1715. *July* 26. CHRISTIAN DALLAS *against* DALLAS of Cantray.

No 24.
In a contract of marriage, it was provided, that it should not be in the power of the wife to renounce any part of her jointure, without the consent of her father. Nevertheless she in her widowity granted a renunciation, in favour of her son, of a part of her jointure, which she delivered *to her father*. The Lords found she could not renounce *cum effectu* without consent of her father in writing.

IN a contract of marriage betwixt the said Christian Dallas, and the deceast Dallas of Cantray her first husband, it is specially provided, that it should not be in her power, either with or without consent of her husband, to quite or renounce any part of her provisions, by that contract, in favours of her husband, or any other person whatsoever, at any time in her lifetime, without the advice and consent of Hugh Dallas her father, or George Dallas of St Martins; and failing them by decease, the said Hugh Dallas's two eldest sons, being had thereto in writ, otherwise the said renunciation to be void and null; and this provision is appointed to be inserted in the infeftments to follow on the contract, and accordingly the clause is inserted in her sasine. Nevertheless, she, in her vidowity, grants a renunciation in favours of her son of 24 bolls of bear yearly, as a part of her jointure; which renunciation she delivered to the said Hugh Dallas her father, who was tutor to her said son; but thereafter having been married to M'Intosh of Stroan, she, and he for his interest, insist in a reduction of the said renunciation; and the question being, How far she, in this circumstantiate case, could renounce, without the written consent of the above-named persons?

It was *alleged* for Cantray; That the renunciation must subsist, notwithstanding of the provision in the contract of marriage, because that provision is a privilege in favours of the wife, which therefore she could dispense with and renounce from the common rules of law; and she did it when she was *soluta viro*, and freed of that influence which was feared, and chiefly guarded against by the provision; nor does it alter the case that the provision is inserted in the sasine, because it is still but a personal privilege in favours of the wife, which in law she could renounce; *2do*, Because not only granted by the mother in her vidowity, but in favours of her own son, in the hands of her own father, grandfather and tutor to the child and the very person who, by the provision in the contract, may consent to and authorise such renunciation; nor was a consent in writing necessary, for here, upon the matter, there is a consent in writing, for her father receives from her a renunciation to himself, for the behoof of his grandchild and pupil; this is writ, not indeed granted by him, but yet accepted by him; he could not properly sign any consent to it, it being in favours of himself; just as a husband who must authorise and consent to his wife's deed, yet, if it be in favours of himself, his acceptance of it is equal to his written consent in favours of another; *3tio*, As to the hardship upon Stroan, the second husband, he was to know, that, notwithstanding of his wife's liferent infeftment, yet her security might be renounced or qualified by any personal deed of her's; and therefore he must be understood to have taken his hazard of all such deeds; for, although her liferent was established by a registrated infeftment, yet that liferent might be restricted, and even renounced,

No 24. although such renunciation were not registrated, since no law requires registration of such writs; and though such infeftments be real for the wife's security, yet it is but temporary, and therefore easier destituted and renounced than such real rights as pass to successors, the renunciations whereof must be registrate.

Answered for the Mother, and her second Husband; 1*mo*, That though it be a general rule, that *unicuique licet favori pro se introducto renunciare*, yet it wants not exceptions, as is evident from the privilege of minors, interdicted persons, &c.; nor can any person resign his privilege, where it is expressly provided, that the same should not be done, nay, where it is explicitly agreed, that any up-giving thereof should be void and null, as in the present case; 2*do*, To the second *answered*, That Hugh Dallas was to be considered likewise as guardian to his daughter in this affair, where his consent was necessary to be adhibited for validating the deed; and, if any such renunciation was in his hands, it was to be considered as a retired evident there for his daughter's behoof; besides, that the clause expressly requires his written consent under his hand, otherwise the renunciation to be void; 3*tio*, Certainly there is a speciality in favours of Stroan, his wife's liferent right is constituted by infeftment, and the said prohibitory and irritant clause engrossed in the sasine; he had good reason thence to believe, that the right behoved to subsist, and that no deed of hers could impair the same, whereon he contracted *bona fide* with her; so that no latent deed can evacuate that right to his prejudice; and though no such clause had been, yet the liferent infeftment could not be extinguished without a registrated renunciation. For it is in general provided by law, that an infeftment upon record cannot be taken away by any deed of the party infeft, except by a writ likewise lodged in the public register, without any respect whether the same was a right of liferent or of property.

Replied for Cantray; That though, for arguments sake, it were granted, that this clause in the contract was in effect an interdiction, yet it cannot hinder the effect of a renunciation; for here is the consent of the interdictor; he receives and accepts of the renunciation, neither can that consent be repudiated as *in rem suam*, because the reunciation is not properly *in rem* of Hugh Dallas, but granted to him for his pupil's behoof.

Duplied for the mother; That if the prohibition was to be considered as an interdiction, then the father's having the custody of the writ cannot make the same effectual; for interdictors' consent is never to be presumed in hurtful deeds, nor to be inferred from implications. Law requires, that their consent be explicitly adhibited, and in a direct way; and whatever consent of an interdictor is in another form, is not noticed in law; for interdictors ought *incontinenter* to interpose there authority for validating the act; besides that they are to be published and registrated.

THE LORDS found the pursuer of the reduction could not renounce any part

of her jointure in favours of her son, the defender, without the consent in writing of the persons mentioned in the contract of marriage. No 24.

Clerk, *Mackenzie.*

Fol. Dic. v. 2. *p.* 82. *Bruce v.* 1. *No* 129. *p.* 168.

1724. *December* 30.

JOHN CUBBISON of Cullenoch *against* JOHN CUBBISON, his second son.

No 25.
A father having been the attorney in taking sasine on a charter to his son in fee, and himself only in liferent, was found barred, when afterwards attempting a reduction on account of the want of his consent.

JOHN CUBBISON the father had taken a disposition from Sir William Gordon of the lands of Blackcraig, to himself, his heirs and assignees; but, when the charter was granted by Sir William the superior, the lands were disponed to the father in liferent, and to John the son in fee; upon this charter sasine was taken, and the father was attorney to the taking of it.

The father raised reduction of this charter, as conveying the fee to his son, contrary to the tenor of the original disposition, and without any written warrant under his hand for so material an alteration of the right, which he contended was necessary, since a right constituted by writ could not be otherways transmitted than by writ, Craig, L. 2. D. 2. § 11. Spottiswood, p. 242.

It was *answered* for the Son; That the father's consent to the settling of the fee in him, must be presumed from his accepting, using, and keeping the charter, especially when he acted as attorney in taking the sasine; and, as a farther evidence that he homologated this disposition of the fee, it appeared, that some years thereafter he signed a bond along with his son, in which the son was designed of Blackcraig, and this designation was not quarrelled by the father.

THE LORDS found, that the charter and sasine conveyed the fee to the son, and repelled the reason of reduction.

Reporter, *Lord Grange.* Act. *Ja. Boswell.* Alt. *Ja. Ferguson, jun.*
Clerk, *Dalrymple.*

Fol. Dic. v. 4. *p.* 77. *Edgar, p.* 140.

1725. *December* 24.

JACOB GOMES SERRA *against* ROBERT late Earl of CARNWATH.

No 26.
Found, that there lay a personal objection against an attainted person's objecting his incapacity to contract.

JACOB GOMES SERRA having sued Robert, late Earl of Carnwath, upon his bond or obligation, for the payment of L. 8000 Sterling, laid out by him at the Earl's desire and for his behoof; the defender moved an objection, That, by reason of his attainder, he was under an incapacity to contract, or to bind himself in payment of any sums, and therefore the obligation granted by him