

Scotland, than that diligence by arrestment is as sufficient an intimation of an assignment, as a personal intimation under the hand of a public notary to the obligor; and this was the most proper way, since the obligor was not to be found; and a horning was likewise signeted thereon.

Judgment,
19 April
1721.

After hearing counsel, *It is ordered and adjudged, that the petition and appeal be dismissed: and that the decree of the Lords Delegates in Scotland, therein complained of, be affirmed.*

For Appellant, *Rob. Raymond.* *Rob. Dundas.*
For Respondents, *Charles Erskine.* *Will. Hamilton.*

Case 83. William Duff of Dipple Esq; - - *Appellant;*
George Gordon of Glastirum Esq; - - *Respondent.*
Et e contra.

21st April 1721.

Real and Personal.—A disposition is granted by a father to his son of the paternal estate, burdened with all debts contracted or to be contracted by the father; in a question between an onerous purchaser of the said estate, and an assignee of two personal bonds granted by the said disponent, the Court found that the debts were a real burden upon the subject disposed; but their judgment is reversed.

Writ.—The writer of a bond is designed “Patrick Gordon, servant to Mr. Alexander Dunbar;” the Court of Session found this a nullity. Upon this point the House of Lords did not decide, but dismissed the appeal.

Homologation.—It was alleged that the grantor of the bonds had homologated the same by payment of interest, &c; the Court found that such alleged homologation did not hinder the onerous purchaser of the estates before mentioned, from questioning these bonds: upon this point also the House of Lords did not decide, but dismissed the appeal.

BY a contract, executed previous to the marriage between Sir Alexander Innes, and Mrs. Jane Rollo, in 1678, Sir Alexander bound himself to settle the lands of Coxtown, and other therein particularly mentioned, upon the heirs male to be procreated of that marriage; whom failing to his heirs male of any other marriage, with several other substitutions of heirs. And Sir Alexander afterwards in 1707, by a disposition reciting the said marriage-contract, conveyed the said lands to his eldest son George, the heir male of the marriage, with other substitutions of heirs, with and under the burden always of payment of all the lawful debts contracted, or to be contracted by the said Sir Alexander Innes, and particularly of the payment of his younger children’s provisions: all which debts and deeds the said George Innes becomes by his acceptation of the said right, tied, bound, and obliged to satisfy, pay and perform, as if they were specially set down, and in the same manner as the said Sir Alexander is bound and obliged therefore himself, with and under which provisions and conditions the right and disposition is declared to be granted and accepted, and no otherwise.

In

In 1712 Sir George Innes, after his father's death took a charter from the crown upon the procuratory of resignation contained in the said disposition, and the several provisions of the disposition 1707, were repeated in this crown charter. He afterwards sold the said lands to the appellant Mr. Duff, for an onerous consideration, being about 25 years purchase of the rents; and Mr. Duff was infeft on a disposition from Sir George on the 10th of July 1714. Mr. Duff applied part of the price in the discharge of such debts as appeared from the records to be charged on the estate, and paid the remainder of the price to Sir George.

In 1719 the respondent Mr. Gordon, who had acquired right in 1718, by assignation, to certain bonds executed by Sir Alexander Innes first mentioned, brought an action before the Court of Session against Sir Alexander Innes, a minor, son of the said Sir George, as representing Sir Alexander his grandfather, and concluded to have the lands of Coxtown adjudged to him in satisfaction of his demand. The appellant Mr. Duff appeared as a defender to this action, and stated that he was a purchaser of these lands for a valuable consideration without notice of these bonds, upon which Sir Alexander had never been inhibited, and that none of these bonds were put upon record till 1720, six years after his purchase. But the respondent insisted, that his demand was a real lien upon the lands in question, because by the disposition by Sir Alexander to his son Sir George, under which the appellant claimed, Sir George was expressly charged with the payment of all Sir Alexander's debts, and therefore had a right to adjudge.

After a report by the Lord Ordinary, the Court, on the 2d of December 1719, "found that the debts were a real burden upon the subject disposed." And on the 1st of January thereafter, "adhered to their former interlocutor."

