

obligement, Halyburton *alleged* it was *donatio inter virum et uxorem*, and now he revoked.

Which the LORDS formerly found relevant, unless the pursuer condescended, that this infestment was remuneratory, for a proportionable provision, brought by the wife; and after condescendence, having considered what the wife brought, and what of it was before the first infestment, and what intervened betwixt the first and the second; albeit whatever fell unto the wife, was moveable, and would have belonged to the husband, *jure mariti*; yet if it had been of that value, to have served both the first and second provision, they would have sustained both, as remuneratory in gratitude to the wife; but they found no such thing condescended on, or instructed, and therefore they reduced the second provision.

*Fol. Dic. v. I. p. 411. Stair, v. I. p. 229.*

\* \* \* Newbyth reports the same case :

JAMES HALYBURTON, brewer in Edinburgh, grants bond to his wife Margaret Allan, whereby he binds and obliges him to provide her and the heirs begotten betwixt them, failing her nearest and lawful heirs, to certain tenements of land, and to infest them therein; the narrative was, in regard she was not provided by contract of marriage, and that he had received a competent portion with her; after the decease of the said Margaret, who died without any children procreated of the marriage, Isobel Allan, a remanent sister of the said Margaret, pursues James Halyburton for implement of the said bond of provision; and the said James having revoked the foresaid bond, as being *stante matrimonio* done, and raised reduction thereof, the LORDS found the bond granted by the husband to the wife, to be *donatio inter virum et uxorem*, and sustained the reason of reduction, likeas they reduced the same.

*Newbyth, MS. p. 6.*

1669. *January 26.* ALEXANDER CHISHOLM *against* LADY BRAE.

ALEXANDER CHISHOLM having apprised certain lands from the heirs of Sir Alexander Fraser of Brae, and thereupon insisting for mails and duties, comparance is made for the Lady Brae, Sir James his relict; who being provided by her contract of marriage, to certain lands, with an obligement that they should be worth 2400 merks yearly, her husband did thereafter, during the marriage, grant her a tack of the whole remanent lands he had then, with a general assignation and disposition *omnium bonorum*. The tack bears to be for love and favour, and that the Lady may be in the better capacity to aliment his children, and bears L. 20 of tack duty, in case there be children, and a duty equivalent to the rent of the land if there be none. The entry to the tack is at the

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condescend upon any remuneration on her part, which a valuable accession of fortune would have been considered to be, although moveable, and falling to the husband *jure mariti*.

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A tack granted by a husband to his wife, bearing 'for love and favour,' was sustained, the wife condescending that it came in place of some prestations in the contract of marriage, which the husband provided unable to implement.

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next term after the granting thereof, and not at the husband's death. Upon this, it was alleged for the Lady, that she ought to be preferred to the mails and duties of the lands in question, by her tack clad with possession by her husband's possession before contracting of these creditors debt, which must be understood her possession *stante matrimonio*, and by her own possession, after her husband's death, before Chisholm's apprising or infestment. It was *alleged* for Chisholm, That the allegiance founded upon the tack ought to be repelled; *1<sup>mo</sup>*, Because it is a donation betwixt man and wife, null of itself, *nisi morte confirmetur*, and so is still ambulatory, and in the husband's power, during his life, and is in the same case as bonds of provision granted to children, and kept by their father, which being still in his power, any debt contracted after would be preferable thereto; so here this tack being in the husband's power, the contracting of a debt thereafter is preferable thereto, and is an implicit revocation thereof. *2<sup>do</sup>*, This tack being a most fraudulent, latent, and clandestine deed, betwixt man and wife, whereupon nothing followed in her husband's life, the creditors having no way to know any such thing, and having contracted *bona fide*, are ensnared and defrauded thereby; and the Lords having declared, that in regard they had reponed the Lady against a former decret, she should now dispute her right of the tack, as in a reduction, against which, this would be an unquestionable reason, that it is a latent, fraudulent contrivance, containing a disposition *omnium bonorum*. It was *answered* for the Lady, to the *first*, That donations betwixt man and wife, are not, by our law and custom, null, but are valid, *a principio*, unless they be actually revoked; and albeit implied revocations have been sustained by dispositions, or infestments of the same lands to others, yet never by a personal bond or contracting of a debt, posterior. To the *second*, The Lady's right can never be interpreted *in fraudem creditorum*, there being no creditors the time of the granting thereof, and the husband being free, and incapacitated by no law, an infestment of the remainder of his estate to her, so cautioned as this is, is both legal and favourable; and albeit in the same there be a disposition *omnium bonorum*, which cannot reach to goods acquired after the debts, yet the tack is valid, *et utile per inutile non vitiatur*. *Thirdly*, Albeit this tack bear to be a donation, and for love and favour, yet it is neither fraudulent nor revocable, because it is *donatio remuneratoria*, granted by the husband, who was obliged to make up the jointure-lands, contained in the contract of marriage, to 2400 merks, of which they came short of four at the beginning, and other four have been evicted. It was *answered* for Chisholm the creditor, that this allegiance was no ways competent against him, who is a creditor, contracting *bona fide*; but the Lady ought to pursue her son as representing his father, for fulfilling her contract; or, at least, till that be declared against the heir, who is the only competent party, the creditor must possess conform to his right. *2<sup>do</sup>*, Whatever was the husband's obligation, the husband hath not granted this tack in remuneration or satisfaction thereof, but expressly for love and favour, without mention of any other

cause. It was *answered*, that the expressing of love and favour, which may relate to the general disposition, cannot exclude other causes; and albeit it make the tack a donation, yet it is well consistent to be a remuneratory donation, which is not revocable.

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THE LORDS found the allegiance relevant, that this was a remuneratory donation, and that there was also much wanting of the contract of marriage; and found it competent against this apprizer; and superseded to give answer to the other points, that if it were not proved remuneratory, whether it could be reduced as latent and fraudulent, at the instance of posterior creditors, or as being in the husband's power, was indirectly revoked, by contracting of the posterior debt, having no more estate to burden with his debt.

*Fol. Dic. v. I. p. 411. Stair, v. I. p. 591.*

\* \* \* Gosford reports the same case :

CHISHOLM having apprised from the apparent heir of Sir James Frazer of Brae, and pursuing him for the mails and duties, compearance is made for the Lady, who craved preference, not only upon her contract of marriage, but upon a tack set to her after the marriage, bearing for love and favour, and for her aliment, and her children's. It was *alleged* for Chisholm, That the said tack, being but a private deed, could not prejudice a lawful creditor, who was in *bona fide* to lend his money to Sir James; and that the said tack was *donatio*, which in law was revocable, and revoked by granting of the bonds whereupon the comprising was led. This allegiance was repelled, and the tack sustained, in respect of this reply, That notwithstanding the conception of the tack, for love and favour, yet it was remuneratory, in so far as upon an inhibition prior to the contract of marriage, there were four chalders of victual of the conjunct fee evicted, and she being provided to 24 chalders of victual, there inlacked four thereof, which they found a good ground to sustain the tack. This was done *me reclamante* upon these reasons, that the tack was not at all granted upon the foresaid considerations, but for love and favour, neither was the inlack made out till long after the tack, and so could be no cause thereof.

*Gosford, MS. No 95. p. 34.*

1687. February.

SIR ALEXANDER FALCONER *against* BARBARA JEFFREY, SIR JOHN FALCONER'S Relict.

A HUSBAND'S disposition of lands, whereof he had formerly given an additional jointure to his wife *stante matrimonio*, found to be a tacit revocation of the said additional jointure, unless it was remuneratory.

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A Lady having obtained an additional jointure, alleged