

No 41.

faid reverſion, and to uſe an order as if it had been granted to the ſaid Francis Freeland himſelf.

THE LORDS thought, That if the price were not adequate, (which was to be tried) the concluſions aforeſaid ſhould be ſuſtained.

Reporter, *Treſaurer-depute.*

Clerk, *Gibson.*

*Fol. Dic. v. 1. p. 68. Dirleton, No 417. p. 204.*

\* \* \* THE LORDS found, in this caſe, That the true value of the lands ſhould be proven, to the effect it may be known whether the price be adequate or not : And albeit the lands had not been laboured by tenants, being ſtill in the heritors hands, the value might, and ought to be proven, by the ſowing and increaſe, and the quantity of the land ; and what lands in that part, of the like quantity and quality, may be ſet for. And it was not enough, that now the Earl of Glencairn offered 2000 merks more, in reſpect the lands might have been improvén ; or the ſaid offer might be made upon picque or emulation.

In this caſe the LORDS allowed a conjunct probation.

Reporter, *Hatton.*

Clerk, *Hay.*

*Dirleton, No 431. p. 213.*

\* \* \* See The ſame caſe as reported by Goſford, *voce* REDEMPTION.

1706. July 24.

JEAN WEEMS and DAVID WHITE, her Husband, *againſt* ANN MURRAY.

No 42.

A diſpoſition *omnium bonorum*, by a wife to her husband, bearing to be for love and favour, and for onerous cauſes, was not ſuſtained in competition with an anterior obligation for an annuity, granted by the diſponer to his aunt.

ISOBEL FORBES, daughter to the deceased Mr Arthur Forbes, being creditor to Sir Patrick Murray in 1000 merks per bond, granted an obligation to Anna and Martha Murrays, her two aunts by the mother ſide, for payment of L. 40 yearly : And thereafter having married the deceased James Hamilton, goodman of the Cannongate Tolbooth, ſhe made a diſpoſition to him *omnium bonorum*, and particularly aſſigned him to the ſaid 1000 merks bond ; but, by a poſterior diſpoſition, ſhe aſſigned to the ſaid Anna Murray her wearing cloathes. James Hamilton transferred the ſaid bond to Jean Weems, his ſecond wife, in implement of the minute of contract paſſed betwixt them *pro tanto*, who, with the concurrence of David White, her preſent husband, purſued for the ſame. Compearance is made for Anna Murray, who claimed preference to the ſum, upon this ground, That ſhe was executrix *qua creditrix* decerned to Iſobel Forbes, and had confirmed the ſame as *in bonis* of the deſunct ; whereas Jean Weem's right depended upon the validity of the diſpoſition made by Iſobel Forbes to James Hamilton, which was null and reducible upon the act of Parliament 1621, as being a diſpoſition *omnium bonorum* by a wife to her husband, in defraud of creditors.

*Alleged* for Jean Weems :—That Anna Murray, as executrix creditrix to Iſobel Forbes, can have no right to the ſum ; becauſe the deſunct was denuded in her

own lifetime. Nor is a disposition by a wife to her husband reducible upon the act of Parliament 1621, as gratuitous, and to the prejudice of lawful creditors; seeing a husband is liable *in quantum lucratus*. Yea, Isobel Forbes, after granting of the foresaid disposition to her husband, had a sufficient fund to answer all her debt, and particularly the debt acclaimed by Anna Murray: In so far as by a subsequent disposition, she disposed to her her wearing apparel, which was more than sufficient for her payment; and must be imputed in satisfaction of the debt due by the disposer, since *debitor non presumitur donare*. And Anna Murray cannot reduce Isobel Forbes's disposition to James Hamilton; Jean Weems's cedent, because she Anna Murray granted a general discharge to him of all she could ask or crave, and consequently of this obligation.

