No. 26. creditors have duly arrested; and the patrons of the mortification have neither assignation to the new bond from Monimusk the creditor, nor have they affected it in any manner of way; for the back-bond narrates only the onerous cause why the granter became debtor for the mortified sum: And it doth not follow, That, because Leslie was debtor to the relict, and she assigned the debt to Monimusk, who became debtor to the patrons, *ergo* Leslie is debtor to them; seeing my debtor's debtor becomes not my debtor, till once I get the debt assigned to me, or affect it by arrestment; yea, as Leslie might have safely and *bona fide* paid the money to Monimusk; so his granting a new bond without any other narrative than borrowed and received, was all one as if, upon his paying down the money, Monimusk had lent it again to him; and Leslie's oath cannot prove that there was another onerous cause for his granting such a liquid bond.

Replied for the Patrons of the mortification: They do not plead their interest in Leslie's debt from the testament, but from the relict's deed, who assigned it for such an end; and the creditors of Monimusk cannot be heard to object against Leslie's oath, as not probative against them, since it was given upon their reference.

The Lords preferred the Patrons of the mortification to Monimusk's creditors.

*Forbes, p.* 420.

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1710. *July* 21.

LIEUTENANT COLONEL JOHN ERSKINE of Garnock, *against* SIR GEORGE HAMILTON,

No. 27.
Effect of a declaration of trust after expiry of the legal.

James Henderson, who *in anno* 1633 apprised the lands of Tulliallan from Sir John Blackadder, was in the year 1634 infeft upon a charter under the great seal. In 1637, this apprising was disponed to Mr. Robert Bruce of Broomhall, who in the year 1648, disponed the same to Edward Earl of Kincardin, Sir James Murray of Skirling, James Loch of Drylaw, and Mr. Henry Charters proportionably and *pro rata*, excepting from the warrandice, a declaration made by the disponer *in anno* 1642, declaring that Henderson's apprising was conveyed to him for the joint relief of himself, George Bruce, and John Rhind, of their cautionary for Patrick Wood, and also to the behoof of James Loch and Thomas Charters for their interest and proportionable relief of a bargain of salt betwixt the Laird of Tulliallan and them, and other sums due by him to them. In the year 1670, Sir John Henderson of Fordel, as heir to James Henderson leader of the apprising, with consent of Sir Alexander Bruce of Broomhall, as heir to Mr. Robert Bruce his father, granted a disposition, narrating the disposition 1637, in favours of Mr. Robert, and disponing the apprising to Alexander Earl of Kincardin, in respect no resignation was made, nor infeftment expede in favours of Mr. Robert Bruce. Upon this disposition (from the warrandice whereof the disposition 1637 is excepted) the Earl was infeft; and Colonel Erskine having right thereto as purchaser of the estate of Kincardin, pleaded preference thereupon, to all rights of the lands of Tulliallan conveyed to Sir George Hamilton.

Answered for Sir George Hamilton: Henderson's apprising cannot be objected to him, in regard it was disponed within the legal, to Mr. Robert Bruce, for the behoof of Patrick Wood, Thomas Charters, and James Loch, Sir George's authors, who had the right of reversion, and consequently became extinct in the person of their trustee, so as it could not afterwards be transmitted by the appriser's heir to any other person; as was found concerning Duncan Lindsay's apprising, February 8, 1709, in this same cause, No. 68. p. 2827. For apprisings within the legal are most easily extinguished by payment, intromission with the rents of the lands apprised, or any other way of satisfying the debt, without necessity of formal resignation, or renunciation: And a disposition to the reversers or their trustee, was equivalent to a discharge of the debt, which, without registration, would undoubtedly extinguish the apprising. No. 27.

Replied for Colonel Erskine: 1*mo*, Apprisings before completing by infeftment, may indeed be qualified by the appriser's bonds or declarations granted within the legal: But after infeftment hath followed, they cannot be taken away by any such personal deeds; especially when latent and never registered or published any manner of way within the legal, July 6, 1661, Telfer against Maxtoun, No. 18. p 5631. July 31, 1666, Southesk against Huntley, No. 36. p. 10203. Besides, there is a difference betwixt the debtor's acquiring right to an apprising, and the doing of it by a second appriser or other reverser; seeing it extinguisheth by confusion in the person of the former, and not in the person of the latter. Nay, my Lord Dirleton doubts, if even by the debtor's purchasing an apprising, it would be extinguished in prejudice of a singular successor without a resignation and reconveyance, as in other infeftments. Nor is the speciality that apprisings are extinguishable by intromission with mails and duties, introduced by the act 6, Par. 1621, to be extended, at least not to such dissimilar cases as ours: For uplifting mails and duties is a public deed, which men cannot be so ignorant of as private deeds, and unregistered renunciations. 2*do*, Though a person having right to the reversion of an apprising, could extinguish it by a latent discharge or renunciation; yet by taking a disposition, which of its own nature is a conveyance, he declares that his design is not to extinguish the apprising, but to have it subsist: And if such a disposition should have an extinguishing effect, it were impossible for a second appriser, to get an effectual right to a first apprising for his own security. In Duncan Lindsay's case, Patrick Wood the reverser signified his design to extinguish the apprising by registrating the disposition in the register of reversions; whereas Mr. Robert Bruce, by his taking a disposition, and not a renunciation, and instead of recording it in the register of reversions, transmitting it to others, hath demonstrated, that he had no design to extinguish the apprising. 3*tio*, Henderson's apprising came not in the person of the reversers during the legal, by being disponed to Mr. Robert Bruce for their behoof; for that is not proved by the disposition 1648; and no respect can be had to the exception therein of the declaration 1642; since *non creditur referenti, nisi constet de relato*, and that declaration is not produced. Again, though it were produced, yet being granted after the legal, and kept latent till after the Earl of Kincardin, the Colonel's author,

No. 27. acquired right, his expired apprising cannot be affected or qualified therewith; for lands cannot be conveyed by declarations, but only by charter and sasine. 4*to*, *Esto* that Mr. Robert Bruce had been reverser, and that the disposition made to him could have extinguished the apprising; yet still he could pass from it as well as from an order of redemption, had he used one; and *ita est*, that he passed from it by his consenting to the disposition made by Henderson's heir *in anno* 1670, to the Earl of Kincardin, which revived the apprising.

