for making a new law; but, as the law ſtood at preſent, the bill was good and probative. No 16.

THE LORDS found, That a bill granted on death-bed, was not a legal method of conſtituting a debt or legacy, even to affect moveables, in ſo far as the bill was gratuitous.

Reporter, *Lord Cullen.* Act. *Jo. Forbes.* Alt. *Pat. Grant.* Clerk, *Mackenzie.*
*Fol. Dic. v.* 1. *p.* 95. *Edgar, p.* 31.

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1736. *November* 26. and *January* 7. 1737.
WEIR *againſt* PARKHILL.

No 17.
Found in general that a donation cannot be conſtituted by a writing in the form of a bill.

MARY WEIR, relict of Malcolm M'Gibbon muſician in Edinburgh, accepted a bill for L. 7000 Scots, payable to John Weir of Kerſe her brother, of a date prior to her ſecond marriage with John Parkhill, of the following tenor: 'Dear 'Siſter, Pay to me, John Weir of Kerſe, or my order, at my dwelling-houſe in 'Edinburgh, eighteen months after date, the ſum of L. 7000, Scots money, 'value due by you to me, as your deceaſed huſband ordered you; make thank-'ful payment, and oblige,' &c.

In a proceſs at Weir's inſtance againſt Parkhill, the ſecond huſband of the ſaid Mary Weir, for payment of this bill, the LORDS, by their interlocutor of the 26th November 1736, Found, 'that a donation cannot be conſtituted by a writing in the form of a bill, and found it proved by the tenor of the writing in queſtion, that the ſame is gratuitous, and therefore ſuſtained the defence and aſſoilzied.' And, on adviſing petition and anſwers, by their interlocutor 7th January 1737, Found 'that a donation cannot be conſtituted by a writing in the form of a bill; and found it proved by the tenor of the writing in queſtion, joined with the purſuer's admiſſion in the courſe of the proceſs, that there was no teſtament executed by the deceaſed Malcolm M'Gibbon, Mary Weir's firſt huſband, ordering the payment of the ſum in debate, and therefore found that the ſaid writing is gratuitous,' and with that addition, 'adhered to their former interlocutor.'

Neither of the ſtatutes 1681 nor 1696 have ſaid any thing to determine what is a proper bill, what not. They have given force to no writing as a bill, which ſuch writing would not have had before. All they do is, to give the further privileges of annualrent, and diligence, to writings, ſuppoſed to be probative as bills; ſo that what writing conſtitutes a bill, is left to be gathered from the practice, and law of nations; and as, by the practice of nations, bills were deviſed as a vehicle for tranſporting money, for the utility of commerce; it was ſaid, that the very firſt notion of a bill was, that it be for value, either with reſpect to the drawer or acceptor; and where no value is, the very reaſon ceaſes for which bills were, by the practice of nations, introduced.

No 17. THE LORDS went even further in the caſe, Fulton and Clerk *contra* Blair, 9th November 1722, No 15. p. 1411.; where they found, that a bill, granted by way of donation *mortis causa*, was void, even where the bill was abſolute in its form; it being proved, that the real cauſe of it was a donation; which was perhaps going too far: For, whatever may be ſaid as to bills bearing *in græmio* to be gratuitous, or what imports it; yet where a bill is *ex facie* formal, that it ſhould become void, becauſe, upon enquiring into the cauſe of it, it is found to have been a donation from one to his friend, would ſeem not ſo eaſy to juſtify.

*Fol. Dic. v.* 1. *p.* 96. *Kilkerran*, (BILL of EXCHANGE.) *p.* 68.