*Answered* for Anna Murray:—The disposition to James Hamilton being gratuitous and *omnium bonorum*, is plainly fraudulent and null by exception, in competition with Anna Murray, an anterior lawful creditor. Nor doth the brocard *debitor non presumitur donare* hold in many cases; as where the writ bears to be a donation; or the thing disposed is not a liquid debt of the same kind; or is remuneratory; or where the presumption of a gift is stronger than that of payment, November 13, 1679, *Anderfon contra Anderfon*, (Stair, v. 2. p. 705. *voce* PRESUMPTION, *donatio non presumitur*.); June 16, 1665, *Cruickshank contra Cruickshank*, (Stair, v. 1. p. 282. *voce* PRESUMPTION, *donatio non presumitur*.) All which exceptions concur in this case: In so far as the disposition to Anna Murray expresseth a donation in these words, *She leaves, gives, and bequeaths*: The subject disposed is wearing apparel, which is not a liquid debt; and it is a remuneratory donation *mortis causa* to an aunt who attended the disposer the time of her sickness, and, at the bearing of all her children, and who had suffered loss by her father. The discharge granted by Anna Murray to James Hamilton, cannot include the obligation in her favours for the L. 40 of annuity: Because, the general clause is not to be extended beyond the subject antecedently therein-narrated, *viz.* The decret recovered against him for the wearing cloathes disposed, and value thereof. Nor does Anna Murray pretend this to be a debt due by James Hamilton, but only by Isobel Forbes.

*Replied* for Jean Weems:—The disposition by Isobel Forbes to James Hamilton bears not only for love and favour, but also for divers onerous causes: And the true onerous cause thereof was, That he had sustained the *onera matrimonii*; and Jean Weems hath the sum transmitted to her for a most onerous cause, *viz.* In satisfaction of the provision in her contract of marriage with him. The cited decisions are not to the purpose; for in that of *Anderfon contra Anderfon*, the quality of the parties oath, by which the debt was constitute, the smallness of the sum, and the circumstances of parties were the rule. And the decision betwixt the Cruickshanks was founded on these specialities, The defunct was rich and had no children, and the pursuer was poor, and his nearest of kin; and the disposition reserved a faculty to alter. The disposition again was burdened with the pay-

No 43. ment of fums to fome other friends, and bore exprefly in fatisfaction of debts due to them, but did not declare fo as to the debt due to the purfuers.

THE LORDS fufained the obligation in favours of Anna Murray, and found, That Ifobel Forbes's difpofition to her husband cannot compete with her right. And found the difcharge by Anna Murray to James Hamilton doth not concern this cafe, but only the decret therein-narrated; becaufe thefe were debts of a different kind. And found, That the affignation, by Ifobel Forbes, of fome body-cloaths to Anna Murray, is not to be confidered as payment or fatisfaction, but a mere donation. And therefore preferred Anna Murray to the annualrents. See PRESUMPTION. See GENERAL DISCHARGES, &c.

*Fol. Dic. v. 1. p. 68. Forbes, p. 129.*

## S E C T. V.

### Gratuitous Alienations by perfons folvent at the time.

1629. March 5.

LA. BORTHWICK *against* GOLDILANDS.

No 44.  
Gratuitous  
alienations  
not reducible  
upon the act  
1621, if the  
debtor be-  
came not  
thereby infol-  
vent.

IN a removing, a tack fet by the umquhile Lord Borthwick, after the fetting whereof, the fetter's right was reduced at the instance of the Lord Newbottle, who had acquired a more valid right than the fetter had, upon a claufe irritant contained in the fetter's infeftment; and in the faid reduction, the tack being alfo reduced *per expreffum*; this reducer having thereafter obliged himfelf to difpone the lands in favours of the fon of the fetter of the tack, for a fum of money agreed to be paid therefor, which fon was ferved heir to his faid father, who was fetter of the faid tack; after which obligation the faid reducer having given infeftment to the Lord Borthwick's fon, who was heir to the granter of the tack, and to his wife in conjunct-fee, and to the heirs to be begotten betwixt them, which failing, to the heirs of the husband after the husband's deceafe; the lady seeking removing upon the faid conjunct-fee infeftment, and Goldilands defending himfelf with the faid tack, and the relict opponing the reduction forefaid, and the defender duplying upon the fuperveniency of the reducer's right in the perfon of her husband, who was heir to the fetter, and whereby his tack convalefced, and that the lady's conjunct-fee right flowed from her husband, whose fuperveniency right by the tackfman's right revived, and the Lady could not quarrel the fame upon that right given to her by her husband, who was obliged to warrand his father's deed: THE LORDS found the tack, being reduced as faid is, could not defend againft this removing purfued by the lady, and that the bond made by the reducer to difpone the lands to him who was heir, and his being heir to the fetter