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A husband getting addition of means belonging to his wife, may grant a remuneratory donation, which he cannot revoke.

1664. February 13. COUNTESS of OXFORD against The VISCOUNT.

THE Viscountess of Oxenford pursues the tenants of the mains of Cranstoun M'Gill for payment of the duties ; compearance is made for the Viscount her son, who *alleges*, No process upon the pursuer's sasine, because it is but the assertion of a notary. And as to the charter, which is the ground thereof, it is for no onerous cause, but a mere donation betwixt man and wife, which her husband might revoke, and did revoke by cancelling his subscription from it ; likeas, the charter was never delivered, but kept by him till he cancelled it. It was *answered*, That the foresaid right is not a mere donation ; but after her husband was married to the young noble Lady, having received a competent tocher, and only provided her out of his great fortune, to 2500 merks yearly, she fell, by decease of her brother Kilsyth, to 8000 merks, which her husband got ; and though the charter did not relate thereto, yet it was dated after, and must be interpreted *donatio remuneratoria*, of that which he *lucratus erat* by that accretion ; neither can the cancelling thereof, or the not-delivery, be obtruded, because the charter being made perfect by sasine, and her husband's Bailie, haver of the charter, having given to her attorney tradition and possession by earth and stone, the charter became then her evident, and could not be cancelled to her prejudice. To this, the charter was opposed, bearing only for love and favour ; and by her contract of marriage she did assign to her husband what should befall to her by the death of her brother ; and the provision therein mentioned was nevertheless in contentation of all she could acclaim, unless what he pleased to bestow upon her.

THE LORDS repelled the allegiance and reply in respect of the answer ; and found the right remuneratory, notwithstanding the contract, wherein they did consider the meanness of her provision, and the plentifulness of her son's fortune, as a great motive of the decision. *Me tamen renitente. In presentia.*

Fol. Dic. v. 1. p. 411. Gilmour, No 93. p. 71.

* * * The like was decided 11th July 1735, Creditors of Brownlee against His Relict. See APPENDIX.

1664. November 23. HALYBURTON against PORTEOUS.

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A second provision by a husband to his wife, was reduced, the wife not being able to

HALYBURTON having married a widow in the Potter-row, there was no contract of marriage betwixt them, but he gave her first an infestment in all the lands he had, the time of the infestment, and thereafter he gave her a second obligation, providing certain lands to him and her, and the heirs betwixt them ; which failing, to divide betwixt their heirs ; her heirs pursuing to fulfil this

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 proved unable to implement.