1716. *June* 28. Colonel PATRICK VANSE *against* Sir ALEXANDER MAXWELL of Monreith.

MAXWELL of Monreith having led an apprising upon the estate of Barnbarroch in the year 1657, and infeft himself thereon under the great seal, Colonel Vanse, now of Barnbarroch, forty-eight years thereafter, grants a bond of corroboration of certain bonds granted posterior to the apprising; and, of the same date, obtains a back-bond from the late Sir William Maxwell of Monreith, obliging him to denude himself, his heirs and successors, of the said apprising, in favours of the Colonel, his heirs, &c. in so far allenarly as might be extended to certain lands therein mentioned, upon payment of the sum contained in the bond of corroboration. The Colonel accordingly makes payment of the sum to Sir Alexander Maxwell, Sir William's heir. But all he got from him being only a discharge and renunciation, wherein nevertheless there is a clause obliging Sir Alexander to renew the said writ at sight of, and as often as shall be thought fit by lawyers, aye and while the Colonel be sufficiently discharged, and he himself sufficiently denuded thereof, conform to his father's said back-bond: the Colonel, finding he could not infeft upon that writ as it was conceived, Sir Alexander standing infeft under the great seal, charges him upon the foresaid clause; and the reasons of suspension were,

That Sir Alexander was sufficiently denuded already by the discharge and renunciation. That an apprising may be satisfied by intromission within the legal, or even upon a discharge of the debt whereon it proceeded; and, therefore, that this discharge and renunciation was sufficient to extinguish the debt, and denude Sir Alexander. That there was a great difference betwixt voluntary rights and legal diligences; for, to denude of an infeftment upon the first, a new infeftment was requisite in the person of the acquirer; but that, to denude of an apprising, the same standing only as a parallel right of security,—how soon it is renounced, the debtor's own infeftment stands valid, without any renovation; and, lastly, that the legal of this apprising was still kept open by the back-bond.

ANSWERED for the charger,—That though an apprising may, within the legal, be extinguished in manner above mentioned, yet here the legal was not only expired, but the years of prescription run, before granting the back-bond, and the appriser infeft under the great seal; which infeftment therefore became as effectual an irredeemable right of property, and denuded the debtor as much as an infeftment upon any disposition whatsoever. So that the question now is, whether a bare discharge and renunciation can denude the suspender. And this must certainly be resolved in the negative; and that it can be no otherwise done than by a disposition containing procuratory of resignation, and infeftment following thereon. And as to keeping open the legal, answered, that, before granting the back-bond, the apprising was impregnable by prescription; besides, that the back-bond refers to debts contracted posterior to the leading the apprising.

REPLIED for the suspender,—That the charger having accepted of the discharge and renunciation, *res devenit in alium casum;* for the obligement to renew being clogged with this express clause, (keeping always the effect and substance above written,) the suspender cannot be bound to grant a disposition containing

procuratory of resignation; which is a deed of a quite different effect and substance from a discharge and renunciation, and even inconsistent therewith.

DUPLIED for the charger,—1*mo*, That though his acceptance had been simple, yet seeing *id agebatur* by the discharge and renunciation, that the suspender should be effectually denuded, and that, *quod voluit non fecit*, law still obliges him to make it good. 2*do*, That the acceptance was qualified with the foresaid clause, in the end whereof, by the substance and effect above written, is signified, that he shall denude of the apprising, and all that followed thereon, as appears by the clauses above mentioned.

The Lords repelled the reasons of suspension; in respect of the father's obligement, and also the suspender's obligement to denude conform.

Act. M'Dowal. *Alt.* Ferguson, junior. Gibson, *Clerk.*

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1716. *July* 3. DAME BARBARA JAFFREY *against* SCOT of Brotherton, and Others.

BY contract of marriage betwixt Sir John Falconer of Balmakelly and the said Dame Barbara Jaffrey, she is provided in the annualrent of 33,000 merks of jointure, which, in case of surviving children, is restricted to the annualrent of 20,000 merks; but, some time after the marriage, there is a bond of provision granted to her by her said husband, whereby, in satisfaction of the said contract, she has disponed to her in liferent his lands of Galraw, with a salmon-fishing thereto belonging, upon which she is infeft, and which does exceed the said annualrent. After this, nevertheless, he infeft several of his creditors in the same subject, and then died, leaving children in life. And, in a competition betwixt the creditors and her, it was ALLEGED for the creditors, That, *quoad* the excess, this was plainly a donation betwixt man and wife, and therefore revocable, and *de facto* revoked by posterior heritable bonds granted in favours of creditors.

ANSWERED for the lady,—That though donations be prohibited, and are revocable, yet nothing hinders a husband and wife to enter into a reasonable transaction such as this was; for the restriction to the annualrent of 20,000 merks was not pure and simple, but only in a certain event, viz. if no children survived the husband, which was a hazard; and therefore they might lawfully transact in such an event. And certainly a *periculi pretium* is always allowed in such cases; and since, in one event, viz. the non-existence of children at Sir John's death, she would have had access to the annualrent of the whole 33,000 merks, it was nowise illegal to make a bargain in relation to that event.

The Lords superseded to determine whether it was a donation or not; but remitted to an Ordinary to hear parties further on that point: only, in the mean time, they continued the lady's possession, aye and while such restriction be found; and allowed decreet to go out against Brotherton, tacksman of the said salmon-shing, for bygones, and even in time coming, aye and while the restriction be