No 50. But if the LORDS incline to ordain the cedent to depone, the pursuer acquiesceth, so be it is with the burden of all expences debursed in the process.

THE LORDS allowed the cedent's oath to be taken *cum onere expensarum.*

Fol. Dic. v. 2. p. 299. Forbes, p. 6.

1712. *July* 2.

NAOMI FORBES, and her HUSBAND, *against* The LADY CULLODEN.

No 51.
A mother sued for exhibition of a bond of provision by the father to his daughter, deponed that she had received it, with power to cancel it, in case of the daughter's undutiful conduct. The quality was not sustained.

DUNCAN FORBES, late of Culloden, when he was giving bonds of provision to his younger children, he provided his daughter Naomi to 3000 merks, and afterwards, in 1703, he gave her a bond for 6000 merks, but with that quality, that it should be in satisfaction of all former provisions. After her father's death, she marries, without her mother's or friend's consent, one Mr Paterson, a chirurgeon apothecary in Elgin; and craving up her bonds from her mother, in whose custody they were left, and she refusing, a process of exhibition was raised against her at the daughter's and husband's instance; and they having referred to oath, she depones, that, at her desire, Culloden her father had signed these bonds, and having some doubt of her behaviour he delivered them to her, with this express condition, that she was not to deliver them if she married without her consent, or any ways disgraced his family, and put it absolutely in her power, either to give her the 3000, the 6000, or nothing at all, as she thought fit; and having run away with Mr Paterson without her consent, she so far executed her husband's will and commands, that she burnt and destroyed them both. This oath coming to be advised, the grand question was, if the quality of the oath about the trust reposed in her by her husband was intrinsic or not? For which it was *alleged*, The existence of the bond was no other way made appear but by her oath, and so the terms and conditions on which she got it was *pars negotii et pactum incontinenti adjectum*, and neither could nor needed have any other instruction but her oath; and none could be so good judges what children deserved as parents, whose testimony alone, by the Mosaical law, was sufficient to prove children's ingratitude or misbehaviour, and can never be presumed *sævire in sua viscera*; and what could tempt the Lady to destroy her own daughter's provision, if she had not deserved it? And though total restraints and prohibitions of marriage be repudiated in law, yet the requiring of them to marry by advice of some friends has been always sustained as lawful, and the Doctors at least require that they should seek it; so says Simon Van Leuwen in his *Censura forensis*, and *Mantica de conjecturis ult. voluntat.*; and gives this reason for it, that either the mother, if consulted in the marriage, might have dissuaded her daughter, or the daughter might have prevailed to bring over her mother to consent. *Answered* for the daughter, That her mother's cancelling her bonds was a most rash and unwarrantable ac-

tion, done *in calore iracundiæ*, and no doubt afterwards repented of; and the quality and power adjected in her oath is utterly extrinsic, and can never excuse her; for whatever power the father had, if he had been in life when she married, yet that being merely personal, he could not delegate it to another; and it is a mistake, that the existence of the bonds is made out only by her oath; for the Laird of Innes, her brother, and Doctor Jonathan Forbes, her brother-in-law, both depone, that they saw and read the bonds after Culloden's death, and brought them out of a cabinet to her; and how can she forfeit these bonds, when the irritant clause was not intimated to her? If she had been certiorated of her hazard, the Lady would have more to say for herself, as was found February 1681, Hamilton, No 3. p. 672.; and which quadrates with the Roman law, *L.* 72. § 4. *D. De condit. et demonstrat*, where Seia is enjoined *arbitratu Titii* to marry, and yet gets her tocher notwithstanding, because that is always reputed a discretionary power; and where a thing is remitted *in alterius beneplacitum*, the lawyers say it must be *beneplacitum rationale*, and not *arbitrarium*; and the Lady ought to give reason of her dissent, seeing the marriage is neither disgraceful nor dishonourable, he being a gentleman of a good employment, and had a stock, which makes the allegeance of disparagement to cease. If she had fallen in fornication, or run away with a base person, there might have been some pretence; and at most, the mother was only the *custos* of these bonds, and cannot, by her oath, make up the terms; for children's bonds of provision need no delivery, and a depositary must prove the depositation, before he can depone anent the terms, else bairns would be in a very unsecure condition as to their portions. Likeas, Dirleton observes a case stronger than this, 22d January 1675, Maxwell *contra* Maxwell, No 92. p. 12322, where a bond was cancelled, though he had letters from the granter allowing it, yet he was found liable. But it was thought the LORDS went too far there, and Dirleton seems to be of a contrary opinion. However, it is plain, the Lady should have preserved the bonds entire, and when pursued for exhibition, might have objected what she now says on her daughter's carriage, and the power lodged in her, against her delivery of them; but she ought not, *brevi manu*, to have destroyed them. Some were for trying whether that cabinet, out of which the bonds were taken, was that wherein the husband used to keep his papers, or if it was the wife's, and that she always had the key of it. Others thought, from that practick of Hamilton's, there was ground to restrict and modify the tocher; but all were clear she could not demand both, but only the last. The plurality found the cancelling unwarrantable; and seeing the bond was not extant, she behoved to be liable in the damage, *loco facti imprestabilis succedit damnum et interesse*; but it being payable after her father's death, and at her marriage, there could be no present decreet till these two periods were proved. She had likewise a process for payment against this Culloden, her brother; but he will allege, that the

No 50.