Mr. Duff the appellant afterwards took an objection to two of the bonds, claimed on, upon the act 1681. c. 5. In these two bonds the testing clause runs thus: "written by Patrick Gordon servant to Mr. Alexander Dunbar;" which was, he contended, no valid description. To this Mr. Gordon answered, he could prove that Dunbar lived at Castle Gordon where the bonds were executed, and had at that time a servant called Patrick Gordon. The Lord Ordinary at first repelled the objection, but the appellant having reclaimed, after answers, the Court on the 13th of February 1720, "found that Patrick Gordon the writer of the said two bonds so granted by Sir Alexander Innes, is not sufficiently designed therein; and therefore sustained the nullity proposed against the said two bonds." 1681, c. 5.

The respondent Mr. Gordon afterwards pleaded, that Sir Alexander had homologated these bonds, by paying part of the interest due thereon, and drawing a bill upon his factor for part of the principal, but which was not paid. The appellant answered, that there was no proof, that any interest was paid, and that the bill drawn upon the factor had no relation to the bonds in question. The Court on the 25th of February 1720, "found that the homologation alleged by Mr. Gordon did not hinder

“ Mr. Duff from questioning the bonds pursued on, and there-
 “ fore adhered to their former interlocutor, finding the writer of
 “ these two bonds not sufficiently designed, and refused the de-
 “ sire of the petition.” And the Court afterwards on the 9th of
 June 1720, adhered to this last-mentioned interlocutor.

Entered,
 19 Dec.
 1720.

Entered,
 13 Jan.
 1720-1.

The original appeal was brought by Mr. Duff, from “ an in-
 “ terlocutory sentence or decree of the Lords of Session of the
 “ 2d of December 1719, and the affirmance thereof, the 1st of
 “ January following ;” and the cross appeal was brought by Mr.
 Gordon, from “ several interlocutory sentences or decrees of the
 “ said Lords of Session of the 13th and 25th of Februray and
 “ 9th of June 1720.”

On the original Appeal: Heads of the Appellant Duff's Arguments.

Purchasers are always safe by the law of Scotland, when no debt nor incumbrance upon the land to be purchased appears upon record, that is what the law construes to be notice, and to charge a purchaser in any other way must unhinge all manner of securities, and defeat the very intention of the laws, with regard to the recording of titles in Scotland. The general clause in the disposition subjecting the son to the payment of the father's debts, could be no notice to the purchaser what these debts were, since neither were they upon record, nor particularly mentioned, which ought to be done when such debts are intended to be a real charge upon the estate. In the case in question, even no suit was commenced either against Sir Alexander or Sir George his son, till some years after the appellant's purchase.

This argument is still stronger against the respondent, who purchased or got an assignment of these debts in question, even after the appellant's purchase; of which he could not but have notice, for the purchase was treated of some months before it was made, and publickly known in the country; the appellant was infest, and that infestment registered, and the respondent, who lived within a few miles of the appellant, could not but know of all this transaction.

It does not appear to have been the intention of Sir Alexander to make these debts a real charge upon his estate; for as there are no particular debts specified, so the clause can import no more than that the son should not use his right of fee in fraud of the creditors, but that he should be bound to pay them, that is, he personally. The payment is directed upon the person, receiver of the rights, and not upon the subject. The express words of the deed are “ that the grantee shall only be subject to the pay-
 “ ment of the debts, in the same manner as the grantor himself
 “ was.” The grantor was only bound personally, and these debts were no real lien or burden on the lands in his person, and consequently they cannot be so in the person of the son.

The proviso subjects the grantee to the payment, not only of the debts then contracted, but also of what he should afterwards contract. These last, of their own nature, could not be real; and it seems pretty incongruous that any debt not real at the time of the

onveyance should afterwards become real without any diligence done by the creditor (a).

On the cross Appeal : Heads of the Appellant Gordon's Argument.

Both the bonds in question are of the same date, bearing the same designation of writer and witnesses, dated at the same place, and subscribed without the least variation in form, an argument the writer designed himself as usual ; besides the intention of the act of parliament is sufficiently attained, that was only to ascertain the writer and witnesses' names, the better to discover the truth or falsity of any deed that might be called in question ; but the present description sufficiently answered that, since as to Mr. Alexander Dunbar it is certain who he was, and there was no other of that name, who had a servant by the name of Pat. Gordon, who is designed writer of this bond : and as the said Mr. Alexander Dunbar was perfectly well known to reside at Castle Gordon, where the bond is dated, so being a catholick priest, it might be some reason why he did not give himself any farther designation, which last facts, if necessary, were offered to be proved ; and that he was so designed in several other writings.

