being proteſtants, ſettled in England after the revocation of the edict of Nantes, where the wife died without iſſue.

Her repreſentatives filed a bill in the Court of Chancery in England againſt the huſband, claiming the two-thirds of the 1200 livres ſettled upon the wife and her heirs, and alſo a moiety of the goods in communion according to the cuſtom of Paris. The Lord Keeper in Michaelmas term 1702 decreed, that theſe two-thirds of 1200 livres ſhould be paid to the plaintiffs, but that the huſband and wife having left France, and ſettled in England, their goods in communion were not to be diſtributed according to the cuſtom of Paris, notwithſtanding the covenant in the marriage articles. But the repreſentatives of the wife having brought their appeal againſt the latter part of the decree, in regard to the diſtributions by the cuſtom of Paris, the ſame was reverſed by the Houſe of Lords.

Laſhley v. Hog, in the Houſe of Lords, 16 July 1804.

In the important caſe of *Laſhley* v. *Hog* in the Houſe of Lords, in a ſpeech previous to the deciſion by Lord Chancellor Eldon, this caſe of Foubert and Turſt was ſtated; his lordſhip conſidered the reverſal as having been founded in the *contract*, and that if there had been no contract, the law of England would have regulated the rights of the huſband and wife, who were domiciliated in England, at the diſſolution of the marriage.

Caſe 2.

Fountainhall, 26 July 1706, 12 July 1707.

Roſe Muirhead, the Widow of James Muirhead the younger, of Bradiſholm, deceaſed, - *Appellant*;
James Muirhead of Bradiſholm, - - - - *Reſpondent.*

14th *March* 1708-9.

Donatio non preſumitur.—A diſpoſition by a father to his ſon, (followed by a ſaſine, which was not regiſtered) made to preſerve the eſtate from penalties of a teſt act, might be warrantably cancelled.

Qualified oath.—An oath received, though objected to as containing qualities.

THE late James Muirhead, the reſpondent's eldeſt ſon, in 1697 married the appellant an Engliſhwoman at London; and the parties in the preſent appeal ſeverally allege, that deceit was uſed with reſpect to the fortunes of the huſband and wife on that occaſion. In September 1700, three years after the marriage, articles of agreement were entered into in the Engliſh form, whereby the huſband covenanted to ſettle lands in Scotland of the annual value of 250*l.* for his wife's jointure; or to leave her at his death 2000*l.* perſonal eſtate, and 2000*l.* more to the iſſue of the marriage. He afterwards brought his wife to Scotland, where they both for ſome time reſided with the reſpondent.

But miſunderſtandings ariſing in the family, the ſon brought an action before the Court of Seſſion againſt the reſpondent his father for exhibition of a diſpoſition of the lands of Bradiſholm, which

which had been executed by the father in favour of the ſon, and of a ſaſine taken thereon; and for declaring the ſon's right to the eſtate in conſequence of theſe titles. Soon after the commencement of this action James Muirhead the younger died, leaving iſſue of the ſaid marriage a daughter, and the appellant his widow pregnant with a ſon, who died in a ſhort while after his birth.

About ſix months before the huſband died, he executed a holograph deed in the appellant's favour, and thereby "ſurrogated, "ſubſtituted, and appointed the appellant, and gave to her his "full right to all and every thing he had or could have had if "living, as fully and amply in all manner of reſpects as if every "thing were there ſet down at large;" and he appointed the appellant his ſole executrix.

After her huſband's death, the appellant re-commenced the action of exhibition and declarator againſt the reſpondent, to compel him to produce and deliver uncancelled the reſpondent's marriage ſettlement, whereby (the appellant contended) her huſband was to ſucceed his father in his eſtate; and alſo the ſaid diſpoſition and ſaſine, which (ſhe ſtated) were made in implement of ſuch marriage ſettlement: and alſo to give the appellant relief in the declarator. The reſpondent made objections to the title of the appellant to carry on the action, as founded on the deed executed by her deceaſed huſband, which being a teſtament, if it could be ſuppoſed to extend to lands, the deviſe was void by the law of Scotland. The court allowed the proceſs of exhibition at the appellant's inſtance to proceed, reſerving to the reſpondent all objections againſt her title after production.

The reſpondent was afterwards examined upon oath in the exhibition; and made a depoſition to the following purport:

"That in 1684, the time of the Teſt, he was in priſon for not "complying with the temper of that time, and underſtood that "the government was to preſs the Teſt on all heritors, and accord-
"ingly by an act of parliament in 1685, the ſame paſſed into a 1685. c. 13.
"law:—that he remained priſoner till 1686, and having taken "the advice of lawyers how to preſerve his fortune, upon their "advice he granted a diſpoſition in favour of his ſon, a child then "12 years old, both fee and liferent, but burdened with the payment of 60,000*l.* Scots, as the deponent ſhould diſpoſe thereof: "that he did this, knowing that Lieutenant-General Drummond "was his near relation, and upon ſight of ſuch a paper, or being "informed of it by the deponent's wife, he could make uſe of it "to protect the deponent from the threatened hazard; and accordingly he did ſign that diſpoſition, containing many other "conditions and qualities in the deponent's favour, and delivered "it to his wife, with a liberty to her to take infeftment upon "it or not as ſhe thought fit:—and, that thereafter while he was "in priſon there was a ſaſine brought or ſent to him by Arthur "Naſmith, who ſigned as notary to the ſame, and Naſmith, by "letter, deſired him to ſend it back to him: but the deponent, "before he came out of priſon, did cancel both the ſaſine and

