

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,—*Imo*, 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. *2do*, 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 obligation, and also the suspender's obligation to denude conform.

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

*Vol. II. No. 6. page 9.*

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 disposed to her in liferent his lands of Galraw, with a salmon-fishing thereto belonging, upon which she is infest, and which does exceed the said annualrent. After this, nevertheless, he infest 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 no-wise 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 decret to go out against Brotherton, tacksman of the said salmon-shing, for bygones, and even in time coming, aye and while the restriction be

found ; to be extracted with this quality, that, if the liferent shall be restricted to the annualrent of the 20,000 merks, this decret shall cease from thenceforth.

*Act. Horn. Alt. Jo. Ogilvie. Robertson Clerk.*

*Vol. II. No. 9. p. 13.*

1716. *July 12.* KATHARINE MAXWELL and her Husband *against* GORDON of Carleton.

THE deceased Major Maxwell of Glenlair, being debtor in considerable sums of money to Carleton, he, for payment thereof, and some other debts, disposes to him the lands of Glenlair, with special provision that the disposition should be burdened, and the lands stand affected with an heritable bond of 1000 merks of annual-rent, &c. of provision granted by the Major to Katharine Maxwell, his daughter, the disposition containing absolute warrandice. After which, nevertheless, an old adjudication appeared, led at the instance of one Mr. John Fraser, which Carleton thought fit to transact ; the ground of which adjudication was a bond, wherein the Laird of Kilwhannadie was principal, and the Major cautioner, and on which Fraser was infest in Kilwhannadie's lands. There being also a debt owing by the Laird of Earlston to the Major, he assigns the same to his said daughter, (at the same time he granted the above disposition,) for the further security anent payment of her said bond of provision.

Carleton being convened by Katharine Maxwell upon the clause of the disposition aforesaid, it was answered for him, *Imo*, That, in so far as she had recovered payment of Earlston's debt, he could not be liable ; her assignation thereto having been expressly granted for further security of her bond of provision : *2do*, *Esto* she had got no payment of that debt ; yet, by the said adjudication at Fraser's instance, now in the defender's person, he was preferable to the bond of provision, notwithstanding his accepting the above disposition, clogged as said is ; and that because of the warrandice which was now incurred by the superveniency of the said incumbrance, and to which she was liable by accepting of the said assignation to Earlston's debt.

REPLIED for the pursuer,—*Imo*, That it was *jus tertii* to Carleton what effects of the Major's she had intromitted with, or what assignations she had accepted from him, since, by the terms of the disposition, the bond of provision was made a burden upon the estate disposed, and nothing could hinder the Major to dispose upon his other effects as he thought fit ; and, upon the matter, Carleton, by accepting the disposition, had made the bond his own debt. *2do*, That she was not concerned with supervenient incumbrances on the estate, she not representing her father : and Carleton having accepted of the disposition with the burden foresaid, can never, upon any ground, quarrel it ; for, by the whole tract of the affair, it was evidently designed, that the children's portions should be secure, and Carleton was to follow the Major's faith in the warrandice.

The Lords sustained the above two defences, viz. that the pursuer had a corroborative security from Major Maxwell, her father, to a debt due by Earlston to