

No 83.

a pari, the husband from that contract is reckoned husband, and donations granted by him are revocable; besides, that this bond is false, and under improbation, as being made up long after the contract of marriage, to sustain the wife's infestment, not only for what is provided in her contract, but for the whole conquest.

THE LORDS found, that a wife's consent to a minute of a contract of marriage of the daughter, she not being consenter in the principal contract, did only import her consent to the marriage, and not to the disposing the estate, without reservation of her liferent. They found also, that the infestment taken originally to the husband and wife, during the marriage, though it did not mention to be in implement of the bond, or any other cause, yet that it was in effect the implement, and not a donation; but superseded to give answer to that point, whether the bond being after the contract and before the marriage, were revocable, as a donation between man and wife, or were null as *contra bonos mores*, till the improbation of that bond were discussed.

Fol. Dic. v. 1. p. 439. Stair, v. 2. p. 666.

1687. July 9.

A. against B.

No 84.

THE LORDS found, that a wife's consenting to her husband's testament, wherein he leaves sundry legacies, does not preclude nor debar her third part of the moveables, because the legacies do not affect her share, but only the dead's part, and so they are not *super eodem subjecto*.

Fol. Dic. v. 1. p. 438. Fountainball, v. 1. p. 465.

1739. July 14. and December 11.

BUCHAN against Sir WILLIAM COCKBURN.

No 85.

Consent of a proprietor to a disposition, implies a conveyance of all right in the consenter's person, but the consent of a creditor implies only a *non repugnantia*.

THE COURT was unanimous, that the consent of a proprietor to a disposition *a non domino*, implies a conveyance of the property, as what can have no other intention or meaning; but found, that a consent by a creditor only, implies no more than a *non repugnantia*, as what could only be the intention of it. Notwithstanding it was observed, that Lord Stair, in several places, says, That consent is the same thing as if the consenter were resigner; and if consent imports a conveyance in its own nature, which was admitted when by the proprietor, so a consent of a creditor should in its own nature import a conveyance of such right as was in him; just as a disposition of the property, when *a non domino*, will imply a conveyance of every lesser right that may be in him, as of a tack or annualrent; and upon which ground the LORDS, by their first interlocutor in this case, had found, That Sir William Cockburn the creditor's consenting to the disposition by Langtoun, the proprietor, to Mr George Buchan, im-

plied a conveyance to him of the debts in Sir William's person; but which was thereafter altered as above.

No 85.

Fol. Dic. v. 3. p. 304. Kilkerran, (IMPLIED DISCHARGE and RENUNCIATION), No 2. p. 279.

* * * C. Home reports the same case :

1739. July 24. ANNO 1723, Sir Alexander Cockburn of Langtoun disposed part of the lands of Cumlege (which belonged to the estate of Langtoun) to Mr Winram. In the year 1730, Sir Alexander sold the remaining part to Mr Buchan, and disposed the same to him as heritable proprietor thereof, with consent of Mr Archibald Cockburn, his son; as also with consent of Sir William Cockburn, for all right and title he had, or could pretend thereto, either as creditor on the said estate, or any other manner of way whatsoever, the dispositive clause whereof was in the following terms: 'Therefore wit ye us, the said Sir Alexander and Mr Archibald Cockburn, with mutual advice and consent foresaid, for our several rights and interests, and also with consent of the said Sir William Cockburn, to have sold annalized, and disposed, from us, our heirs, &c. to and in favour of the said Mr Buchan, &c. This disposition likewise contained the following clause, 'And for the said Messrs Buchan and Winram, &c. their further security in the premisses, and in corroboration of, and but prejudice to the consent of the said Sir William, the said Sir Alexander and Mr Archibald oblige themselves, &c. to procure from Sir William Cockburn a valid consent to, and ratification on a paper apart of this present disposition; as also of the former disposition granted by them in favour of Mr Winram, for all right or title whatsoever which Sir William has, or could pretend to the lands disposed to him, by virtue of the rights and debts after-mentioned (after which some particular debts are specified), or by virtue of any other rights, debts, or diligence, in the person of the said Sir William, affecting, or which might affect the said lands above disposed, or those formerly disposed, to Mr Winram; and which rights, &c. are to be particularly enumerated in the said separate consent and ratification, which the said Sir William shall be obliged to communicate to the said Messrs Buchan and Winram, &c. and allow them to make use thereof in his name, for their security, and defence of their respective purchases, against all evictions or incumbrances that may happen to occur.' At the date of this disposition, and for several years before and after, Sir Alexander Cockburn, who was heir served *cum beneficio* to his father, possessed the estate of Langtoun, and acted as heritable proprietor thereof; but, as it was well known that the same was greatly incumbered, and that Sir William, who was a friend of the family, was possessed of many preferable debts thereon, it was judged necessary that his consent should be adhibited, and likewise that the after-clause above specified should be ingrossed. Upon this deed Messrs Buchan and Winram brought a process

No 85. against Sir William, concluding he should be decerned to convey to them all the rights in his person affecting the said estate, for security and defence of their respective purchases.

