

1715. February 2. OGILVIE of Murthil *against* LESLY of Glaswell.

No 2.

A person disposed with warrandice from his own fact and deed only, and particularly against an infestment in favour of Janet Millar. In a question betwixt the parties, whether the warrandice was incurred, as there was no such infestment as the one described, but there was another in favour of Jean Webster, the Lords found that the warrandice was not incurred.

THE deceast Lesly of Glaswell having granted two bonds to the also deceast Ogilvie of Murthill, of the same date; there was a disposition granted by Murthill to Glaswell of some lands, with warrandice from fact and deed, and particularly against an infestment in favours of one Janet Millar, proceeding upon a bond granted by a former heritor. Upon a charge to make payment, Glaswell suspends, and withal raises a process of contravention of the warrandice, upon his being excluded from the mails and duties, by a liferent infestment in favours of one Jean Webster, granted by the former heritor to his own son, and this Jean Webster in conjunct-fee and liferent.

*Alleged* for the charger; That the infestment to be warranted from, was an infestment proceeding upon a bond to Janet Millar, her husband, and her heirs; whereas the infestment founded on by the suspender was a liferent infestment in favours of Jean Webster, proceeding upon a contract of marriage; and, therefore, since the description of the incumbrance, of which the lands were to be purged, did not agree with the nature of the sasine founded on, it was in vain to pretend that the charger ought to purge.

*Answered* for the suspender; That it was plain, *imo*, that an infestment was warranted against, which the disponent was expressly obliged to purge. *2do*, It did not appear that ever there was such an infestment as that mentioned in the clause of warrandice, in the person of one Janet Millar; it follows then, that the infestment founded on and produced by the suspender in favours of Jean Webster, granted by the then heritor of the lands, must be taken for that which was understood by the parties in the clause of warrandice; *ut plus valeat quod actum est, quam quod simulate concipitur*; since *falsa designatio*, or even *error in persona non nocet*, both which we are informed of in *l. 17. § 1. De Cond. et Dem.*

THE LORDS found, that the warrandice in the disposition by the charger's father to the defenders, was only against an infestment in favours of Janet Millar, proceeding upon a bond granted by the heritor of the lands, and the incumbrance not purged, founded upon by the suspender, was an infestment in favours of Jean Webster, proceeding upon a contract of marriage betwixt the heritor's son and her; therefore found the contravention of the warrandice not incurred.

Act. *Grahame.*

Alt. *M'Dowal.*

Clerk, *Sir James Justice.*

*Fol. Dic. v. 1. p. 294. Bruce, No 51. p. 65.*

1739. January 16.

REID *against* KER.

No 3.

AN adjudication against Patrick Livingstone of Barrouny, was found null on this ground, that the bill of adjudication was against John Livingstone; in so