

No 53. 1682. *March 17.*—The point betwixt Dr Trotter and Patrick Telfer and Agnes Campbell his spouse, being this day reported by Saline, ‘The LORDS sustained her disposition.’

*Fountainhall, v. 1. p. 168. & 179.*

1709. *July 14.*

VALLANCE against M<sup>o</sup>DOWALL.

No 54.  
Found in conformity with  
Nicolson against Inglis,  
No 52. P.  
5834.

JAMES VALLANCE of Possil having married Barbara Fullerton, sister to Corsby, and relict of Macdowall of Freugh, to obtain her consent, he grants a full and ample renunciation and discharge of his *jus mariti*, and all right he had to her jointure, in regard she was resolved not to wrong her first children by that re-marriage. Possil having raised a process of mails and duties against the tenants of her liferent-lands, compearance is made for Freugh her son, who *alleged* you can never crave these rents, because you are excluded *objectione personali ex capite doli*, having renounced all interest you had therein, and *per leg. 1. D. De pact. nihil magis fidei humanæ congruit quam ea quæ placere servari*, if they do not shock moral honesty, nor the standing laws of the kingdom; and it was so found, 15th January 1669, Hamilton *contra* Baine, Div. 10. Sect. 2. *b. t.* that a husband could not recall a ratification of a wife's disposing her jointure in favour of her first childreu. *Answered*, The question is not, if a husband may not renounce his *jus mariti*, either before or after his marriage, in favours of a stranger, so that he might have assigned her jointure to a third party, and it would have stood good and subsisted in law, though it had been in favours of her own children; but the case here is of a renunciation given by a husband directly in favours of his future spouse, and her assignees; and she having made no assignation before the marriage, his discharge accresced and returned to himself whenever the marriage was complete; and he being both debtor and creditor in the obligation, it became extinct, and was so found, 9th February 1667, Ratho and Collington *contra* the Lady Collington, No 50. p. 5828.; and his power of administration is so inherent and rooted, that it can no more be renounced than his marital right of government of the wife, as by the laws divine and natural he is constituted to be her head. *Replied*, That *bona fides* is a necessary requisite in all transactions, but especially in contracts of marriage; and this were to turn deliberate pactions entered into in the greatest state of unrestricted freedom into ridicule, under pretence they were made *in æstro amoris et contra bonos mores*; and if the future husband renounce his *jus mariti*, will he not be liable in warrandice if he contravene? and these pactions have been sustained for a long tract of time backward.—THE LORDS, by plurality, found the renunciation, before the marriage, accresced and returned back to the husband on the consummation, unless it had been assigned to a third party before the marriage was entered into.

*Fol. Dic. v. 1. p. 389. Fountainhall, v. 2. p. 515.*

\* \* \* Forbes reports the same case :

No 54.

POSSILS having, before his marriage with Barbara Fullerton Lady Freugh, written and subscribed a renunciation of her jointure, containing an obligation to renew the same in favour of her assignees, when and how oft he should be required ; and she having, many years after the marriage, assigned her jointure to Patrick M'Dowall of Freugh, and William his brother, her children of the first marriage, Possils pursued an action of mails and duties against the assignees and other intromitters with the rents of the jointure lands, who founded on the renunciation to exclude him *ab agendo*.

*Alleged* for the pursuer ; No respect can be had to the renunciation ; because, 1<sup>st</sup>, It is null, for that it bears not the place where it was written. 2<sup>dly</sup>, The Lady had tacitly past from the benefit thereof, not having disposed of her jointure before the marriage ; and she could not do it afterwards, in respect the marriage was a legal assignation to the pursuer of all that belonged to his wife, or stood in her person at the time they entered into the state of matrimony ; and the right renounced recurred to him *jure mariti*.

*Answered* for the defender ; As it cannot be controverted, but had the renunciation been transmitted by the wife to a third party before the marriage, the conveyance would have been effectual, January 15. 1669, Hamilton *contra* Bain, Div. 10. Sect. 2. *b. t.* ; so, in the present case, the husband having obliged himself to renew the renunciation in favours of his wife's assignees, there seems to be a *jus quæsitum* to them whenever she assigned.

*Replied* for the pursuer ; The clause in the renunciation, obliging the husband to renew the same in favours of the wife's assignees, must be understood *positis terminis habilibus*, in the terms of law, she exercising the faculty of assigning *debito tempore* before her marriage, which was a legal assignation in favours of the husband, of all she had not otherwise disposed of ; so that the defenders in this process are to be considered only as second or posterior assignees, competing with the husband's first legal assignation intimated by the marriage.

THE LORDS did not regard the objection against the renunciation, that it mentioned not the place where it was granted, seeing it was written and subscribed by the husband himself ; but found, that the renunciation of the liferent recurred to the husband *jure mariti* after the marriage. See WRIT.

*Forbes, p. 346.*

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1730. June 23. WALKER against The CREDITORS of her Husband.

No 55.

FOUND, that a husband, in his contract of marriage, may renounce his *jus mariti*, and that the reservation, though not exercised by the wife in favour of any third party, does not fall *sub communione*. See APPENDIX.

*Fol. Dic. v. I. p. 389.*