only that it was presumed to be as the appellant stated it, from the evidence which was brought. The decree in favour of the appellant reducing the bonds, is equal to a discharge; and so long as that decree stands unimpeached, no benefit can be made of these bonds against the appellant, and they are equally safe for both parties, when in the custody of the Court, and not to be delivered out without a warrant.

After hearing counsel, *It is ordered and adjudged, that so much of the interlocutor of the 22d of July* 1725, *as is appealed from, be reversed; and it is further ordered and adjudged, that the Lords of Session do cause the appellant's costs and expences to be taxed and ascertained; and that the same, when so taxed and ascertained, be forthwith paid to the appellant by the respondent: And it is further ordered, that the other interlocutor complained of in the said appeal be affirmed.* Judgment, 4 April 1726.

For Appellant, *Dun. Forbes.* *C. Talbot.*
For Respondent, *Ro. Dundas.* *Will. Hamilton.*

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Dame Margaret Houston, Widow of Sir John Houston, Bart., Assignee and Executrix of Dame Helenor Schaw, the Mother of the Appellant and Respondent, *Appellant;*

Sir John Schaw, Bart. - - - *Respondent.*

Case 128. Forbes, 5 Jan. 22 June 1709. 19 July 1711.

20th *April* 1726.

*Proving the Tenor.—Presumption.—Mutual Obligation.*—In an action by a mother against a son for proving the tenor of a deed executed by her during her husband's life, it is found that the pursuer's having the disposition cancelled in her hands, and never ratifying the same judicially, presumed that it was cancelled by herself.

This cancelling dissolved the obligations of a bond, granted by her husband in consideration of said disposition.

In regard the pursuer's counsel did not deny that the cancelled deed was in her hands, and refused to give their oaths of calumny thereon, the defender is assoilzied.

*Costs and Expences.*—These interlocutors pronounced in 1711, are appealed from after the death of the pursuer, by her daughter and executrix, but are affirmed with 50*l.* costs.

IN the process between Dame Helenor, and the respondent, relative to the annuity of 8000 merks claimed by her, and the proving of the tenor of the bond, by which the same was granted to her, which are fully stated in the other appeal, between the present parties (No. 126 of this collection), the Court of Session, on the 19th of July 1711, "Found that Dame Helenor "having the disposition cancelled in her hands, and never ratify-"ing the same judicially, presumed in law, that it was cancelled "by herself, and therefore that the obligements on Sir John by

" the bond are diſſolved." Againſt this interlocutor Dame Helenor proteſted for remeid of law, but did not preſent an appeal to the Houſe of Lords.

The preſent reſpondent afterwards offered to refer it to his mother's counſel, whether they had not ſeen the cancelled deed in her cuſtody; but they declined to depone, and the Court, on the 25th of July 1711, " In reſpect that in the debate, Dame He-
" lenor's having the cancelled diſpoſition in her cuſtody was not
" refuſed, and that her advocates refuſed to appear to give their
" oaths of calumny, becauſe of the appeal interpoſed, aſſoilzied
" the ſaid Sir John Schaw."

Entered, 25 Jan. 1925-6.

The appeal was brought by the appellant as executrix of her mother from " two decrees of the Lords of Seſſion made the " 19th and 25th days of July 1711."

*Heads of the Appellant's Argument.*

The bond for payment of the annuity of 8000 merks, executed by Sir John Schaw the father, with conſent of the reſpondent his ſon, was for a full and valuable conſideration, given at the time of executing that bond, equal to the annuity, *beſides* the ſettlement Dame Helenor made of her eſtate of Carnock and Plain in favour of the reſpondent, at ſame time, and as a part of the conſideration of the annuity.

The ſettlement in queſtion never was produced, ſo that it could not appear whether it was ratified or not, if that had been neceſſary: nor was any proof made or attempted to ſhew that it was cancelled, much leſs that it was cancelled by Dame Helenor. No inference ought to be drawn from her counſel's not appearing to anſwer upon oath: this was an unuſual proceeding, and ought not to have been allowed. Their reaſon for not appearing was, becauſe, after the interpoſing of the proteſt for *remeid* of law, the appearing at any further proceeding in that court might have been conſtrued as a paſſing from the appeal. Beſides, it is immaterial whether the cancelled deed was in Dame Helenor's hand or not; it might have come to her accidentally after her huſband's death; or ſhe might have recovered it from the cuſtody of third parties, and have ſhewn it to her counſel, to be adviſed as to the import and effect of it: therefore, though her counſel had ſeen it in her cuſtody cancelled, it would have been no evidence that it was cancelled by her. Dame Helenor, in the whole courſe of the action, abſolutely denied that ſhe had cancelled the ſaid ſettlement, and therefore it was not, as the appellant conceives, conſiſtent with the rules of juſtice or equity to preſume that ſhe had done ſo.

But ſuppoſing the ſaid Dame Helenor had cancelled the deed (which ſhe did not), her cancelling it would not have avoided the covenants of it, and the tenor might eaſily have been proved: ſhe offered, too, to have executed a new deed to the ſame purport, which ſhe afterwards actually did.

*Heads*

*Heads of the Reſpondent's Argument.*

Though by the accident of the old lady's living, and not marrying again, the cancelling of the conveyance came to be of no conſequence; yet if ſhe had died, or married a ſecond time ſoon after her firſt huſband's death, the conſequence would have been no leſs than the loſs of the fee of the eſtate of Carnock and Plain to the reſpondent, which, the diſpoſition being cancelled, he then could not claim. The act, therefore, that cancelled that diſpoſition, defeated the annuity dependant upon it; and nothing can be more unequal than to ſuppoſe in the old lady a power of defeating her own deed by cancelling it, and at ſame time of preſerving the obligation to pay the annuity which was the conſideration for making it, and renewing the ſame diſpoſition at the diſtance of many years, when the growth of thoſe annuities made it advantageous to claim them.

But in reality the appellant is not properly entitled to carry on this appeal; her right to do ſo is dependant upon the deed in 1711, which was revocable, and was in effect revoked by the deeds of 3d March 1722, the final ſettlement of the old lady's eſtate, whereby ſhe ſettled her whole real and perſonal eſtate, upon a certain line of heirs of entail, and conſidered nothing to be her eſtate but the lands of Carnock and the annuity of 2500 merks. Theſe, containing the laſt will and ſettlement of the deceaſed, muſt be conſidered as a revocation of the former conditional grant of the annuity of 8000 merks, made by her when ſhe was out of humour at the decree of the Court of Seſſion, and when ſhe intended to proſecute an appeal, a purpoſe that in the remaining courſe of her life ſhe never took any ſtep to proceed with, and conſequently muſt be preſumed to have relinquiſhed upon after-thoughts.

After hearing counſel, *It is ordered and adjudged that the petition and appeal be diſmiſſed, and that the decrees therein complained of be affirmed: and it is further ordered, that the appellant do pay, or cauſe to be paid to the reſpondent, the ſum of 50l. for his coſts, by reaſon of bringing the ſaid appeal.* Judgment, April 1726.

For Appellant, *P. Yorke.* *Will. Hamilton.*
For Reſpondent, *Dun. Forbes.* *C. Talbot.*