*** C. Home reports the ſame caſe:

MARY WEIR, relict of Malcolm M'Gibbon, having ſucceeded to his effects, did, in the year 1723, marry John Parkhill; and, in their contract of marriage, ſhe diſponed to him all her goods and gear, whether heritable or moveable, pertaining to her, or that ſhe might ſucceed to any manner of way. This marriage diſſolved, by Mary Weir's death, in the year 1734; after which, her brother, the ſaid John Weir, intented an action againſt John Parkhill for payment of a bill, granted by his ſiſter to him, before her marriage with the defender, of the following tenor or contents: 'Edinburgh, March 14, 1723. Dear Siſter, pay to 'me, or my order, at my dwelling-houſe in Edinburgh, eighteen months after 'date, the ſum of Seven thouſand pounds Scots money value, due by you to 'me, as your deceaſed huſband ordered you; make thankful payment, and ob-'lige your humble ſervant.' (Signed) *John Weir*, and addreſſed to, and accepted by, the ſaid Mary Weir.

Againſt this writing, it was *objected:* That the ſame was void, for want of the writer's name and witneſſes; it being no bill *in re mercatoria*, but a plain gratuitous obligation, as appeared from the words of it: Neither did it prove its date; and ſo, if a true writing, might have been granted after the defender's marriage, in which caſe he could not be liable. In ſupport whereof it was *obſerved*, That the extraordinary privilege granted to bills, of their being probative, without the legal ſolemnities, ariſes only from their utility in commerce; but where they are not *in re mercatoria*, as in this caſe; there is no reaſon for ſuſtaining, or giving them any ſuch privilege. On the contrary, they ought to be diſcouraged, as dangerous to property, by opening a door to manifeſt frauds. Another reaſon for allowing extraordinary privileges to bills in mercantile affairs, is, That, by their nature, they are not to ly over, but to be ſpeedily negotiated; and ſo, if falſe, may be eaſily ſubject to challenge: But, if it be allowed, to take a bill in place of a bond, where there is no mercantile dealing, and for no conſideration in money, there is an end of our law, which has introduced the ſolemnities of writings, as neceſſary for the ſecurity of the ſubject. Agreeable to theſe principles, it was found, That a bill was not a legal method of conſtituting a debt or legacy, in ſo far as it was gratuitous, 13th February 1721, Hutton, No 16. p. 1412.; which is extremely ſimilar to the preſent queſtion; ſeeing by the tenor of this obliga-

tion, it is no other, than the acceptance of the burden of a legacy. Now, no reaſon can be given, why a bill for a legacy ſhould be void, for want of the ſolemnities; and that one undertaking the burden of a legacy, ſhould ſtand good. In ſhort, the very nature of a bill is to be for value; and, if it bear to be ſo, that may be ſufficient to ſuſtain it; becauſe the preſumption is on the ſide of the writ; yet, if *in græmio*, it bear not to be for value, but for a gratuitous cauſe; there it ought to have no privileges; if it were otherwiſe, all contracts might be turned into bills. Conform to this reaſoning, it has likewiſe been found, That a bill, granted in the way of donation, *mortis causa*, was void, 9th November 1722, Fulton, No 15. p. 1411.; where it was admitted, That, if it had expreſſed the cauſe thereof, ſo as to point out, that the ſame was a gratuity, it would have been void: Now, in the preſent caſe, this writing is *felo de se*; it is not an abſolute draught; not ſo much as the form of a bill for value; but bears its cauſe to have been a verbal legacy; which, it is pretended, the acceptor's huſband left to the drawer; and which ſhe could not have been obliged to pay. It is upon the ſame foundation, that bills, bearing annualrent and penalty, are void; ſuch ſtipulations not being ſuitable to the nature of the obligation. No 17.

As to the laſt part of the objection; it was obſerved, That, if ſuch obligations were to prove their dates, no huſband could ever be ſecure againſt the deeds of his wife; it being ſo eaſy to antedate them, eſpecially for gratuitous cauſes; nay, every reaſon, that makes holograph writs not prove their dates againſt an heir, concurs in ſupport of this part of the objection.

