

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

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 supervened to the husband, whereby the tack revived, and might have defended the tackfman 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 oneous 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 disposed, 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 tackfman 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 absolutor from that warning, except that the command had been given to him to pay it, as tackfman, 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.

A.G. Nicolson & Bellier. Alt. Advocatus: Cunningham. Clerk, Hay.

Ed. Dic. w. 1. p. 68. Durie, p. 432.

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

THE Lord Jedburgh having bound himself to dispoise 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 fet to the Lord Jedburgh of the lands, for the yearly

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Found in conformity with the above.