No 50. mother's oath cannot make up the tenor of a bond against him, neither writer nor witnesses being condescended on.

Fol. Dic. v. 2. p. 300. Fountainhall, v. 2. p. 747.

*** Forbes reports this case:

1712. *July* 8.—IN the exhibition at the instance of Naomi Forbes against the Lady Culloden her mother, for exhibiting two bonds of provision granted by the deceased Duncan Forbes of Culloden her father, the Lady deponed, acknowledging that her husband delivered to her, in trust, two bonds of provision in favour of their daughter the pursuer, one for 3000 merks, another of a posterior date for 6000 merks, in satisfaction of all former provisions, and that there was a clause in the 6000 merk bond declaring it effectual only in case she married with the deponent's consent, and were no disgrace to her father's family; and that the deponent got these bonds in trust from her husband, with full power to deliver either one or other, or none of them, as she saw cause; pursuant to whose directions she had burnt the bonds, upon the pursuer's running away with Mr Paterson her husband.

THE LORDS found, That the 3000 merk bond is absorbed and comprehended in the 6000 merk bond; and that the defender had no power to destroy the bonds, her daughter not having married to the disparagement of her father's family; and remitted to the Ordinary to hear parties' procurators in the process of liquidation of the damage and payment, and how far in this case, *Loca facti imprestabilis succedit damnum et interesse*:

Albeit it was *alleged* for the defender; The qualities adjected to her oath being intrinsic to the act of having, *de quo quærebatur*, must be as probative of the manner of having, as the rest of the oath is of the having had. For when any point is referred to one's oath, all the circumstances that enter into the nature, and are *partes actus*, may be deponed upon, and ought to be received. And albeit in this case the adjected qualities had been extrinsic, yet the oath cannot be questioned, because *juratum est deferente adversario*. So that it being proved by the defender's oath, the only mean of the pursuer's probation, that the bonds were delivered by the granter to the defender in trust, with full power to make them her daughters, or not, as she thought fit, and under obligation to destroy in the event which happened; her doing so was justifiable. Because, as the father had the absolute disposal of these undelivered bonds, so he might commit them to the defender with the same power he had himself. Had Culloden given to his Lady 6000 merks in specie, to be bestowed by her at pleasued on their daughter, or the heir, could the daughter have quarrelled the trustee's conferring that money upon the heir, or *vice versa*? Neither can she quarrel the defender's destroying the bonds in obedience to her husband's appointment in a discretionary manner, for which she was accountable to none:

No 50.

In respect it was *answered* for the pursuer; Albeit he who gives, may qualify his gift as he thinks fit, yet law, for the security of property, provides that a bond or other security once out of the granter's hand (though delivered to a third party) belongs to the creditor, who only can qualify and limit the right, and recover it *per mille manus*. The receiver or haver who, as a naked *custos* of the writ, subject to what law requires of such as have the simple keeping of what belongs to another, can never exoner herself by her own assertion. All intended or designed by a process of exhibition, is only expiscation, and to discover where the writ lies. Now, the Lady having acknowledged, that the bonds were deposited in her hand, the presumed terms of depositation are, that the depositary shall give back the writ to the person he had it from, if required, and if not, to the person in whose favour it is conceived, January 25. 1677. Ker against Kers, No 64. p. 3249. Could a depositary's oath prove against the creditor in a bond deposited, that the granter ordained it to be cancelled in a certain event, it were absolutely in the depositary's power to make the obligation subsist or not, Stair, Inst. Lib. 1. tit. 13. § 4. The pursuer had occasion only to refer the having of the writ to the defender's oath; which being acknowledged, the obligation to deliver or make up the damage takes place in favour of the creditor. The delivery of the bond to the defender by her husband, and the qualities or conditions of the delivery are all forced into the Lady's oath, without any connection with what is simply referred. *Esto*, that Culloden had power to order the bonds to be delivered or destroyed in certain events, he could not effectually commit this power to the Lady, but by his own writ. How soon a bond is out of the granter's hand, law presumes delivery to the behoof of the creditor, against whom no condition, limitation, or restriction should be qualified by the oath of granter or depositary. Again, though the qualities in the oath were instructed by the father's writ, the Lady could have had only a discretionary power to act rationally; whereas she burnt the bonds *sine justa causa*, in so far as the quality in the bond was not known or intimated to the pursuer. And though her marrying without her mother's consent might be considered as a neglect of her duty, it can never be stretched to forfeit her bond, the marriage being suitable, and no disparagement to her father's family. Besides, as she could not be thought to have contravened with any neglect or contempt of her father's good pleasure, so she being scarce thirteen years of age when her bond of provision was signed, could not give any reasonable occasion to jealouze her good deportment. There is no parity betwixt Culloden's delivering a bond, and his delivering money to his Lady, to be bestowed at her pleasure; seeing a bond is a *corpus* which may not only be exhibited, but recovered *rei vindicatione*; whereas the delivery of a sum of money transfers the property to the receiver, and makes her only debtor by an obligation to restore, which, having no other foundation than the trustee's oath, might be qualified by her at pleasure.

Forbes, p. 610.