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of the tack, made not the tack to convalesce before the heir was infeft in the lands, for there was found no superveniency before there was a real right established in the person of him, who was heir to the setter, and that the bond to give a right made no superveniency, nor yet his being heir, except also he had been infeft, and also heir, and that his being heir without infeftment made not the right to convalesce, but might furnish personal ground of warrandice against him as heir, and the real right being made by the reducer to the husband and his wife in conjunct-fee at one time, and in one writ; it was found that this was not a donation flowing from the husband to his wife, albeit the bond was granted of before, as said is, to the husband alone, not mentioning the wife; and albeit the husband paid the sum, for the which the disposition was made, and so albeit the right superveened to the husband, whereby the tack revived, and might have defended the tacksman against the Lo. Borthwick's self, so long as he lived, yet he being dead, the tack could not convalesce against the relict, who, *eodem tempore*, acquired with him the real right, for her lifetime, from the reducer, which was not esteemed to have proceeded from her husband, as said is, but from a third person to her. In this process it was found, that a disposition, albeit made without a cause onerous by the debtor, after he was debtor, to his preceding lawful creditors, could not be found as coming under the act of dyvory, except the debtor, who disponed, had been then dyvor; for he not being bankrupt then, the prior creditor could not, upon that act, then quarrel the posterior right, made *etiam sine causa onerosa*: It was also found, that payment of taxation for the lands by the tacksman defender, made at command of the pursuer liable for the taxation, after the warning, which the defender alleged, was also sufficient, as if he had received payment of the tack-duty, after the warning, was not relevant to infer absolvitor from that warning, except that the command had been given to him to pay it, as tacksman, or to be paid out of the duty of his tack, which was so found, and the said exception repelled, albeit the defender alleged, that he was not the pursuer's debtor, but in the duty of the tack, and he was not obliged to pay taxation for her, or to relieve her thereof, neither could the command given by her have any respect, but to the tack and duty thereof, he not being otherwise debtor, which was repelled.—*See* HUSBAND and WIFE. *See* IMPLIED DISCHARGE.

Act. *Nicolson* & *Belshes*. Alt. *Advocatus* & *Cunninghame*. Clerk, *Hay*.

Fol. Dic. v. 1. p. 68. *Durie*, p. 432.

1632. *March* 6. LAIRD GARTHLAND *against* SIR JAMES KER.

No 45. Found in conformity with the above.

THE Lord Jedburgh having bound himself to dispone an annualrent out of his land of   to the Laird of Garthland's son, oye to the Lord Jedburgh, redeemable upon twelve thousand merks, and accordingly having infeft him, and there being then a back-tack set to the Lord Jedburgh of the lands, for the yearly

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duty of twelve hundred and thirty merks; upon this right Garthland having intented action of declarator, as is mentioned betwixt these parties, Feb. 26. 1631, (Durie, p. 575. *voce* LEGAL DILIGENCE), Sir James Ker compearing, *alleged* this right was a right made by a conjunct person, viz. the goodsir to the oye, without a cause onerous, but only for love and favour, which ought not to be found good and lawful against him, who was a lawful creditor to the Master of Jedburgh, to whom the granter of this infeftment is father and retoured heir; and who is obliged expresly to pay all his son's debts, for which this excipient is bound, conform to a contract betwixt them; and for relief whereof he is infeft before the pursuer's infeftment, albeit after the bond granted to the pursuer; and so that his right being for causes onerous, and the pursuer's *ex titulo lucrativo*, he ought to be preferred, specially seeing the same is made to his own oye, whose mother is one of his appearand heirs, he having no other bairns but her and her sisters; and so being that person who has acquired that right, *post contractum debitum*, and which therefore will make her liable to the creditor if the goodsir were dead, so it ought now to have no force against the creditor's right; moreover, he alleged that this was an usurary right, and fell under the act of Parliament 1597; which prohibits to take more than ten for each hundred; for there is a back-tack set for 1230 merks, which is thirty merks more than the ordinary annualrent of 12,000 merks. These *allegeances* were both repelled, and the pursuer's infeftment sustained, albeit it had been a mere donation, depending upon a bond prior to the excipients infeftment, seeing it was never *alleged*, that the granter of the infeftment, the time of the making thereof, or since, was become bankrupt, and not *solvendo*; neither had the excipient done diligence against him, to discuss him for his debt; and so not being bankrupt, but being able to pay all his debts in lands and goods, he might lawfully *ex causa simplicis donationis* effectually grant this infeftment, albeit he was then debtor to his creditors; and the act of Parliament 1597, anent usury, was not found to militate in this case, which was not of borrowing and lending of money, wherein the act prohibits to take more than ten for the hundred, and extends no ways to this case controverted, or the like, which concerns a free donation, where the parties may contract to make the lands redeemable, which is gifted, upon more or less sums, as they agree together, than as effeirs to the duty of the land, contained in the back-tack; and the overplus also being but thirty merks, and so being of so mean a quantity, could not make the whole infeftment null. *See* POINDING. *See* USURY.

Fol. Dic. v. 1. p. 68 *Durie, p.* 626.

Lord Kerse mentions the same case thus:

FOUND that the statute 1621, against bankrupts, militates not against donations, except it were known that the party is bankrupt or not solvent, and has not so much land, as to relieve the creditor.

Kerse, (CREDITOR), *MS. fol.* 57.