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But the obligation of warrandice expressly referred only to *prior* existing incumbrances, and therefore could not secure the right of the heir against debts afterwards entered into by the father in the exercise of that right, which in point of law remained, and would have remained in him, although he had infeft the appellant in terms of the contract, as pointed out by the interlocutor of February 1724.

Judgment, 7 March 1751.

After hearing counsel: "It is ordered and adjudged, &c. that the several interlocutors complained of be, and the same are hereby, affirmed."

For Appellant, *W. Murray, Alex. Lockhart.*
For Respondents, *A. Hume Campbell, C. Yorke.*

The LORD ADVOCATE, - - *Appellant;*
LORD BOYD, *et alii*, - - *Respondents.*

28 *March* 1751.

FORFEITURE.—ACT 1, GEO. I. c. 20.—A conveyance by a father to his son after the date specified in the act, sustained—the debts charged on the estate, and for which the son became personally liable, being nearly equal to the value of the lands.

[Elchies *voce* Forfeiture, No. 8.—Falc.—Mor. 14768.]

No. 95. WILLIAM, Earl of Kilmarnock, in 1732 disponed his estate, reserving his own liferent, to his eldest

son, Lord Boyd. The conveyance was likewise burdened with a faculty to provide L.2000 to younger children, with a jointure to Lady Kilmarnock, and with all the debts contracted by the earl or his predecessors previous to the date of the disposition. Lord Boyd was infeft, and the instrument of sasine duly recorded.

The earl was attainted of high treason during the rebellion 1745, and executed. Lord Boyd then entered into possession of the estate, and in order to pay off the debts he conveyed it to certain trustees, (respondents) by whom it was shortly afterwards sold to the Earl of Glencairn, and the purchase money applied towards satisfaction of the debts. But the estates having been surveyed by the Court of Exchequer, as forfeited by the earl's conviction, Lord Boyd and his trustees entered their claim in the Court of Session, in the manner directed by the 20 of Geo. II.

To this claim it was objected,—that by the clan act, (1 Geo. I.) it had been enacted, "That all "tailzies, settlements, &c. of any estates made in "Scotland in name of whatsoever person since the "1 August 1714, or that should be made in time com-"ing, by any person who shall be convicted of high "treason, shall be void and null, excepting such "deeds, securities, &c, as had been or should be "made for just and onerous causes,—the said "causes being instructed otherwise than by the "writings themselves." That the disposition under which the respondent claimed was posterior to the 1st of August 1714, and consequently was null and void unless the respondents could instruct the onerous cause thereof.

Answered—1st, That the above statute, and

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particularly the clause founded on, was a temporary law limited by the words, as well as by the obvious intention of the act, to the rebellion in 1715; and that it would be attended with very dangerous consequences to extend it in the manner proposed, as no person could be sure that the party with whom he contracted might not be guilty of high treason at the distance of thirty or forty years; and it would be impracticable, at such a distance, to prove the onerosity of the deeds, otherwise than by the writings themselves. That this construction was strongly confirmed by the vesting act of the 20 Geo. II. whereby the very same provision was re-enacted with a retrospect only to the 24 June 1742, which is inconsistent with the idea, that the former act was to regulate convictions for high treason in 1745.*

But, supposing that the said former act could now be considered as a subsisting law, the present case comes within the exception of the statute; for the deed 1732 was not only granted for just and rational considerations, but, in the eye of law, for causes strictly onerous, being burdened with debts to such an extent as amounted to an onerous purchase.

The Court ordained the claimant to give in a particular condescendence of the onerous causes alleged, and the manner of proof. From the condescendence it appeared, that at the date of the

* "We were all of us greatly difficulted in this question, except "the President, who said he thought the act lasted only during the "rebellion 1715, to which opinion he was chiefly determined by the "clause; but as the lawyers at the bar hinted that they would be "able to prove the onerous cause, we all agreed, before answer, to "order them to give in a condescendence of them and of the manner "of proof."—*(Elchies' Notes.)*

deed the debts charged upon the estate, and for which Lord Boyd became personally liable, exceeded the value of the estate at the time.