*Answered* for the purſuer: There is no foundation in law for maintaining, that a bill, given by way of pure donation, will not be valid: May not a man, who intends to make a preſent of a hundred pounds, accept a bill for the payment of it? Surely that will be as obligatory upon him, as if it were for value: The purſuer is at a loſs to find out a reaſon for doubting; ſeeing, if a man, who was not debtor *ab ante*, can gratuitouſly make himſelf ſo by a bond; it is inconceivable why he ſhould not be able to accept a bill for that ſum. The law gives force to all inland-bills, or precepts in general, without diſtinguiſhing whether for value or not; and, therefore, the preſent one, though it were gratuitous, is ſecure againſt this objection; at the ſame time, it is not altogether ſo, being granted in implement of her huſband's requeſt, to whoſe effects ſhe ſucceeded; had ſhe paid the money, it could not have been repeated *condictione indebiti*; conſequently, it is evident, the bill was binding on her; and, of courſe, muſt affect her huſband, who cannot pretend to take her eſtate, without the burden of her debts. It is true, that where the form of the obligation has deborded from the common nature of bills, and parties have ſought, under the colour thereof, to create a different contract, the Court has juſtly diſregarded ſuch writings; but, when there is a drawer and acceptor, and a fixed term of payment of a certain ſum; which properly conſtitutes a bill; it has never yet been found, that ſuch writing is not entitled to the uſual privileges. Indeed, a bill to pay a ſum of money after the acceptor's death, accepted in truſt, that, if the party did not then die, it was to

No 17.

be given up, and, if he did die, the ſame ſhould ſtand as a legacy, was declared void, in the caſe between Fulton and Clark, No 15. p. 1411.; becauſe, obviouſly, this tranſaction was the making a will, and not the acceptance of an order to pay a ſum of money: As this was the fact, it amounted to no more than a legacy, or *mortis causa donatio;* and therefore the Court, very juſtly, would not ſupport the writing: But here the draught is pure and ſimple, having no quality, or condition, to difference it from the common ſtyle and nature of bills; wherefore it muſt ſtand, as long as the act 1696. An obligation likewiſe to pay a ſum of money with annualrent and penalty, is clearly a permanent ſecurity, for money intended not to be paid, but to ly at intereſt; and therefore is directly oppoſite to the form and nature of a bill; ſo that, though it may be conceived in appearance, by way of draught and acceptance, to entitle it to the privilege of one; yet, in reality, it is not a bill; and the ſuſtaining it as ſuch, would encourage conceiving permanent ſecurities in that form, which might be attended with great danger. With reſpect to the hazard, to which the lieges would be expoſed, if ſuch deeds were ſuſtained, from the impoſſibility of diſproving their dates; it was acknowledged, they were undoubtedly liable to many abuſes; but that was nothing to the purpoſe; ſeeing the ſtatute has ſaid, That they ſhould be valid; and, therefore, ſo long as it remains in force, ſuch conſiderations can have no weight.

The Lords found, That a donation could not be conſtituted by a writing in form of a bill; and that there was no onerous cauſe for the writing produced.

*C. Home, No* 36. *p.* 67.

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1782. *December* 2. James Adam *againſt* Thomas Johnstone.

No 18.
A bill was granted by a donor, *mortis causa*, to a confident perſon, on purpoſe to effectuate the donation, by means of that perſon's interpoſing his bill to the donee. The tranſaction was ſupported by the Court.

John and William Russel, in the name of Adam, their indorſee in truſt, ſued Johnſtone for payment of two bills, as having been drawn by them ſeverally upon, and accepted in their favour, by Johnſtone's deceaſed father, for the purpoſe, as they avowed, of making donations *mortis causa* to his widow; who was their ſiſter, and Johnſtone's ſtep-mother; and to his children by her; the Ruſſels, on the other hand, having granted equivalent bills to the donees. By theſe means the legacies ſeemed not to be immediately conſtituted by the donor's bills.

*Pleaded* for the purſuer; Donations, it is admitted, or legacies, cannot be conſtituted by bill of exchange; ſo that, had the bills in queſtion been granted immediately to the donees, they would, no doubt, have been ineffectual. But to the Ruſſels, they do not conſtitute any donation; having been given for a ſpecific value; which was the equivalent bills accepted by them in favour of the donees; in the ſame manner, as if money itſelf had been paid to the latter. That objection therefore would be miſapplied, if urged on the preſent occaſion. Nor does it make any difference in the caſe; that the perſons to whom the Ruſſels granted the equivalent bills, were their own ſiſter, and her infant children.