The Lords found personal bonds, whether for payment of debts, or relief of cautionry, not a sufficient title to reduce a disposition of lands granted by the debtor, although no infeftment had followed thereon. No. 48.

Forbes, p. 336.

*** This case is in opposition to what was decided in the case of Mackenzie against Campbell, No. 45. p. 16099. *supra*, and in that of Forbes against Earl of Aberdeen, No. 7. p. 15003. *voce* SUNDAY.

1710. *January* 10.

HENRY BOTHWEL of Glencorse, *against* JOHN TROTTER of Mortonhall. No. 49.

In the action at the instance of Glencorse against Mortonhall, for payment of £.7 11*s.* Sterling, contained in a precept drawn by Alexander Trotter upon the defender, his brother, payable to Alexander Bothwel, merchant in Edinburgh, the pursuer's brother, dated September 7, 1688, the Lords found, That the pursuer being decerned executor to his brother, and having confirmed his testament, needed not a licence to pursue before the commissaries, for payment of another debt not confirmed.

Forbes, p. 386.

1713. *January* 28.

WILLIAM M'PHERSON, Writer in Edinburgh, *against* JOHN M'PHERSON of Dalradie.

No. 50.
A charge against the superior upon an adjudication, found sufficient to entitle the adjudger to reduce real rights clothed with infeftment, though the adjudication was led by a trustee for the behoof of an apparent heir upon his own bond for his own behoof, and he was not served heir and infeft.

William M'Pherson having adjudged the lands of Invereshie, upon a bond granted to him by Mr. James M'Pherson, apparent heir to Elias M'Pherson of Invereshie, for the said apparent heir's behoof, and charged the superior to enter him, he William M'Pherson pursued a reduction and improbation of all rights in the person of John M'Pherson affecting the said lands.

Alleged for the defender: He cannot take a day for producing any writs whereon infeftment had followed; in regard the pursuer stood not infeft in the lands, nor is the charge against the superior equivalent to infeftment in this process more than in a removing, albeit *fictione juris* it be effectual in some particular cases, as for bringing in equally adjudgers within year and day of the first effectual adjudication, December 1683, Brodie against Elphinstoun and others. And though a charge against the superior be equal to an infeftment *quoad* him, for excluding him from the casualty of non-entry, yet as to third parties the rule of law, *nulla sasina nulla terra*, still obtains; December 14, 1627, Beg against Baillies of Lanark, No. 14. p. 2704.; June 24, 1681, Oswald against Douglas and Deans, No. 56. p. 6650.; January 20, 1665, Little against Nithsdale, No. 26. p. 5194.; nor can it be pretended, that an adjudger who hath charged the superior, hath done all in

No. 50. his power to have his right made real, seeing he might prosecute his right, by running from the superior to the Crown, who refuseth none.

Replied for the pursuer: Tantum operatur fictio in casu ficto, quantum veritas in casu vero, therefore as an adjudication on a charge to enter heir, doth as effectually carry the right to the lands, as if the heir or debtor being served and infeft had disponed the same; just so a charge against a superior to infeft an adjudger or appriser, hath the same force as if the creditor had been actually infeft, in order to attain possession and exclude others; Stair, Instit. p. 211. (219.); January 20, 1665, Little against Earl of Nithsdale, No. 26. p. 5194.; June 24, 1681, Oswald against Douglas and Deans, No. 56. p. 6650.

The Lords repelled the defender's objection against taking a term for producing writs clothed with infeftment.

Further alleged for the defender: The adjudication being for the behoof of the apparent heir, no reduction and improbation of real rights can be sustained without an actual service and infeftment thereon; because an apparent heir served, if not infeft, cannot force production of rights completed by infeftment, more than an apparent heir not served, can reduce a personal bond; seeing apparency doth not state him a proper contradictor, and the defender, though assoilzied, might upon the apparent heir's death, be reconvened by the next heir served, Spottiswood, Tit. IMPROBATION; Stair, Tit. RED. and IMPROB. By our practice apparent heirs are only impowered to reduce rights on death-bed, and rights without removing whereof they could not be served: And *exceptio firmat regulam in non exceptis*, February 11, 1635, Muir against Muir, No. 21. p. 16088. Besides, the apparent heir's taking assignation from William M'Pherson the trustee, makes him *passivè* liable; and the diligence, *eo ipso* extinguished by coming in his person, cannot be the title of so important an action; and the charge against the superior must fall with the adjudication itself.

Replied for the pursuer: Whatever be the effect of simple apparency; yet an apparent heir furnished with an adjudication and a charge against the superior in the person of a trustee, hath a sufficient title in a reduction; January 20, 1665, Little against Earl of Nithsdale, No. 26. p. 5194.; March 13, 1707, Robertson against Houston, No. 65. p. 13291.; February 11, 1635, Muir against Muir, No. 21. p. 16088.; December 3, 1634, Johnston against Johnston, No. 45. p. 6640. And seeing the apparent heir, by the adjudication on his own bond, subjects himself *passivè* to the defunct's debts as effectually as if he were served heir; no body hath prejudice, whether he possess by such an adjudication, or by infeftment on service and retour.

The Lords repelled also this objection, against the taking a term, and sustained action against the defender.

Forbes, p. 650.