Duplied for Sir George Hamilton: It doth not alter the case, that Mr. Robert Bruce's declaration of the trust was long after expiring of the legal; because, the disposition in favours of Mr. Robert, being never completed by infeftment, might still be qualified by declarations and back-bonds, as he might be absolutely denuded by a simple disposition of his personal right. And all being long prior to the right acquired by the Earl from the appriser's heir, there was no *medium impedimentum* to hinder Mr. Robert Bruce to qualify his own right, by declaring it to have been a trust in his person *ab initio*. Mr. Robert, who was trustee to Sir George's authors, could not pass from the extinction of the apprising, by the disposition to him in that quality, by his consenting to the deed of Henderson's heir in favours of the Earl. 2*do*, Whatever might be pretended, by any third party acquiring *bona fide* for onerous causes from the appriser's heir, without any relation to the prior disposition made to Mr. Robert Bruce; yet the disposition 1670, by Henderson's heir to the Earl, narrating the anterior disposition to Mr. Robert, and that it was granted for making the same effectual to the Earl, is to be understood affected with the burden of Mr. Robert's right, with whom the heir was made to concur only for the more security: And Mr. Robert being fully denuded of his right which was but personal, by the disposition 1648, the disposition 1670, to Earl Alexander, was clearly *a non habente potestatem*, and therefore can have no effect.

Triplied for the pursuer: *Perinde est* to the Colonel, as deriving right from the Earl, whether Mr. Robert Bruce's declaration of trust was before or after the Earl's right, since it never came to light till after his purchase: And if he had counteracted his trust, those concerned may pursue his representatives as accords. The mentioning Mr. Robert's right in the disposition to the Earl, and excepting it out of the warrandice, import not that the Earl's right is with the burden of that; for Mr. Robert's right is narrated as a thing that never took effect; and excepted from the warrandice, to free Henderson's heir from the penalty of granting double rights, and from the Earl's recourse against him upon the warrandice, in case he were excluded by Mr. Bruce's right. Besides, the disposition 1648, is not mentioned in the Earl's right. It cannot be pretended, that because the disposition to Mr. Robert Bruce was but a personal right, his conveyance *in anno* 1648, did so denude him, as he could not effectually make a second in favours of the Earl: For though the granter of a second right is liable in warrandice to the receiver of the first, the second is always preferable, if first completed; as a second assignation to a personal bond first intimated, will be preferred to the first. And as my Lord

Stair Instit. Tit. DISPOSITION, observed, If one not infeft dispone to two persons, the obtainer of the last disposition will be preferred, if the disponer's right be completed by his diligence. Besides, the Colonel founds not on the disposition 1670, as flowing principally from Mr. Robert Bruce, but as a valid right granted by the heir of Henderson who was infeft, and the only person from whom a real right could be transmitted. No. 27.

The Lords sustained the disposition of Henderson's apprising to the Earl of Kincardin *in anno* 1670, notwithstanding of the declaration in the year 1642, and the disposition in the year 1648, and therefore preferred Colonel Erskine's right derived from the Earl, to that founded on by Sir George Hamilton.

*Forbes, p.* 430.

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1710. *November* 21. DALLAS *against* LEISHMAN.

No. 28.
A person named trustee without his knowledge refused to subscribe any deed. He was found obliged to denude.

Mr. Robert Dallas, writer in Edinburgh, having right to a bond of St. Martine's by a blank assignation from one Home, he fills up therein the name of one Leishman, his friend, without acquainting him, or getting any back-bond declaring the trust from him, and in his name leads an adjudication against St. Martine's; and in regard Leishman scrupled to denude, he pursues him in a declarator of trust, and refers it to his oath; who depones, that he had no interest in the writs and diligences, but his name was put in without his knowledge, and did not belong to him. This oath coming to be advised, they found Leishman had no interest, but it nowise proved that the writs belonged to Dallas, the pursuer; and ordained him to give some evidence and documents of the property of the writs; which he did by the depositions of witnesses, clerks, extracters, and others, that he carried on the processes, and expended the whole, &c. Whereupon the Lords found the trust proved. But he insisting, that Leishman should denude, and dispone the adjudication, with its grounds and warrants, he contended, that his name having been borrowed without his knowledge and consent, it was both unmannerly and unjust to involve him in a trust, without asking his leave and permission; and therefore all that Dallas could do was to take out his decree declaring the trust, as to which *non facit vim;* but to dispone might create him trouble, and put him under warrandice, and others might claim the debt hereafter, and bring him to expense. Answered, You can suffer no prejudice by denuding that wherein you pretend no interest, and no warrandice is sought but from your proper fact and deed. The Lords found he ought to denude; but least warrandice might be thought to imply *quod debitum subest*, therefore they ordained it to be explained in these terms, that he was to be nowise liable whether there was a ground of debt or not; and to indemnify him *cum omni causa*, they ordained the pursuer to pay him all the expenses he had put him to in this process, seeing he had officiously inserted his name, on the sole prospect that he would not quarrel it, because of the familiarity and friendship betwixt them.

*Fountainhall, v.* 2. *p.* 599.