

Were it enough for setting aside a deed, that the testator himself, or the person employed to frame it, did not understand or foresee all the remote consequences which might possibly result from the destination, and if such allegations were to be established by parole testimony, the most approved principles of our law would be overthrown, and no settlement could ever be secure from challenge. Though landed property cannot be devised without written documents, and these framed in such a manner as to shew, that the testator was able and desirous to regulate his succession, it would thus be in the power of inattentive, unmindful, or false witnesses, to disappoint the most deliberate settlements, and to substitute in their place a destination wholly inconsistent with the wishes of the proprietor; Duke of Hamilton and Earl of Selkirk *contra* Douglas, in 1776. See APPENDIX.

No 60.

After advising memorials, counsel were heard; and the LORDS, by a very narrow majority, sustained the defences.

A reclaiming petition was preferred, which was followed with answers, when the former judgment was altered, and the deeds set aside.

But after advising a reclaiming petition for the defenders, with answers for the pursuer, the LORDS, returned to their first opinion, by sustaining the defences.

Reporter, Lord Duñsinnan. Act. Lord Advocate, Dean of Faculty, Solicitor-General.
Alt. Wight, Blair, Abercromby, Armstrong. Clerk, Gordon.

G. Fol. Dic. v. 3. p. 246. Fac. Col. No 89. p. 161.

* * * This cause was appealed :

THE HOUSE OF LORDS, 23d February 1791, ' ORDERED, That the appeal be dismissed, and the interlocutors complained of affirmed.'

S E C T. XII.

Reviving an extinguished obligation in prejudice of a creditor.—Discharging a bond, and taking a new one, payable to a third person, to disappoint a creditor.—*Sale retenta possessione.*

1725. July 8.

DAVID MACCLELLAN *against* HENRY ALLAN, Writer in Edinburgh.

No 61.

IN the competition of Sir George Hamilton's creditors, there arose a debate betwixt Mr Macclellan and Mr Allan, concerning their different interests :

A cautioner in a bond having granted a bond of cor-

No 61.
 roboration
 after the se-
 ven years,
 within which
 time a credi-
 tor of the cau-
 tioner had af-
 fected his es-
 tate by an in-
 hibition; the
 Lords found,
 that the debt-
 or, being once
 free of his
 cautionary
 obligation by
 prescription,
 could not re-
 vive it in pre-
 judice of an
 inhibitor.

That produced for Mr Allan was a bond by Sir Robert Miln as principal, and Alexander Miln as cautioner, with a bond of corroboration thereof by the said Sir Robert and Alexander Milns as principals, and Sir George Hamilton as cautioner, to James Maccelellan, dated 3d of July 1697, upon which inhibition had been used against both principals and cautioner, *anno* 1698. This bond was assigned by the said James Maccelellan to his son David, to whom Sir George granted a bond of corroboration, in March 1705, for L. 1500 as then only resting. Upon this last bond there was a new inhibition used, *anno* 1709, and a new bond of corroboration granted; and, upon all these, an adjudication was led by Maccelellan against Sir George of his interest in the estate of Kinglass, *anno* 1722.

Mr Allan's interest was a bond by Sir Robert Miln and Sir George Hamilton as co-principals, for 3000 merks, in April 1693; and another bond by Sir George for L. 4000 in December 1693; upon both which bonds inhibition was used in February 1698.

It was *objected* by Mr Allan, *imo*, That Sir George was only a cautioner in Mr Maccelellan's debt *anno* 1697, and after the act 1695 anent cautioners, he was free in the course of seven years; and therefore his bond of corroboration in March 1705 was reducible upon Allan's inhibition *anno* 1698: For he being once free by the prescription, he could not revive the debt in prejudice of an inhibitor, more than he could contract a new one.

2do, The inhibition used by Mr Maccelellan within the seven years could not preserve the debt, so as it might be corroborated after that time; for the act of Parliament only excepts diligence done within the seven years, which is to stand good and have its force and effect; and, granting the inhibition had the effect of an interruption, yet it could go no further than to secure the principal sum and annualrents due within the seven years, but not the annualrents arising thereafter.

It was *answered* for Mr Maccelellan, That the inhibition within the seven years secured the principal sum, and of consequence its growing annualrents as its accessory; and besides, there was a registrate horning used within the seven years, which had the effect to make even the fruitless part of the debt a principal sum which afterwards bears annualrent. *2do*, Sir Robert Miln, the principal debtor, disposed to Sir George, the cautioner, several funds for payment of this and other debts, whereby Sir George became in effect principal debtor, by which there accresced to Mr Maccelellan and the other creditors an interest in these funds, seeing they were assigned as a subject for their payment. *3tio*, Allan's inhibition was null, as not being executed at the head burgh of the jurisdiction within which the subject in competition lay; and further, Allan's inhibition narrates two bonds, yet in the imperative part of the letters there is only one bond mentioned, and the executions are made out accordingly; and therefore only one of the debts is secured by the inhibition.

It was *replied* for Allan, to the *1st*, That neither principal nor annualrents are preserved, except in so far as they can be made effectual by diligence within the seven years, which in the present case being only an inhibition, could not affect the fund in question; and suppose the debt were preserved, yet the growing annualrents after the seven years were not due; for, though the statute excepts 'lawful diligence,' yet that was restricted to make effectual only what fell due within that time.

It was *replied* to the *2d*, That the disposition being made in security of the proper debts due to Sir George, and for relief of cautionries, and the debts due to himself far exceeding the sums disposed, he did not thereby become a proper debtor.

To the *3d* it was *replied*, That the inhibition being executed at the head burgh of the shire where the inhibited party dwelt, it was sufficient since it was registered in the public register, Lord Gray *contra* Hope, No 71. p. 3733; which holds the rather in this case, where the subject falling under inhibition was not secured by infestment in land, but by an adjudication; which is therefore to be regulated by diligence done *in domicilio* of the debtor: And though the inhibitory part relates only to one bond, yet seeing the inhibition narrates both, and bears a discharge of contracting, &c. in defraud of the complainer, anent payment making of the sums of money, &c. therein contained, it is evident, that although the letter *S* be omitted, the prohibition will extend to both bonds, which were sufficiently notified by the narrative and registration.

THE LORDS found the inhibition at Macceellan's instance secured the principal sum and annualrents due within the seven years; and found the inhibition at Allan's instance cut off the effect of the corroboration to Macceellan; and found the making over securities to Sir George Hamilton, did not make any alteration in the nature of his obligation, but that notwithstanding thereof he continued cautioner; and repelled the objection against Allan's inhibition. See INHIBITION.

Reporter, Lord Forglan. For Allan, *Ja. Boswell*. Alt. *Alex. Hay*. Clerk, *Mackenzie*.
Fol. Dic. v. 3. p. 246. Edgar, p. 186.

1750. June 12.

The KING'S ADVOCATE against JAMES BLAIR and CHRISTIAN RAMSAY.

THE Earl of Northesk, 21st July 1716, granted bond to James Blair of Ard-blair, which he assigned, 18th January 1720, to Alexander Alison of Birkhill, on his back-bond, to hold the same for the use of Jean Blair, the assigner's sister, and spouse to Alexander Ramsay of Drumlochry, in life rent, and her children in fee: And Alexander Alison granted bond, 8th December 1726, declaring he had uplifted the sum and interest thereof, which he became bound

No 62.

A rebel, with a view of dis-appointing his forfeiture, and saving a sum of money to his children, discharged a bond due to him, upon