

No. 54. Further alleged for the pursuer : That it is not altogether clear that an assignation to a count-book needs confirmation ; for though there be many accounts in it, which makes the assignation a kind of general one, yet the book itself is one complete subject ; and though many persons be concerned in the several accounts, yet the book may be considered as *unum nomen* ; just as when a man assigns an account consisting of many articles, or a flock of sheep ; in neither of which cases is confirmation needful, since, though there may be many heads, yet there is but one subject.

Answered for the defender : That a special right behoved to condescend upon the debtor and the subject received ; for otherwise, by the same rule, an assignation to all debts might be interpreted a special assignation.

Replied for the pursuer : That the present case differs from that where several bonds are assigned, since each bond is a *distinctum nomen* and *species*.

The Lords sustained the pursuer's title, he confirming before extract.

Act. Col. Mackenzie.

Alt. Cochran.

Clerk, Gibson.

Bruce, v. 1. p. 144.

1716. June 20. SIR PATRICK HOME *against* The EARL OF HOME.

No. 55.

Found in conformity with Keith against Cathcart, No. 44. p. 16099.

The deceased Mr. George Dickson of Rughrig obtains an adjudication against James Earl of Home, this Earl's uncle, as he who stood infest in the estate under the Great Seal, and as charged to enter heir to James Earl of Home, his father, this Earl's grandfather ; and Sir Patrick Home adjudges the right of the said adjudication from Mr. George, and pursues reduction and improbation against the present Earl, producing for his title James the uncle's charter and sasine, and Dickson's adjudication, and Sir Patrick's adjudication from him, whereon nevertheless Sir Patrick is not infest.

Alleged for the Earl : That no infestment having followed upon Mr. George Dickson's adjudication, nor the pursuer's, these could only be sustained to force a production in an improbation of personal rights, but not of real ones, whereupon infestment had followed.

Answered for Sir Patrick : *1mo*, That the reason of reduction being falsehood, the defender must produce all rights called for, that it may be known if there be such rights or not, or if they be false or true deeds ; *2do*, Earl James the uncle being infest, the right of that infestment is carried by Dickson's adjudication ; so that, as the Earl might have pursued reduction and improbation, so also might Dickson, and consequently Sir Patrick, as coming in his place ; and seeing the foundation of Sir Patrick's right is by infestment, it does not import whether the infestment be passed upon the conveyances and mid-couples or not ; *3tio*, Mr. Dickson's adjudication is not only against Earl James, as infest, but likewise as charged to enter heir to his father, the Earl's grandfather, to whom this Earl is heir served and retoured.

Replied for the Earl: That it is a known rule in our law and form, that parties in peaceable possession of their lands by real rights can never be obliged to produce these real securities to parties whose claims are only founded on personal rights. Thus, the Lord Stair, Tit. REDUCTION AND IMPROBATION, § 14. says, That a pursuer of reduction and improbation should not insist upon any title until he himself be actually infeft on that right; and, for the same reason, he cannot insist to reduce and improve upon a disposition, or any other right but an infeftment, if the reduction be for reducing infeftments. And, further, *1mo*, That Sir Patrick's allegiance, that his author's evidence would be good for a preference in a competition, was indeed true; but his inference therefrom was fallacious; and he might as well allege, that his author's infeftment did entitle him to warning and removing tenants, as to force production of real rights while he was not infeft himself. *2do*, As to Earl James's being infeft, and also charged to enter heir,

Answered: That the present Earl, though he were served heir to the grandfather, that service could not make up Sir Patrick's title; for the Earl would not produce rights, whereon infeftments have followed, to Sir Patrick, who is not infeft, though such rights were granted to himself; and the question of the defender's representation cannot here enter into the debate, which relates not to the defender's implementing of obligations, but only concerns his production of real rights to Sir Patrick, who is not infeft; and if Dickson's infeftment were here sufficient, that would entirely destroy the rule, That a personal right is not a title whereupon to reduce an infeftment; for, since all personal rights do necessarily at first flow, at least, mediately and remotely, from a person who is infeft, it is impossible to state a case in which the rule can take place; and here neither Sir Patrick nor his author are infeft; and therefore, if we go one step further back, by the same reason, we may go to fifty.

