cannot find them; but his wife tells him, that she had burnt them, as no more useful, being only done to serve a turn, and divert a storm, which blew over. This oath coming to be advised, the Lady's procurators repeated a declarator, that there being once a *jus quæsitum* to young Bradisholm by that disposition and sasine, which makes a complete right, it could not be warrantably cancelled afterwards; and though it was not registered, and so could not militate against third parties and singular successors, yet it stood always good against the granter; and he could not lawfully destroy it, but it must be reputed as extant against him, *pro possessore habetur, qui dolo desiit possidere.* *Answered*, This right given to the son was never intended for a permanent durable right, but only extorted by the rigour and severity of these times; and that ceasing, *cessat effectus:* for, suppose the French dragoons caused a Hugonet dispone his estate, if the impression of fear go off, will any say the disposition stands? neither was it ever a delivered evident; and so cannot be pretended to have been fraudulently put away. *Replied*, If Bradisholm had disponed his estate to a stranger in trust, to save him against rigorous laws then urged, he might have craved to be reponed; but this was to his own son in the natural channel, who was *alioqui successurus*, and so more favourable. The question being stated, Whether fraudulently put away, or warrantably destroyed? the LORDS found, The disposition being only *ad specialem effectum*, which ceased, he might warrantably cancel it, the delivery and consummation of the deed not being proved. No 182.

1707. *July* 12.—THE cause mentioned 26th July 1706, Lady Bradisholm younger *contra* the Laird, being heard this day, the LORDS adhered to their former interlocutor, finding Bradisholm might warrantably destroy the disposition made to her husband, his son. Whereupon the Lady gave in her appeal and protest, for remead of law, to the Court of Judicatory, come in place of the Parliament of Scotland by the articles of the Union. See APPENDIX.

Fountainhall, v. 2. p. 346. 381.

1717. *July* 6. JANET ROSS *against* BAIN of Tulloch.

No 183.
Bond of provision, by what means it becomes a *jus quæsitum* to the child.

SIR DONALD BAIN of Tulloch disponed his lands to his eldest son John, with the burden of his debts and children's provisions; and *de facta* took from him bonds of provision in name of his children. Janet Ross, grandchild by Elisabeth Bain, one of Sir Donald's daughters, pursued an action of exhibition of her mother's bond of provision, against Kenneth Bain, Sir Donald's second son and heir-male, containing a conclusion of payment, libelling, That the bond had been delivered to him by his father, for the said Elisabeth Bain's behoof;

No 183. which was offered to be proved by his oath. Kenneth accordingly deponed; and the import of his oath was, 'That his father delivered to the deponent the 'bond, to keep for him; that, after the bond had been in the deponent's cus-'tody some months, he delivered it back to his father; who, in the deponent's 'sight, did cancel and destroy the same, and that by reason the daughter's be-'haviour did not please him.'

This oath coming to be advised, it was *pleaded* for the pursuer, Whatever power a father may have with respect to bonds of provision granted by himself, he has no power to revoke or cancel such bonds granted by third parties. The parent's power of revocation is founded in the general maxim of law, 'That 'an undelivered deed may be recalled.' And, in reality, the parent, as to that point, has no further privilege than any other granter, except what arises from a presumption in law concerning the delivery of writs, viz. That deeds in favours of foreigners, found out of the granter's hands, are delivered for the behoof of the creditor, unless the contrary appear; whereas, deeds done in favours of children, though found in a third party's hand, are presumed deposited upon the father's account, unless they are proved delivered for the behoof of the child. Thus, then, however the presumptions concerning the delivery may vary, it is plain that the delivery, or not delivery, is what gives the parent the power of revoking or not revoking; which puts parents, as to that particular, upon the same footing with others. Nor is there any foundation for what hath been held forth upon this subject, 'That the faculty of revocation 'arises from the paternal power of providing children at the parent's pleasure, 'and of altering their settlements according as the children's behaviour merits.' It is true, before parents complete their deeds, which in some sort are donations, they have an unlimited power, as all other donors have, of forbearing to complete their intended gratuity; but when once deeds of parents are completed by delivery, they become valid and irrevocable, without respect to the paternal power; which is a demonstration that the power of revoking does not depend upon any speciality of fatherly authority. Having premised this, it was *observed*, That deeds granted by a third party in favour of children, though of the parent's purchasing, are in a different case; for though such deeds, while they remain with the granter undelivered, are revocable by him; when once completed by delivery, either to the child, or his parent, the administrator, they become absolutely irrevocable, just as deeds done by the parents, and delivered actually to the children, do. For clearing this point, pursuant to the foregoing observation, one needs but consider, whether the putting a deed made by a third party, in favour of a child, in a father's hand, is in law an effectual delivery or not; for, if it is, the deed must certainly become irrevocable. And that it is so, appears from this,—that were the granter reducing or revoking the deed, the delivery to the father would, in every respect, be equal to the delivery to the child himself. And, indeed, there is a great odds betwixt the parent's custody of a writ granted by himself to his child, and his custody of

