

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and that there was also much wanting of the contract of marriage; and found it competent against this apprizer; and superseded to give answer to the other points, that if it were not proved remuneratory, whether it could be reduced as latent and fraudulent, at the instance of posterior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

No 350.  
that it was remuneratory, her husband having been debtor to her sister in a sum, the bond for which he received after her death. The Lords found this not relevant, unless the Lady could prove that the bond belonged to her, as succeeding to her sister, and was assigned by her to her husband.

1688. February 26.—SIR JOHN FALCONER being obliged, by contract of marriage, to infeft his Lady in some lands, which, with some other lands, he infeft her in *stante matrimonio*, and having afterwards sold these other lands to Glenfarquhar, who raised reduction of the infeftment as to these other lands, as being *donatio inter virum et uxorem*, revoked by the posterior disposition to him,

*Answered*, The wife's infeftment in these other lands cannot be understood or revoked as *donatio*, in respect it was granted for an onerous cause, viz. in remuneration of 7000 merks which Sir John was resting to her sister by bonds bearing annual rent, which fell to his wife as heir to the creditor, and were got up by him, though they fell not under his *jus mariti*. *2do*, The wife's right to these other lands was public by her husband's possession.

*Replied*, The right bears 'for love and favour,' and cannot be ascribed to an onerous cause, contrary to the cause expressed. *2do*, The husband's possession cloaths only a wife's infeftment depending upon her contract, and not extraneous rights.

*Duplied*; There is here but one infeftment for both the lands in the contract and the other lands, which cannot be partly cloathed and partly uncloathed.

THE LORDS found; That notwithstanding the right bore 'love and favour,' the defender might prove the cause to be onerous; and sustained the right as cloathed *in toto*, both lands being included in one infeftment. But thereafter it being alleged that the bonds were never made over to Sir John, and were now produced by his relict uncanceled; they did not sustain these bonds as an onerous cause to support her right to the lands disposed to Glenfarquhar; nor could they be considered as instruments *apud debitorem*, in respect the creditor died in Sir John's house; whereby he might have had access to them.

*Fol. Dic. v. l. p. 411. Harcarse, (STANTE MATRIMONIO.) No 885. & 889. p. 252.*

\* \* \* Fountainhall reports the same case :

SIR JOHN FALCONER of Balmakelly, Master of his Majesty's Mint, having given Dame Barbara Jaffray, his Lady, an additional jointure of L. 1000 Scots out of his lands of Scotstoun, beside her matrimonial provision of 1800 merks out of Gallera; and she pursuing a poiding of the ground, it was *alleged* for Sir Alexander Falconer of Glenfarquhar, who had bought these lands after her right, *imo*, That her's was base, and his public, clad with possession; *2do*, Her's was *donatio inter virum et uxorem stante matrimonio*, and so revocable, and *de facto* revoked by his disposition to Glenfarquhar; *3tio*, That he bruiked by apprisings and preferable rights.—*Answered* to the *first*, That her husband's possession was her's. *2do*, It was a remuneratory donation, he falling then to an estate by the death of her sister Nicolas; and though it bore not that clause, but only love and favour, yet it being prior, it must sustain and adminiculate it; and *per. leges penult. et ult. C. De donat. propter nupt.* the husband is allowed

*augere dondtionem ad modum augmenti dotis.* But, by the Novels, a precise equality was introduced betwixt them. This being reported by Redford, the LORDS found the narrative of the bond of provision granted to the relict, bearing for love and favour, does not take off the relict's allegiance that the right is remuneratory; and before answer to that point, if the husband's possession should be holden to be the wife's possession, as to an additional provision granted to her, ordain any former practicks relating to this case to be produced; and, before answer to that point anent the accession which Sir John Falconer had by his Lady's sister's portion, appoint the Lord Reporter to try if these sums, which fell to him by his good-sister's death, were heritable or moveable, and if the same were disposed by him to his Lady or not; and recommend to the Lord Reporter to hear the parties on the last allegiance founded upon Glenfarquhar's other real rights and diligences, affecting the lands prior to Sir John Falconer's rights, if these rights were acquired by the husband prior to the disposition granted by him to Glenfarquhar; for then they would also accresce to her.

Glenfarquhar gave in a bill against this, offering grounds of law why this infestment should not be admitted to be sustained and proved remuneratory, contrary to its own express narrative of love and favour, (which is the opposite to a cause onerous,) and craved it might also be remitted to a farther hearing, as well as the other points; which the LORDS granted on the 28th of July.

As to the husband's possession not being the wife's in additional jointures, See Stair, 7th December 1664, Lady Craig, *voce* POSSESSORY JUDGMENT. And as to onerous causes, things are now come to that interpretation, that if writs bear only in their narrative onerous causes, and make no mention of sums of money received, it is not reputed fully onerous, but merely a false narrative, made up as the most part of narratives of writs now are. See Stair, 18th July 1667, Lady Burgie, No 37. p. 1305.; 26th January 1669, Chisholm, No 349. p. 6137; 13th December 1671, Jack, *voce* PROVISION TO HEIRS AND CHIDDREN; 21st February 1672, Reid, No 38. p. 1305.

The case the Lady Balmakellie *contra* Sir Alexander Falconer, being reported by Collington, the LORDS found the condescence given in, and the bonds produced as the onerous cause of her additional jointure, not sufficient to prove it remuneratory, viz. that he being debtor to her sister Nicolas in 7000 merks, got up his own bonds after her death; unless she prove that the rights of these bonds were established in her person, and were assigned and made over by her to Sir John Falconer her husband.

*Fountainball, v. 1. p. 470. & 498.*