No 88.
liferent of 300 merks a-year, 100 of which, in case of children, to be renounced in their favour. The entire liferent being no more than reasonable; the provision out of it to the children sustained against anterior creditors.

nounced 100 merks of the said annuity in their favour allenarly, secluding all others from the benefit thereof. Rutherford dying, Reid his creditor adjudges his lands; and, in a competition for the mails and duties betwixt him and the said Grizel, the relict, and her children, it came to be debated, whether her renunciation of the 100 merks accresced to the adjudger, or to her bairns. It was *contended* for Reid, he was preferable, because the 100 merks was provided to children then not born, but *liberis nascituris*, and so only belongs to them by way of destination; and as substitutes in a bond, who are reputed as heirs, and liable *in valorem* to their father's creditors, as was decided 23d December 1679, Erskine *contra* Carnegies, (No 82. p. 968.) *2dly*, It was a fraudulent contrivance to prefer the children to their father's anterior creditors. *Answered* for the children, That the clause was plainly conceived in their favour, with an express seclusion of all others from the benefit thereof. *2dly*, It is not a renunciation in favour of the heirs of the marriage, (for that would have accresced to the creditors, and been affectable by them), but of the bairns; and if it had stood still in her person, her husband's creditors could have had no claim to it, and no more can they in this case: And the decision cited has many distinguishing circumstances; for there her jointure was exorbitant, far above what her husband could give; whereas Grizel's annuity is very moderate, being but 300 merks, and she brought 2000 merks of tocher with her; and in such a case the LORDS found the benefit of a renunciation only accresced to the children, 16th November 1665, Wat *contra* Russel, Stair, v. 1. p. 308. *voce* PERSONAL and TRANSMISSIBLE; neither is there any fraud, but a just, equal, and open bargain, and nowise flowing from their father, and so not subject to his debt. THE LORDS found this provision so expressly exclusive, that they preferred the children to the creditors. The like was found lately between the Laird of Kinfawns and his father's creditors, p. 489. & 970.

Fol. Dic. v. 1. p. 72. Fountainhall, v. 2. p. 185.

1715. *February* 10.

The LAIRD and LADY BLACKBARONY *against* The LORD and LADY PITMEDDEN, and MONTGOMERY of MAGBIEHILL.

No 89.
A person, after contracting a debt, and after diligence had been done upon it, grants a bond of provision to his daughter. Found relevant to *presume* that the

HUNTERS of Hagburn, elder and younger, were debtors to John Peter of Whitslaid in upwards of 3500 merks, and horning and caption raised thereon; and John Peter assigned these sums to Elizabeth his daughter, Magbiehill's grandmother. And after this debt was contracted, and diligence so done, Hagburn elder made a bond of provision, (afterwards corroborate by his son) in favours of Catharine Hunter one of his daughters for 3000 merks; young Hagburn having fallen into difficulties, conveys his estate to Mr William Wallace his brother-in-law; but the price not having been applied for payment of creditors, Elizabeth

No 89.
debtor was insolvent at the time of granting the bond of provision, while no effects are condescended on for payment of onerous debts prior thereto. Therefore the bond of provision postponed.

Peter, and William Montgomery of Magbiehill her husband, obtained a decreet in 1662 against Mr William Wallace, as the person who had unduly acquired their debtor's estate; whereby he is decerned to pay to William Montgomery, or Mr William Lauder, (who had acquired right to Catharine Hunter's bond, and was father to the Lady Pitmedden) the sum of 2500 merks, with the current annualrent; or to such of them as by multiple-pounding to be raised by him, should be found to have best right; the Lady Blackbarony, daughter to Mr William Wallace, with concourse of her husband, having called the Lord Pitmedden and the present Magbiehill his grandfather's representative in this multiple-pounding.

It was *alleged* for Magbiehill, That the ground of his claim was a due and onerous debt, constitute long before the Lord Pitmedden's bond of provision granted by the common debtor to his own daughter, after all lawful diligence was used against him for payment of Magbiehill's debt; which, as such, is still preferable to a gratuitous and voluntary bond of provision.

Answered for Pitmedden, That *non apparet* that the common debtor was bankrupt when he granted the bond of provision to his daughter, and two charges of horning, whereon no denunciation followed, could not make him bankrupt: So that the bond of provision fell not under the act 1621.

Replied for Magbiehill, That as an onerous creditor, and having done diligence against the common author, he only pleaded a preference to the Lord Pitmedden's gratuitous bond of provision, long subsequent in date to the contracting Magbiehill's onerous debt and diligence, which gives him a legal preference without necessity of reducing the Lord Pitmedden's bond of provision on the act of 1621: And Hagburn being bankrupt, would be found sufficiently instructed by the decreet 1662. Nay, Magbiehill's present claim makes him bankrupt, so long as the Lord Pitmedden does not prove that he had a sufficient estate for payment of that and all his other debts. And the Viscount Stair, and all our other lawyers agree, that such bonds of provision are not at all onerous, being granted after the competing creditors debts, though corroborate by the apparent heir.

The Lords found, that it is relevant and presumed that the common debtor was insolvent at the time of granting the bond of provision, since no effects appear for payment of the onerous debts prior thereto: And therefore found, that since the debts in Mr William Montgomery's person and diligences thereon, are prior to the bond of provision in the person of the Lord and Lady Pitmedden, that therefore the said Mr William is preferable to the said Lord and Lady Pitmedden.

For Pitmedden, *Horn & Seton.* Alt. *Sir Ja Nawmyth.* Clerk, *Roberton.*

Bruce, No 64. p. 77.