause, however expressive of the intention. In the same manner as in the present instance, the faculty of redemption for an elusory sum was then ordinarily substituted in its place; a practice of which the tailzie of the estate of Kintore, recorded in July 1578, and the settlement of that of Cromarty, may be also mentioned as examples *. But the revocation of rights merely nominal being the object of that stipulation, it was by no means needful to follow out a formal and regular order of redemption; so that it is of no consequence to the present case, whether such occurred in it or not. Though strict feudal forms are doubtless to be observed, yet it is only when essential to rights, not when solely calculated for elusory purposes. Thus, in the case of Rosehall, a clause of redemption in an entail was, without the order having been used, found to be equivalent to a power of revocation *. On the same principle was the determination of the House of Lords in that of Forbes of Pitsligo,

* *See* TAILZIE.

No 86. 9th March 1756, *voce* FORFEITURE. And, in effect, a similar judgment was given by the Court of Session in the case of Cromarty, *voce* TAILZIE.

Still however this argument goes on a ground more favourable to the Earl of Lauderdale, than just; for it is not truly to be supposed that, in this case, the order of redemption was not actually accomplished. *Post tantum temporis*, the presumption of law is, for its due observance; since, to Lord Eglinton, the right in question, from the time it was *de facto* conveyed to the author of his predecessors, has descended through an unbroken course of succession, by titles on which, as to the other subjects of them at least, constant possession has followed; whilst no such transmission appears in favour of Lord Lauderdale, or his authors; and as little proof is there of the right of patronage having been exercised by any of them since 1649.

Answered for the Earl of Lauderdale; In regard to the actual exercise of this right of patronage, if Lord Lauderdale's authors have not enjoyed it, not more have those of Lord Eglinton; and therefore here parties will but stand on an equal footing. With respect to the constitution of the right, a difference appears in their situation; but it is in favour of the former. The extract produced is not equal to a principal bond of reversion. By the statute of 1469, indeed, such extracts were held as valid documents; but, in consequence of a posterior enactment in 1617, they can only bear faith 'when they are not offered to be 'improven;' which, as to that in question, is now ready to be done.

But supposing this extract to be probative, and the stipulation respecting redemption to have intervened, still however the right of reversion will not operate *ipso jure*. The conveyance in favour of Lord Lauderdale was undoubtedly in itself valid, and of consequence he and his successors were to remain vested in the feudal right, until it should be legally taken from them; which could only be done by the executing of the order of redemption, or by means of adjudication in implement. To say, that because in some cases such a distinction may exist, as that between substantial and nominal rights, no compliance with legal forms, nor any attention to them is requisite with regard to the latter, is a doctrine that were equally dangerous to the stability and order of the law, as it is in itself unsupported by any authority. No right, it will be owned, more purely nominal, can be imagined, than is the fictitious constitution of many freehold qualifications; yet not even that shadow of a right can be set aside *de plano*; but in order to restore the title of the party from whom it flows, he must pay obedience to all the legal forms.

It is true, that, for the reason stated on the other side, family settlements have sometimes been framed by means of deeds, which, though *ex facie* complete in themselves and unlimited, were yet subject to a separate obligation of reversion, to be effectuated by an elusory redemption. The law, however, is not to be influenced by the secret purposes, but by the overt acts of parties; and of course, after a conveyance has been made, the solemnity of reconveyance thus becomes indispensable. Those cases which have been referred to, give truly no counte-

nance to the opposite doctrine. The case of Kintore had not the sanction of any judgment of the Court; that of Rosehall was determined by the law of prescription; and, with respect to that of Pitsligo, it was the personal right of a father, who, together with his son, derived a title from a third party, which, by the House of Peers, was found to fall under his forfeiture; so as to occasion the reversal of the decision of the Court of Session. In the case of Cromarty, the second tailzie proceeded on the narrative, that the order of redemption had been used. No 86.

Indeed, were this argument, of the independence of substantial rights upon legal forms, of any solidity, why, it might be asked, on the other hand, cannot an apparent heir transmit, without any formality, the substantial right with which he is vested? No reason for it could then be assigned; for that he might, and other the like incongruities, would plainly be unavoidable consequences of a doctrine which has no foundation in law. Thus, it is evident, that however much a nominal right that of Lord Lauderdale's author may have been, a reconveyance nevertheless, or an order of redemption, was necessary for the reinstating of the disponer Lord Abercorn, or his successors; and therefore, as at this moment, Lord Lauderdale stands undivested of the patronage in question, he is, *in hoc statu*, at least, entitled to the legal exercise of that right.