a writ granted by a third party. In retaining his own writ, he withholds the delivery, and preserves the power of revocation; whereas, in receiving a writ from a third party, he acts as administrator for the child to whom it is granted: the writ is established by delivery; there is a *jus quæsitum* to the child; and the father's acting in name of the child, was never intended to give him any power in the bond of revocation, or otherwise; which now, after delivery, is not even competent to the granter. And it is not a specialty of any importance, that the third party, granter of the deed in question, was heir to the parent; since the transaction in consequence of which the bond of provision was granted, was a fair contract, entered into betwixt the father and the son *tanquam quilibet*, and must be determined by the same rules as if a stranger had granted the bond. From what hath been said, it is plain that bonds taken by parents in favour of their children, where they have only the custody as administrators, are not revocable at pleasure; and therefore that, in the present case, Sir Donald Bain of Tulloch, who had the keeping of the bond granted to his daughter Elisabeth, by John Bain, could not warrantably destroy it, so as to discharge John of the debt, or save himself or his heirs from accounting for his illegal action. But, 2*do*, There is a further circumstance in this case; and that is, that John Bain of Tulloch had an estate disponed to him, with the burden of this bond of provision, amongst others. Now, the moment John Bain was infeft, this bond became a real burden; and Sir Donald could not alter or revoke a settlement, that was so far secured to the creditor as to become a real security upon the estate. No 183.

In answer to the *first*, it was owned, That if this bond of provision had flown from a stranger, though put in the father's hand, he could only have had the custody as administrator; but where the bond flows from the eldest son, the apparent heir, and who got right to the estate *præceptione*, for undertaking the father's debts and provisions, this, in the construction of law, is the same thing as if the father had granted the bond of provision; and indeed there can no material disparity be put. It was not, sure, the intention of the father to alter the circumstances betwixt him and his children; but to secure them against their elder brother, to whom he was conveying his estate. The form here is not so much to be considered, as the intention of parties; and seeing *hoc tantum agebatur* by the transaction, to make a conveyance to the eldest son, with burden of the debts; the younger children ought to reap no more advantage by this than if the father had reserved a power to burden the estate with their provisions, and had accordingly granted bonds, but without delivery. The presumption therefore is, when the father took the bonds of provision, keeping them to himself, or, which is all one, putting them in the custody of one of his other sons, in family with him, That he acted in that matter for his own behoof, that he might have it in his power to bind his eldest son in provisions to his other children, or not, as he pleased, and not at all as admini-

No 183. strator. *Answered* to the *second*, Suppose it had been made a real burden, that does not take it out of the father's power to discharge his son of the provision, more than if he had retained a faculty to burden, which he might have exerced, or not.

" The Lords found, That Sir Donald Bain having given the bond libelled upon to his son Kenneth, and the father having called for the said bond, upon his getting up thereof from his son, did warrantably cancel the same.

Act. *Dun. Forbes.* Alt. Sir *Wal. Pringle.*

Fol. Dic. v. 2. *p.* 149. *Rem. Dec. v.* 1. *No* 6. *p.* 10.

SECT. X.

Delivery of Goods, what Cause presumed.

1677. *June* 13. Hume *against* Jamieson.

No 184.
Delivery of victual, by an ordinary buyer and seller thereof, found to infer the ordinary price, unless the defender would instruct an other cause of delivery than a sale or definite price.

David Hume having obtained decreet before the Bailies of Kelso for certain victual sold and delivered by him to Jamieson, he suspends, on this reason, That the decreet is null for want of probation, there being nothing proved but the delivery of the victual, and nothing of bargain or price, though it was so expressly libelled; and delivery alone would not be relevant, for delivery might have been as a donation, or for payment and satisfaction of debts, and upon many other accounts. It was *answered*, That delivery of a considerable quantity of victual presumeth that it is in the ordinary way by sale, unless the receiver prove another cause; for merchants are never put to prove more but the taking off and delivery of ware, for which their apprentices are admitted, and which will burden the receiver to prove payment, though oftimes it be made at the delivery of the ware; and where the special price cannot be proved, it is presumed to be the ordinary price, and so is modified by the Judge. It was *replied*, That the probation in merchant ware is not sufficient by witnesses proving the delivery, without the concourse of a merchant count book, wherein all parties may have inspection, and see that the ware be marked for present payment, or if to a day, it be delete when paid; but in bargains of victual, there are no such adminicles.