

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.