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.

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.

Answered; It is that very circumſtance, which ſeems deciſive of the cauſe. The purſuers muſt admit farther, that a bill of exchange is equally invalid, as a document of donation; whether it be granted through the medium of a truſtee, or immediately to the donee himſelf. Now the avowed object of the whole tranſaction above-mentioned; and eſpecially of the interference of the Ruſſels; being to effectuate donations to their ſiſter and her children; their character of truſtees, is apparent; notwithſtanding that the mode they adopted, of diſcharging the truſt, was by interpoſing their own bills. Even apart from their avowal, that they did this, with an intention ſo very oppoſite, to that of perſons who truly, or *bona fide*, bargain; exchanging a *quid pro quo*; the law would have preſumed ſimulation, from the cloſe connection, in which they and the donees ſtand to each other; all conjunct and confident perſons in the ſtricteſt ſenſe. The mere appearance, then, of bills of exchange; a circumſtance evidently, or confeſſedly calculated, to elude the law; cannot in reaſon merit any regard. *Plus valet quod revera agitur, quam quod simulate concipitur.* No 18.

Accordingly, if, in practice, effect were to be given to ſuch a proceeding, independent of the true object of parties; thoſe ſalutary regulations of ſtatute that require, to effectuate a donation, other vouchers than bills of exchange; which, for facilitating commercial dealings only, are exempted from the preſcribed ſolemnities, would aſſuredly avail but little. For let it be ſuppoſed, that fraud in this matter is intended; and then, it is likely, two or more bills conceived in favour of different perſons, aſſociates in the crime, may be as eaſily produced as one. On the purſuer's hypotheſis, however, the reſult muſt be ſtrange. Though any one of thoſe bills alone would not; yet the whole together, will neceſſarily become, legal documents of donations or legacies; not leſs effectual, than the moſt formal and regular deeds; ſince all that is neceſſary to their complete efficacy, is the mutual interchange amongſt the aſſociates, of bills equivalent to thoſe containing the pretended gratuities. Thus, for example, if the aſſociates A and B hold each of them a bill for L. 100; to give full effect to their ſcheme, A needs only to frame an equivalent bill as granted by him to B, and B again to do the ſame thing reſpecting A. They will then be furniſhed with preciſely the ſame argument, as is urged by the purſuer; that the bills in their favour were given for value, contained in thoſe, which they mutually accepted in favour of each other. So that were that plea to be a ſucceſsful one; it could hardly hereafter be ſaid with propriety; that donations or legacies might not be conſtituted by bill of exchange, as well as by bond or latter will.

Obſerved on the Bench, Prior to the late act of Parliament, limiting to ſix years the commencement of action on bills of exchange; as they might have been brought in ſuit, at any time within the period of the long preſcription; there was evidently a much greater danger of frauds being committed by means of them; than there has been ſince that enactment. Hence thoſe documents are to be conſtrued, with leſs ſuſpicion and ſtrictneſs, now than formerly.

No 18. The Court, in general, ſeemed to adopt the argument of the purſuer; which they did not conſider as obviated by that of the defender.

THE LORD ORDINARY had repelled the defence; and on adviſing a reclaiming petition, with anſwers,

THE LORDS adhered to the Lord Ordinary's interlocutor.

Lord Ordinary, *Westhall.* Act. *Hen. Erskine.* Clerk, *Hume.* Alt. *W. Steuart.*

Stewart. *Fol. Dic. v.* 3. *p.* 75. *Fac. Col. No* 74. *p.* 113.

*** *See* Barbour and Blackwood againſt Hair, Fac. Col. No 62. p. 95. 8th February 1753, *voce* HUSBAND and WIFE.

See Dowie againſt Millie, Fac. Col. No 254. p. 390. 2d February 1786, *voce* LEGACY.

SECT. IV.

Of Bills with clauſes ſtipulating Annualrent and Penalty.

No 19. 1727. INNES *against* FLOCKHART.

A BILL bearing a penalty and annualrent, from a term preceding the date, found null; and no action competent againſt the acceptor upon it.

*** This is the import of the above caſe as ſtated in the printed pleadings in Thoirs againſt Fraſer, Sect. 8th of this Diviſion. The ſtatement of it in the caſe below is different.

No 20. Bills are ſuſtained, tho' bearing annualrent from the date, and before the term of payment.

1727. *December.* HENDERSON of Gairdie *against* SINCLAIR of Quendal.

SINCLAIR of Quendal being debtor for ſome feu-duties to Henderſon of Gairdie, upon the 2d February 1725, accepted a bill for the bygones, payable 1ſt October thereafter, bearing intereſt from the date.

Againſt this bill, an objection of nullity was made; as not being of the proper nature of a bill; becauſe it bore annualrent *in gremio*, not from the term of payment, but from the date. And it was urged, that bills are *ſtricti juris* writs of a certain form and tenor, againſt which there is no liberty to tranſgreſs: But here the clauſe objected againſt, is even contrary to the nature of bills; which bear annualrent after the term of payment only, *ob moram*; but never from the date. And the caſe was cited betwixt Innes and Flockhart, determined January 1727, (*ſupra*,) where a bill was found null, 'as bearing annualrent from the term of payment,