Pleaded for Sir William ; It is plain from the disposition, the whole price was paid to Sir Alexander and his son, and no part of it to him ; wherefore the question is, What is the natural and legal import of a consent to a sale made by another in those circumstances ? As to which, the meaning of such a sale would seem to be none other, than that the consenter shall not oppose the same upon any right in his person, and that he shall not compete with the purchaser thereupon, but allow him a preference to the consenter's rights, though otherwise they might be preferable to those acquired by the purchaser. Let us suppose, that a creditor who has the only infeftment of annualrent upon an estate, consents to the debtor's granting a second infeftment of annualrent thereon ; What can be supposed to be intended by this consent, other than that the second creditor is to be allowed to draw his debt out of the lands upon his own right, without any opposition from the infeftment of the first creditor, though preferable ? Can any body imagine that the first creditor meant, in such a case, to transmit his debt and infeftment to the second, in order to enable him to possess the lands upon his preferable right, and thereby to extinguish his debt, when he had got no consideration for such transmission, nor adhibited any other concurrence to the second creditor's right, than a *nudus consensus* or *non repugnantia* ; surely this is too absurd to be maintained. And the same way, when a consent is adhibited to a sale, the import of it is none other than that the creditor consenting passes from his right in security, so far as it affects the estate sold, and restricts himself to the remaining lands, which he believes may be sufficient for payment of his debt ; or, even though they should come short, he yet is bound by his consent to leave the purchaser in quiet possession, and to take his hazard of recovering his debt out of other subjects. But it is obvious, what a wide difference there is betwixt this and a transmission of the consenter's debts ; for, if that is supposed, the purchaser might attribute his possession to the debts conveyed to him, and by his possession extinguish them ; so that the consenter could not afterwards recover payment thereof out of any other subject affected by them, or belonging to his debtor ; and surely no creditor, who knows what he is doing, will agree to the extinction of his debts without payment ; a donation, indeed, may be expressly made, but it is never to be presumed, when not expressed, and when another rational construction can be put upon the transaction. Such is the doctrine likewise of the civil law, which expressly distinguishes a consent from a transmission, *aliud est vendere, aliud vendenti consentire*, l. 160. D. De regulis juris. See also l. 10. pr. D. Quib. mod. pig. vel hyp. solv. ; Craig, Tit. De resig. et renunt. § 29. ; Boyd, No 79. p. 6522. Analogous to this are many other decisions, which have been given upon the construction of consent in other cases, which suppose it imports no conveyance ; for instance, it is a rule in law, That *jus superveniens auctori accrescit successoribus*.

If a consenter was considered in the eye of law as an author or disponent, he could not compete with the purchaser, even upon supervening rights; but the contrary is an established point, That he can make use of a supervening right, even to destroy the right consented to. Again, a conveyance imports warrandice, but a consenter is never liable in any warrandice; and, if the principles now pleaded for be admitted, he cannot discover any other clause in the disposition, that can support the conclusion of this process; for, as to the clause whereby Sir Alexander and his son are bound to procure a ratification from Sir William to communicate his rights affecting the lands to the pursuers, it does not appear how this can affect the defender, who is no ways bound nor named in it, otherwise than as a third party, from whom Langtoun elder and younger are bound to procure such ratification. In the *next* place, Supposing, for argument's sake, that Sir William had consented to this obligation, and that it were inferred from thence that he was bound to perform it; now, supposing even this had been the fact, still it could not be obligatory on Sir William, when Sir Alexander is only bound in it. But, it is plain, there is no such consent in this case: Sir William consents, indeed, to Sir Alexander's disposition, the import of which has been already explained; but, as to this obligation granted by Sir Alexander and his son, to procure a communication of the defender's right, he grants no consent; and surely it will not be maintained, That, because he consented to the disposition with the view already set forth, therefore he should be bound to perform an obligation entered into by others to procure a conveyance from himself, and which could never be intended to be obligatory upon Sir William; else it had been incongruous to take others bound for it, when it was a thing in his power, had he agreed to it, instantly to perform.

It was *answered* for the pursuers, That the import of a consent to a disposition of property appeared to be a thing as well known and fixed in law, as any point whatever, namely, to make the *dominium* pass for all right that was in the consenter, as well as in the principal disponent. See *l. 12. D. De evictionibus*. And upon the same principles it is resolved, That a proprietor, alienating with consent of a liferenter, or of a creditor having a pledge in the subject, that the full dominion passes to the buyer, which consists of the several interests of the disponent and the consenter; and, as this would be implied by the naked consent of one having right to a conveyance made by another, there is yet less reason to doubt, that the right of the consenter is transferred, when he concurs or joins with the disponent, as in the present case, for all right and title he has any manner of way; for there it is not left to conjecture or implication, but the intention to convey or transmit the right of such consenter is in express words declared. And here the defender concurs not only in the dispositive clause, but again in the procuratory of resignation, which is sufficient to infer the conclusion of this action; for, as he who disposes the absolute property is obliged to deliver the progress of titles which he has to the same, so he who disposes in virtue of particular rights or incumbrances in his person, ought in like manner