Duplied for Sir Patrick: That the case is cleared by decisions, *1mo*, 12th December, 1635, Rolland *contra* Wardlaw, No. 23. p. 6088. where the Lords found a general retour was sufficient to give the pursuer a title to reduce a comprising, whereupon infeftment had followed; *2do*, Hope, in his larger Practicks, Tit. IMPROBATION, says, The Lords, in an improbation pursued by Glencairn *contra* Morro, No. 37. p. 6632. sustained action on a charter without sasine; *3tio*, In the cause, 3d December, 1634, Lord Johnston *contra* Johnston, No. 45. p. 6640. the Lords sustained comprising from the apparent heir, who was charged to enter, to be a sufficient title in a reduction and improbation; for that charge and comprising was as sufficient as if the party had been retoured heir; *4to*, The same was found with respect to an adjudication, 20th January, 1663, Little *contra* the Earl of Nithsdale, No. 26. p. 5194. and 24th June, 1681, Oswald *contra* Douglas and Deans, No. 56. p. 6650. and this even though the adjudication was to the behoof of the apparent heir.

Triplied for the Earl: That the *first* reason quoted is single, singular, and in desuetude; besides that, even as it stands, it will not support Sir Patrick's plea; for the case there was, that a debtor infeft in lands having them apprised from him

No. 55. for payment, whereupon the appriser was infest, the debtor's heir served in general, though not infest, was found entitled to pursue reduction, and force production of the appriser's real right; which differs widely from the case of a singular successor, to whom our law gives not the same indulgences as to the right of blood. *2do*, In the *second* quoted decision, the question was not, If a pursuer, not infest, could force production of real rights? but only, If a naked charter, without sasine, could force production of any rights, even personal ones? which concerns not the present case. *3tio*, The *third* decision proceeds only with relation to personal rights, and where the pursuit was only in improbation on falsehood; nor is there any mention there of real rights completed by infestment. *4to*, As to the *fourth*, it neither mentions rights real by infestment, nor did there the lands hold of the King, but of a subject, whom the compriser had charged to infest him, which put the compriser in the same case as if he had been actually infest; besides, the comprising was on the apparent heir's own bond; so that, in this case, the Lords had likewise regard to the right of blood. And, *lastly*, it is noticed in the end of that decision, that the Lords would not admit certification against an apprising, if the infestment thereupon were produced; so that this decision made directly against Sir Patrick; and this answer also serves to take off the above cited decision, Oswald *contra* Douglas and Deans; for there also the adjudger had charged the superior, whereby his right was real and complete; besides, that, even in that case, the Lords refused to force the production of real rights, but restricted the action to improbation.

Quadrupled for Sir Patrick: That a charge against the superior gives no real right, but is only useful in competitions, in case a superior should prefer one adjudger to any other; so that it is the adjudication, and not the charge, that gives the right to pursue such actions. *2do*, That there could be no charge against the superior in this case, because the lands hold of the Crown.

“The Lords found the pursuer's title not sufficient to call for production of heritable rights whereupon infestment followed, unless the pursuer restricted his process to an improbation on falsehood.”

Act. Sc.

Alt. Sir Ja. Nasmith.

Clerk, Gibbon.

*Bruce, v. 2. No. 3. p. 3.*

1720. July. LORD STRATHNAVER *against* DUKE of DOUGLAS.

No. 56.

The heir of entail neglecting the deed of entail, and making up his title to the land as heir of line, having thereupon burdened the land with debts contrary to the terms of the entail, a process for disburdening the tailzied subject of these debts, at the instance of the next substitute against the representatives of the said heir of entail, was not sustained, without a service.—See APPENDIX.

*Ecl. Dic. v. 2. p. 473.*