

at pleasure; but a captain of a ship may be necessitated to retain even contumacious sailors, wanting hands to navigate his ship without them. It was further *alleged*, That the mariners going ashore without their master's consent, and sleeping a night there, inferred the forfeiture of their wages, and sundry other penalties. THE LORDS decerned for the wages confessed, and found the qualities extrinsic, reserving the Master's action for liquidating his damage against this pursuer, as accords, upon his malversations.

*Fol. Dic. v. 2. p. 299. Fountainhall; v. 2. p. 72.*

1705. June 20.

Captain JOHN GRANT of Easter Elchies, as Assignee by ARCHIBALD INNES of Auchluncart, *against* Major ALEXANDER ANDERSON.

IN the action at the instance of Captain Grant against Major Alexander Anderson, for payment of L. 79 Scots contained in his ticket, whereby he stood obliged to hold count for that sum to Innes of Auchluncart the pursuer's cedent; the ticket being quarrelled as null for want of writer's name and witnesses, the pursuer offered to prove by the defender's oath, That he both written and subscribed the ticket. And he having in his deposition acknowledged the same to be holograph, but that he had in the terms thereof counted with Auchluncart for the money, the LORDS found the oath supplied the nullity of the ticket, and the quality to be extrinsic, and therefore decerned; albeit it was *alleged* for the defender, That the defects of the ticket being only supplied by his oath, the oath could not be divided. *2do*, The ticket is not of the nature of a clear and liquid obligation, where one obliges himself to pay a sum, but is allenarly to hold count, which of itself implies, that the person to whom it is granted is debtor on the other hand, and that there are mutual claims; upon which the defender having deponed, that seems to make a complete probation.

Then the defender offered to prove by the cedent's oath, that he did count with him in the precise terms of the note for the sum, and allowed the same in the first end of what he was resting at the time of the counting; which must prove against the pursuer, though an assignee for an onerous cause, seeing the obligation is only to count for the sum.

*Answered* for the pursuer; If the defender had counted with Auchluncart, he would either have got a writ under his hand acknowledging so much, or retired his own note, neither of which is done. *2do*, The cedent's oath is not to be taken to the prejudice of his assignee; nor even the assignee's oath after a cause is thus concluded, where the oaths may clash, and prove contradictory.

No 49.

No 50.

That a assigned ticket, to hold count for a sum, was holograph, being referred to the granter's oath, and he having deponed acknowledging so much, but that in terms of the ticket he had accounted with the cedent; the quality was found extrinsic, and the cedent's oath upon the accounting allowed to be taken *cum onere expensarum*.

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 *savire 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-