Observed on the Bench: The extract of the bond of reversion not being challenged in a reduction-improbation, is for that reason to be accounted a good document; and even though it were challenged, it would still be not less effectual, because from the possession its tenor would be proved. The bond gives a power to alter; but because that is a personal faculty, does it follow, that by its not being exercised, the feudal right would become complete and unlimited in the disponee? No; for the true and substantial right remained with the disponer. On this principle judgment was pronounced with respect to the entail of the late Lord Lovat; a case omitted in the pleadings*. There it was argued, that the reservations in that deed being merely personal faculties, his son's right to the estate did not fall by his forfeiture; but it was found, that a nominal fee only existed in the son, while his father continued still vested in the substantial right, which was affectable by his debts and deeds, and of course by his forfeiture. In like manner, in the present case, the substantial fee in Lord Abercorn, (not so as to the nominal right of Lauderdale), was subject to his debts and deeds, and had he incurred forfeiture, would have fallen under it. It is for a similar reason that a *donatio inter virum et uxorem* is, though unrevoked, ineffectual against creditors, when there is a deficiency of funds. As, therefore, Lord Abercorn *de facto* conveyed away the estate, that was a sufficient extinction of the nominal fee. But indeed were it necessary *post tantum temporis*, the actual redemption should be presumed.—Even independently of these observations, the right of Lord Eglinton being continued down to the present time, by a regular series of titles, and clothed with possession, is to be esteemed preferable to that of Lord Lauderdale, on which not only no possession has follow-

* *See* TAILZIE

No 86. ed, but which has not even been transmitted to him through any part of the period intervening from its origin till now. Its antiquity, in these circumstances, is unfavourable to his claim; and until the warrants be produced of his charter and infeftment, these last are to be deemed absolutely of no avail.

The majority of the Court however seemed to disapprove the idea of a charter and sasine, though of an old date, being unavailing from the want of possession.

Some of the Judges did not admit the presumption of redemption *post tantum temporis*, and objected to the effect allowed to the distinction between real and nominal rights; observing, that though there was good ground for disregarding in future the nominal right of Lord Lauderdale, yet as long as he was not divested of it, he was entitled to its effect; for so long the right of Lord Eglinton, though redeemable, was not in fact redeemed; and its redemption ought not to have a retrospect.

But the Court in general adopted the presumption, and therefore,

The Lord Ordinary having 'assoilzied from the conclusions of declarator at Lord Eglinton's instance; and preferred Lord Lauderdale to the patronage in question;'

The Lords 'altered that judgment, and found the right of Lord Eglinton to be preferable.'

Lord Ordinary, *Hailes*. For the Earl of Eglinton, *Wight, J. Boswell*.
For the Earl of Lauderdale, *Hay Campbell*. Clerk, *Home*.

Fol. Dic. v. 3. *p.* 156. *Fac. Col. No* 80. *p.* 124.

1783. *February* 5.

John and Hugh Parkers, *against* Douglas, Heron, and Company.

No 87.
Disponees in security found preferable to the disponer's personal creditors, who had executed a poinding of unripe crops, in the natural possession of the disponer.

In 1774, James Campbell being debtor to Douglas, Heron, and Company to a large amount, by a deed, containing procuratory of resignation and precept of seisin, and on which infeftment followed, 'sold, alienated, and disponed his 'lands of Adamhill, *&c.* in security to them,' redeemable upon payment of the principal sums and annualrents. The deed farther contained an assignation to the rents and profits, with a power to take the subjects into their own possession, to grant leases, to appoint factors without being liable but for their own intromissions, and to sell the lands by public auction.

A considerable part of the lands was allowed to remain in the debtor's natural possession; and on the 31st of May 1780, Messrs Parkers, creditors to him by bill of exchange, executed a poinding of the growing crops. In August following, before they had completed their diligence by cutting down and ingathering, the Sheriff of the county, upon the application of Douglas, Heron, and Company, awarded a sequestration over the lands, in security of the current annualrents due to that Company.