" diſpoſition, upon the information that the king was not to preſs " the teſt with that ſeverity: that Naſmith wrote to the deponent " to ſend it back to him, in reſpect that it either was not inſert " in his book, or that he was to inſert it: that there was no re- " giſtration or mark of regiſtration on the ſaſine; and as he gave " it to his wife, ſo ſhe re-delivered it to him, and when ſhe re- " delivered it, ſhe told him, that the diſpoſition had never been " out of her hand, which made the deponent believe there never " was ſaſine taken upon it, but that the ſaſine ſent was but a " ſham: but being interrogated if he did not believe it was a " real ſaſine, deponed that he believed it was: and deponed that " he had not had it in his cuſtody, and knew not where the ſaid " diſpoſition was, but acknowledged that he had the ſaid can- " celled diſpoſition and ſaſine, and ſaid that he laid them among " uſeleſs and cancelled papers, but that he had not ſeen them " ſince the intenting of any proceſs between him and his ſon, " and having occaſion to look through theſe papers on another " account, he had not found either of them, and acknowledged " he did not make a ſearch eſpecially on account of the ſaid " diſpoſition and ſaſine, becauſe his wife told him they were burnt " or deſtroyed: and being interrogated if or not he had ſeen the " ſaid cancelled diſpoſition or ſaſine after the time that differences " began to ariſe between his ſon and him, deponed that he be- " lieved he did ſee them among cancelled papers, but knew " nothing of them then, farther than that his wife told him they " were deſtroyed.—And being interrogated if or not he had the " contract betwixt himſelf and his lady, deponed that he had, " and it ſhould be produced with the infeftment thereon; but he " did not know of any former tailzie made by his prede- " ceſſors."

The appellant, after this depoſition was made, proteſted againſt all the qualities contained in the ſame, in regard there were no qualities contained in the act which directed ſuch examination to be made.

She alſo petitioned the Court, that the reſpondent might be compelled to ſearch for the diſpoſition and ſaſine, and if found, to exhibit the ſame in ſuch ſtate, as they then were.—The reſpondent accordingly was re-examined, and deponed that after ſearch he could not find the diſpoſition and ſaſine.

After adviſing theſe depoſitions, the Court, on the 26th of July 1706, " Found that the defender cancelled the diſpoſition and " ſeiſin warrantably, and that the oath proved not, and aſſoilzied " the defender from the exhibition, and declared him to be " free therefrom."

The appellant preſented two reclaiming petitions to the Court, which were ſeverally " refuſed, and the former interlocutor ad- " hered to," on the 30th of July 1706, and 11th of July 1707. All theſe interlocutors were carried in favour of the reſpondent, by a majority of one vote each time.

The

The appeal was brought from "a ſentence or decree of the Lords of Council and Seſſion made on the behalf of James Muirhead, the 11th July 1707." Entered, 16 Dec. 1708.

Heads of the Appellant's Argument.

The diſpoſition and ſettlement was by the infeftment taken, and inſtrument of ſaſine following thereon, effectually executed according to the law of Scotland. It contained no power of revocation; and the reſpondent could not lawfully cancel or deſtroy it.

The appellant brought her huſband a conſiderable fortune, in conſideration of which he contracted for certain proviſions to be ſettled upon her.

The reſpondent's oath proves the execution of the diſpoſition and the infeftment taken thereon. What the reſpondent ſtated in his oath of his intention in executing the deed, was an extrinſic quality of the oath, and ought not to weigh in this matter. Such motive or covered intention was merely *præpoſitum in mente retentum, quod nihil operatur.*

Heads of the Reſpondent's Argument.

It is a rule of the law of Scotland, that the mind and intention of the grantor at the time of making a deed are principally to be conſidered. The diſpoſition in queſtion was merely gratuitous, and for no antecedent onerous cauſe. All the circumſtances of the caſe ſhew that the reſpondent made the diſpoſition only to ſecure his family and protect his eſtate from forfeiture, and that he never intended to diveſt himſelf abſolutely. Many ſimilar conveyances were made by gentlemen in Scotland about the ſame time, and for the ſame purpoſes.

This matter having been referred to the reſpondent's oath, the oath muſt be taken entire, and with all its qualities. There is no proof of the exiſtence of the deed, but in this oath.

After hearing counſel, *It is ordered and adjudged that the ſaid petition and appeal be diſmiſſed this Houſe, and that the ſentence or decree therein complained of be affirmed.* Judgment, 24 March 1708-9.

For Appellant, *T. Powis.* *Spencer Cowper.*
For Reſpondent, *John Pratt.* *P. King.*