

## DIVISION V.

## Effect, in Scotland, of personal Obligation executed in a Foreign country, according to the Law of the place.

1633. March 7.

GORDON *against* WORLIE.

## No 23.

By a contract of marriage made in England, a conjunct-fee was provided to the wife, 'conform to the laws of Scotland.' By the law of England, the tocher must be paid before the husband can be obliged to implement. And this maxim of the law of that country was found to be applicable to the case. The law of England, relative to the presumption of payment, in consequence of the document being in the hands of the debtor, was likewise adopted in the decision.

It was questioned betwixt Gordon of ———, and Mary Worlie, an English woman, who was married upon the second son of the said Gordon; and her husband being dead, craved to be secured in the conjunct-fee, contracted to her by her contract of marriage, and wherein the said ——— Gordon her father-in-law, was obliged to provide the said relict, after all legal manner, conform to the laws of Scotland; this contract being made in England, where the parties and the father also then dwelt and remained for the time, and being made after the manner of English securities, by way of indenture, wherein each party was mutually obliged to each other in their own part, and the double of which indenture was mutually interchanged, every one of the parties having one for their security of the other's obligations; likeas, the person obliged to give the conjunct-fee, and to whom the tocher was to be paid, for his further security of the payment of his tocher, received a bond beside the indenture, whereby the party was obliged to pay the same to him, of a date some days posterior to the indenture;—the defender *alleging*, That there was a sum promised to him in tocher by the said contract, which was not paid; and, it was the form and practise of the laws of England, that no conjunct-fee should be given to the wife, until the tocher were first paid, and so no action could be sustained here in Scotland against him, while that part were first performed to him, seeing he ought in this case to be ruled by the English laws, being done in England, and the tocher of an English woman, and all the parties dwelling then in England; and the other party opposing the contract, bearing, that the woman should be made sure after the law of Scotland;—here it offers to be considered, how far English writs, bonds, or other securities should be admitted, to produce action or exception in Scotland, and what form is required to loose such securities; whether they may be loosed after the laws and custom of the realm, where they are made, or if the law of this realm should be observed, in proceeding to dispute thereon, either for maintaining of pursuits thereon, or for eliding of the same by exceptions qualified, and to be tried and proven after the laws of this realm, or of the realm where the writs were made, and whether it may be alleged, that such trial would be there admitted.

*July 27.*—IN this action, whereof mention is made, March 7. 1633, the LORDS found that exception proponed for the defender, upon the custom and laws of England, where the indenture was made to be relevant, viz. that the party to whom tocher should be paid by an indenture, and who again is obliged to give a jointure or conjunct-fee to the other party, if he send at the first term to seek that proportion of the tocher, which by the indenture is appointed to be paid at that first term, and receives not payment accordingly, that *eo casu* he is not obliged to give the jointure or conjunct-fee, neither can action be moved against him therefor; which was so found, albeit the defender was obliged to provide the conjunct-fee to the woman, after the manner and laws of Scotland; for, the LORDS found, that provision should be made to her, seeing the lands lay in Scotland, if the indentures were obligatory against him; but this exception tended to make the party free of all obligation thereby. Thereafter it was *replied*, that the tocher behoved to be repute as paid, seeing *instrumentum cancellatum apud debitorem repertum præsunit liberationem*; and it is true, that this part of the indenture, which the defender had, with the bond granted thereafter, was found in the parties hands, who was obliged in the tocher, and is now cancelled in the pursuer's hands. This reply was not respected, but the exception sustained notwithstanding thereof, because that presumption of the law holds not, where there is other probation competent to prove the debt, by and beside that writ cancelled, which is in the debtor's hands, as in this same case where the pursuit was founded upon the title of the other part of the indenture produced by the pursuer, which bearing this clause of payment of the tocher, the defender might in law propone any exception upon the writ which was used against him, to liberate him, and the retiring of the other part of the indenture prejudged him not thereof; for the party pursuer, haver of the other part of the indenture, ought to have taken a discharge from the party, of that clause conceived in his favours, if she had intended to be free of her obligation, by retiring of the writ, without which the retiring thereof could not free her, in respect the other double of the indenture, which was in her own hands, would ever prove the debt against her, if she had intention to pursue thereon and to use it; and this was done so, because the defender offered to prove, that he sent his son with these writs to crave the tocher in England from the woman obliged; and thereafter his son dying, this pursuer and her mother intromitted with these writs, whereupon he was ready to make faith, having no other probation; which was thought the more favourable, seeing it was never alleged, nor could be shown, that ever any part of the tocher was paid at all. And thereafter the pursuer *answering*, That she offered to prove that bonds, being so found in the debtor's hands, as she has alleged in this case, are sufficient to liberate the debtor for ever, according to the laws in England, perpetually observed, this reply was sustained upon the custom of the laws of England, and admitted to the pursuer's probation.

Act. *Stuart & Macgill.*Alt. *Nicolson & Gilmor.*Clerk, *Gibson.**Durie, p. 679, 691.*