

1638. December 21. L. CRAIGMILLAR against NISBET'S RELICT.

THE Laird of Craigmillar pursues removing from the lands of Little France, against the relict of umquhile Mr Gavin Nisbet, who *alleged*, That she had tack granted to her husband and her, and the longest liver of them two, during their lifetime, and by virtue thereof her husband was 30 years and more in possession, and she divers years since, since his decease. It was *replied*, That the tack was set by him, who was only a liferenter, being denuded at that time of the fee, in favours of his son; *2do replied*, That her husband, who acquired that tack, had accepted another tack thereafter to himself and his brother's son, during their lifetime, by virtue whereof he bruiked the land, and whereby he had passed from that tack excepted on; and as the husband was the purchaser of the first tack to himself and his wife, so he might revoke the same, being *donatio inter virum et uxorem*: Likeas, in effect he has tacitly done the same, by procuring of the second tack, without naming of his wife, to himself and his brother's son. And it being *duplied*, That the tack being once acquired to the husband and his wife expressly, and so *jus uxori acquisitum*, could not be taken away from her, without her own deed, and it cannot be called *donatio inter virum et uxorem*, because it flows to them both from a third person, the Laird of Craigmillar, and so is not revocable by the husband; and although it were the husband's donation, yet it is not revocable, because *maritus non redditur pauperior per hanc donationem*, seeing it is conferred to the time of his death, and so falls not under that revocatory law;—THE LORDS nevertheless repelled the exception and duply, in respect of the first reply, which they also received in this same order of removing, to take away the tack, without necessity of reduction.

Act. Gilmour..

Alt..

Clerk, Hay..

1639. January 30.—THE Laird of Craigmillar pursues a removing against Margaret Chalmers, relict of umquhile Mr Gavin Nisbet, for removing from the lands of Little France. And she defending, that she bruiked by virtue of a tack set to her umquhile husband and her, during their lifetimes, by umquhile Sir George Preston of Craigmillar, whereto it being *replied*, That this tack could not defend her, being *donatio inter virum et uxorem*, and so revocable by the husband; and which was also revoked by him, in so far as he, after the date of this tack, accepted another tack from this same author, set to himself for his lifetime, and after his decease to another person, during his lifetime, not making any mention of the woman; whereby it is evident, that it was not the husband's will that his wife should bruik the benefit of this prior tack;—THE LORDS sustained this exception; and found, That this tack was not revocable, neither was the wife prejudged by this posterior tack, acquired by her husband;

No 302.

A relict possessed a tack which was let to her husband and her during their lives. In a removing against her, the tack was sustained, although it was pleaded, that it was a *donatio a viro facta uxori*, which was revoked by the husband, he having accepted a tack in which the wife was not mentioned.

No 302. for albeit it was alleged, that the acquiring of this tack behoved in law to be presumed a donation made by the husband, and the wife cannot be presumed to have had any means for purchasing thereof, *ob evitandam suspicionem turpis quæstus*, so that the husband behoved to be reputed the purchaser thereof; yet this was not respected, seeing the tack was a deed immediately flowing from the setter, to her husband and to her; and by the inserting of her name as liferenter, after the husband's death, the husband was not made thereby *pauperior*; and the law permits such donations, and such as are given *ad victum et sustentationem uxoris*, as this is, and therefore was found not revocable.

Act. Nicolson.

Alt. ———.

Clerk, Hay.

1639. February 19.—In the action of removing, pursued by the Laird of Craigmillar against Chalmers, whereof mention is made 21st December 1638, before the pursuer passing from the first reply, which he then proponed for eliding of the defender's exception, (which reply bore, 'that the tack excepted on was set by him, who was only liferenter,') and insisting only upon the second reply, viz. (that the tack was *donatio inter virum et uxorem*, which was revoked by the posterior tack, accepted from Craigmillar to himself during his lifetime, without mentioning his wife,) in fortification whereof he offered to prove, that this defender, the time of the acceptation by the husband of the posterior tack, renounced that first tack; which renunciation being some way miscarried, after the death of the husband, or intromitted with by his relict, who might have put the same out of the way, he offers to prove the same by one of the notaries, who is yet on life, who subscribed the same for her, who is a person without all exception, viz. John Bannatine, Clerk to the Justices, and also by her own brother; and which, being so joined to the former reply, ought to be sustained; specially seeing, by and attour the lands of this tack, the husband had provided the defender to six chalders of victual yearly, and the annualrent of 11,000 merks;—THE LORDS not the less sustained the exception, notwithstanding of the reply, and found, That this tack, specially being acquired by the concession of a third party, and not directly from the husband, was not such a donation as fell under the prohibition of the law, prohibiting donations *inter virum et uxorem*, for by this donation the husband was not *pauperior*; and also donations, which are conferred to take beginning after the decease of the granter, are not prohibited in law, concerning the donations betwixt husband and wife; and found, that the relict's renunciation could not be proved but by writ, or oath of party allenarly. See PROOF.

Act. Nicolson.

Alt. ———.

Clerk, Hay.

Fol. Dic. v. 1. p. 409. Durie, p. 869. 872. &amp; 874.