In the answers to the condescendence it was attempted to be shown, that in fact the estate exceeded in value the incumbrances with which it was charged;* but it was chiefly insisted in point of law, that, it not being alleged that Lord Boyd paid or gave to the late Earl any price or valuable consideration whatever out of his own money or any separate estate of his, it could not be maintained that the conveyance had been made 'for just and onerous causes,' in the true sense of the act, nothing being *given* for that conveyance by the disponee. So far as the debts are real and *bona fide*, the creditors will not be prejudiced; but Lord Boyd now claims the reversion of the estate for no consideration. That is the only thing now in question, and it is the settlement of that only which is alleged to be voided by the clause founded on.

Replied—That the plain intention of the statute, (supposing it to be now binding,) was to prevent fraudulent conveyances, calculated to avoid the effect of forfeiture for high treason, supposed to have been in view when such conveyances were executed; so that, where the grant appeared so far just and onerous as to exclude all suspicion of such a design, the conveyance must be held to fall within the exception. Here there can be no suspicion of evil intentions in granting the disposition, as it was not until long after its date that the earl was seduced from his loyalty. By virtue of the

* Monboddo mentions that the debts extended to twenty-two years purchase of the estate, and that it was sold at twenty-seven years purchase.—(*Brown's Sup.* V. 774.)

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disposition, the respondent became personally liable for the debts charged on the estate, which at least equalled its value at that time; and in fact he had granted his personal security to several of the creditors. The transaction, therefore, was the same as if he had engaged to pay, as the purchase money of the estate, a sum of money equivalent to these debts. Supposing the value of the estate to have since increased, this cannot affect the question, which must be governed by the state of matters at the date of the conveyance in 1732.

Entered 28 Nov. 1749. Judgment, 28 March 1751.

The Court sustained the claim, and decerned, (27 July 1749.)

The appeal was brought from this interlocutor.

After hearing counsel: "It is declared, &c. "that it appearing that the amount of the debts "charged upon the estate in question, to which "the respondent, Boyd, became personally liable, "by his acceptance of the right under the deed of "10 August 1732, was, at the time of making the "said deed, equal to the then value of the said es-"tate, or thereabouts,—the said interlocutor or "decree ought to be affirmed, and it is therefore "ordered and adjudged, that the said petition and "appeal be and is hereby dismissed this House, "and that the said interlocutor or decree be, and "the same is hereby affirmed."

For Appellant, *D. Ryder, W. Grant, W. Murray.*

For Respondents, *A. Hume Campbell, Alex. Lockhart.*

"The Lord Chancellor stated three material points in the "cause; 1st, Whether the clan act was or was not temporary? "2d, Whether Lord Kilmarnock was or was not attainted of

" the treason therein mentioned? 3d, Whether the disposition " 1732 was onerous or not? He thought the discussion of the " first point might rather be reserved for some other cases that " might come before them; but I am told that by his way of " reasoning he seemed to think it temporary. The second he " thought unnecessary, because that objection had not been " made for the claimant before us; and as to the third, he " thought the disposition onerous: and if the House was of that " opinion, he proposed that the judgment should be, to declare " that the debts chargeable on the estate, and on the respondents " to pay, being equal or thereabouts to the value of the estate " at the time that the disposition was executed, the disposition " was therefore onerous, and the interlocutor complained of " should therefore be affirmed; which the House agreed to." —*(Elchies.)*

THOMAS DRUMMOND of Logie Almond, - - - - } *Appellant;*
The LORD ADVOCATE, - - *Respondent.*

30 *April* 1751.

FORFEITURE.—ACT 19, GEO. II. c. 26.—A person being attainted by virtue of the act, which declared that if he did not surrender himself before the 12 July following, he should stand attainted of treason from the 18 April preceding;—it was found that the forfeiture did not operate *retro* to the effect of incapacitating him to succeed to property in the interval.

WRIT.—Circumstances under which a deed was not considered a delivered evident.

[Elchies *voce* Forfeiture, No. 15.—Falc.—Mor. 4875.]

BY the act 19 Geo. II. it is enacted, That if certain persons therein mentioned, and among