

requisition mentioned, did import a power to require. *2dly*, This is a dilator after a peremptor.

No 67.

THE LORDS found the allegiance upon the nullity of the requisition receivable after the peremptor, and sustained the requisition, the pursuer producing the procuratory, which was the warrant thereof, before extract. See REDEMPTION.

Fol. Dic. v. I. p. 381. Stair, v. I. p. 741.

1671. July 12. MARJORY MURRAY against ISOBEL MURRAY.

UMQUHILE ——— Murray having infest Isobel Murray his wife in two tenements, did thereafter by his testament, leave a legacy of L. 1000 to their daughter Marjory Murray, and gave other provisions to the said Isobel his wife, and provided his daughter to the two tenements, which testament the wife subscribes, and after his death confirms the same; but under protestation, that her confirmation should not prejudice her own right. The daughter pursues for the legacy of L. 1000, and for the rents of the tenements, and *alleges* that the L. 1000 must be free to her, without being abated by implement of the mother's contract, and likewise the two tenements by her mother's consent and subscription. It was *answered*, That the mother's subscription was a donation betwixt man and wife, for being to the man's daughter, whom by the law of nature he is obliged to provide, it was all one as if it had been to himself. *2dly*, Her subscription was obtained *in luctu*, her husband being near his death, and at his desire, *ex reverentia maritali*, and the confirmation can be no homologation, because of the protestation foresaid. It was *answered*, That it was *protestatio contraria facto*; and the wife had no necessity to do it, for she might have confirmed herself executrix creditrix.

THE LORDS found that there was here no donation between man and wife; but in respect the parties had not debated the effect of *reverentia maritalis*, ordained them to be heard thereupon, and found the protestation sufficient to take off the ratification, or homologation by the confirmation, and found the legacy of L. 1000 to be left only according to the nature of a legacy, out of the defunct's free goods, and would not exclude the relict, or any creditor. See LEGACY.

Fol. Dic. v. I. p. 383. Stair, v. I. p. 755.

* * * Gosford reports the same case :

MAJORY MURRAY having pursued her mother for entering her to the possession of a tenement of land whereof her mother was liferentrix, and for payment of L. 1000, conform to her father's testament testamentar, subscribed by the mother, it was *alleged*, That the said subscribed testament was not:

No 68.

A person in his testament appointed his wife executrix, and left a legacy to his daughter. The widow confirmed the testament under protestation, that it should not prejudice her own right. This was found to take off the allegiance of homologation, and so the legacy was found a burden upon the dead's part only.

No 68.

obligatory ; likeas there was a reduction raised upon these reasons, *1mo*, That it was subscribed in *mærore et luctu*, she being induced by her husband who was then a-dying ; *2do*, It was *donatio inter virum et uxorem*, and so revocable ; *3tio*, The L. 1000 left in testament was but a legacy, which could not be paid, the debts being greater than the moveables. It was *answered* to the *first*, That no deeds granted in *luctu et ob reverentiam maritalem*, were reducible by our law, which being a general case, the LORDS reserved to be debated in *præsentia*. To the *secoud*, It was *answered*, That the subscribing of the testament, bearing the disposition of a liferenter's right of a tenement of land was in favours of the daughter, and not of the husband, and so was not *donatio inter virum et uxorem*. To the *third* it was *answered*, That the L. 1000 being for the provision of a bairn, the mother having both subscribed to the same, and confirmed the testament, did make herself liable, and could not exhaust the inventory by any debts due to herself by contract of marriage. THE LORDS did find, that the mother subscribing as to her liferent right in favours of her own daughter, albeit in her husband's testament, it was not *donatio inter virum et uxorem*, and could not be revoked ; but for the L. 1000 left by the father, they found that it was a legacy, and that the mother having consented to it, did not prejudice her as a lawful creditor by her contract of marriage, and that it could only be due *deductis debitis*.

Gosford, MS. No 375. p. 184.

1671. November 30.

HOME against CORSAR.

No 69.

The receiving two years' duty as a tack-duty, found not to infer homologation of the right as a tack, which was contended to be a wadset.

UMQUHLE Alexander Dickson by a contract betwixt him and Robert Corsar, for the sum of 400 merks, wadsets his lands of Stanifauld, and in the same right there is mention made of a tack, or tack-duty during the non-redemption. Thereafter he infefts Anna Home his wife in liferent of the same lands. She pursues Corsar to remove, who *alleged* absolvitor, because he possesses by a tack set by the husband before her infeftment, which right the pursuer hath homologated, by granting two several discharges, mentioning and relating this right as a tack. The defender *answered*, That this right produced being clearly a wadset, having all the clauses ordinary in wadsets, though in one place it mentions a tack, yet that is only of the teinds of the lands, and so it being an imperfect right, on which no infeftment followed, and not being a clear tack, it cannot defend against the pursuer's real right by infeftment. *2do*, Albeit it were a clear tack, yet it is null, having no determinate ish, but to endure during the not redemption, which may be perpetual ; and such tacks have not been sustained by the Lords against singular successors, and if sustained, they would be of dangerous consequence ; for thereby lands might be set for sums equivalent to the value, which would be known by no register ; and as to the homologation, it can operate no more than as to the years discharged, and can-