No 85.

to make good his disposition, by delivering his titles, if he hath no other use for them; and, if he has, by conveying or allowing transumpta. to the purchaser. The effect of such consent is expressly declared by our lawyers to be what is now insisted for. See Craig, lib. 3. D. 1. § 29.; Stair, book 2. tit. 11. § 7. As such is the doctrine of the civil law and our own, it is likewise evident that this was the true meaning of parties; for, as the estate of Langtoun was subject to many incumbrances besides those in Sir William's person, which were reckoned to be amongst the most preferable, it could signify little to the purchasers, that he should barely renounce any claim upon the lands bought by them, since, he not being the sole creditor, such renunciation would still leave them exposed to the next creditors after him whose diligences affected the lands; and therefore his consent was evidently taken to the end that his titles might serve to maintain and secure the purchasers against other incumbrances less preferable on the subject. And, *2dly*, If more were needful, the intent of parties further appears from the other clause in the deed, whereby Sir Alexander and his son obligate themselves to procure from Sir William, to both the purchasers, a special communication of all the titles in his person; and, though he be not directly an obligant in this clause, yet, as it stands part of the disposition, which is signed by himself as one of the parties thereto, it seems impossible he can evade the force of it, in so far as it serves to demonstrate the meaning of his consent or concurrence by him adhibited to the disposition itself.

And as to the second part of his defence, That he not being specially obliged in this clause, cannot be pursued to perform the same, it was *answered*, That it was not agreeable to equity or *bona fides* for Sir William, who was party to the transaction, and concurring with his friends in granting the deed, which contains, in corroboration of, and without prejudice to his consent, an obligation to his friends to procure from him a separate communication of his titles, to say, It is true I signed the deed; but I never meant it should be performed; such a construction would be to render the deed fraudulent and elusory; but his signing the same, containing such a clause, plainly implies his willingness or consent to the granting thereof; and the obligation imposed on the other two was intended merely to free the purchasers from the trouble or expense of carrying into execution, or obtaining actual performance of that special communication which all the parties had in view was to be afforded them.

Replied for Sir William; That he was so little a party to the sale by Langtoun to Mr Buchan, that he never exchanged a word with him, or any other person for his behoof, on the subject; neither indeed knows he, to this hour, how much was given for it. It is true, that, at signing, the deed was read to him; and, as he had engaged himself by promise to Langtoun to consent, so he was made, to his apprehension, only a consenter thereto: He likewise saw therein an obligation on Langtoun and his son to procure titles from himself; but he did not dream that he was bound thereby, because his name was mentioned in it as a third party. And sure it is no stretch on the word *procure*,

When it is understood *purchase*; as it is believed every body concerned at the time understood it in that sense; but, if it was meant that the defender was to give these transmissions for nothing, Why was he not taken directly bound to do so?

No 85.

THE LORDS found, That Sir William Cockburn is bound to communicate the rights and diligences in his person to secure Mr Buchan's purchase; but found, that this obligation doth not extend to Mr Winram, the other purchaser.

But, on the 11th December thereafter, the LORDS found, That Sir William not being a conjunct disponent, his consent imported no more than a *non-repugnantia*; and that he was not obliged to communicate his rights, &c. to secure Mr Buchan's purchase.

C. Home, No 129. p. 214.

S E C T. XIV.

Discharge of Trust.—Settlement of Factory-accounts.—Expenses of plea after extract.

1729. June 11.

Hog against NIVEN.

ONE Niven being executor-testamentary nominated and confirmed to-unquhile Hog testator, and in the same testament the whole gear being left to Mr Thomas Hog, son to the testator, who was left universal legatar by the defunct, so that the executor had only *nudum officium*; and the executor having recovered sentence against some of the debtors named and given up in the testament; thereafter the legatar having convened the executor for payment of the debts given up in testament, it was found that the executor having made the legatar assignee to the decreets obtained by him against the debtors, that he was not further obliged to pay the debts to the legatar, seeing the executor had only a naked office, and the legatar only the benefit; and found that the executor had no necessity to put the decreets against the debtors to execution, either by pointing or horning; neither was obliged to make the debts good, albeit the debtors had become bankrupt, or unanswerable to pay thereafter, they being responsal, if the sentences had received execution; for which the executor was not answerable, nor was obliged in diligence, he being free of all fraud or collusion with the debtors, and he never being desired by the legatar to coneur with him in any act against the debtors; so that the assignation made by the executor to the debts and goods contained in the testament, in favour of the legatar, with all that follows thereupon, was found sufficient, and that the same

No 86.

One whose trust is taken off his hand, cannot be afterwards challenged for neglecting to do diligence.

In this case, an executor, having taken decree against the defunct's debtors, assigned to the universal legatee. The acceptance of the assignation barred challenge for neglect of diligence.