The obligor in the bonds had paid part of the interest to the obligee, and in payment of part of the principal had drawn a bill upon his factor ; the bill not being accepted, was protested and duly negotiated. This was a homologation by the obligor, so that he was barred from making this objection, and so consequently ought the respondent to be, who purchased the estate subject to the obligor's debts.

Heads of the Respondent Duff's Argument thereon.

The intention of the act no doubt was to prevent vague and uncertain descriptions, such as in the case in question ; for it must be admitted if the writer had been Mr. Alexander Dunbar, without any other description, the same would not be good, because there may be several of that name : the writer then being designed servant to Mr. Alexander Dunbar, would never vary the case, since it is not such a description, as to ascertain the person, and discriminate him from others ; and his being so designed in other writings can be no argument for supporting this.

The several facts insisted upon, and pretended to be made use of, in order to ascertain the person, are to no purpose, since the law expressly enacts, "that the want of a designation of writers and witnesses is not suppliable by condescending upon the designation of writers or witnesses," so that if the writer is not in the deed itself sufficiently described, that can never be supplied by any after condescendance : nay, this was the very design of this act ; for the law before that time required the writer and witnesses to be designed, but then the want of that used to be sup-

(a) The argument of Mr. Gordon on the original appeal has not been found ; as his counsel gave up the point of law at the hearing appeal, it is probable that he had no printed case. The argument on the other points is taken from Mr. Duff's case.

plied by an after condescendance upon a proper description of writer and witnesses; and to prevent the inconveniences arising by such condescendance was the principal view of this act.

There is no proof that any such interest was paid, it being only founded on the obligee's own allegation; and the bill drawn by the obligor upon his factor has no manner of relation to the bonds now in question; and even the payment of interest by the obligor could not have been pleaded in bar to any suit brought by the obligor himself to set aside a deed or obligation declared by law void and null, much less can it be made use of against the respondent, who is a purchaser for a valuable consideration, without any notice of this debt, and consequently is entitled to protect his purchase by the nullities arising from the face of the obligations themselves, which are made use of in order to affect his purchase; and he is the rather justifiable in insisting upon the strictness of the law, since he has already paid a full and adequate price for the estate in question.

Journal,
21 April
1721.

Counsel being this day called in and heard upon the appeal and cross appeal, and the several answers thereto, *the counsel for the appellant, William Duff, having opened the matter of his appeal, and shewn* “that the complaint of the interlocutors finding the bond debts in question real burdens on his estate is founded upon a point already adjudged by this House:”

The counsel for the respondent, George Gordon, admitted it to be so, and therefore would not enter into the defence of the said interlocutors: and further declaring “that he, looking upon the reversal of these interlocutors to put an end to the whole contest between the parties to these appeals, declined to trouble the House with arguments in support of the bonds in question, against the interlocutors complained of by the appeal of the said George Gordon.”

Wherefore the counsel for the said William Duff prayed, “that the appeal of the said George Gordon be dismissed.”

Judgment.

And upon due consideration had of what was offered on either side in the said causes, it is ordered and adjudged, that the said interlocutor of the 2d of December 1719, finding the bond-debts real burdens upon the estate in question, and the interlocutor of the 1st of January following, in affirmance thereof be reversed; and that the petition and appeal of George Gordon, complaining of the said interlocutor of the 13th and 25th of February 1720-1, and the interlocutor of the 9th of June last, in affirmance thereof be dismissed; without prejudice to any demands the said appellant George Gordon may have upon the two bonds in question against any other person beside the said William Duff the original appellant.

For William Duff. Ro. Dundas. Will. Hamilton.

It was in the case *Lord Lovat v. Emilia Dowager Lady Lovat and others*, 1st April 1721, No. 80 of this collection, that the point of *real and personal*, noticed in the judgment was decided. The judgment here reversed upon that point is noticed in the Dictionary as an existing case, *voc. personal and real*, vol. 2. p. 67.