

much; for this would liberate all cautioners, and annul hundreds of deeds given for love and favour; besides her negligence in letting it be lost in her house, on the edict *nauta caupones*. Neither is it of any weight, that it is only a verbal legacy; for that restriction only holds where it is left payable after their death; but here the bank-note was called for to have been instantly delivered in her lifetime; and her promise needed no present acceptance; for they may be made to infants, idiots or absent, and yet bind; and it is a mere quibble to say he did not declare his acceptance; for who in his right wits would reject and repudiate such an express offer? THE LORDS found the promise obligatory, and sufficiently proved by her oath; but allowed her yet to instruct he was *aliunde* paid, if she would burden herself therewith.

*Fountainhall, v. 2. p. 697.*

No 22.

1717. July 10.

PATERSON *against* INGLIS.

A DEBTOR'S relict having written in the postscript of a letter, not to the creditor, but to a third party, these words: 'Shew such a person that if I were come, &c. she shall be paid, &c. if it be His holy will to spare me;' the LORDS found that these words not only imported a resolution, but an obligation. See APPENDIX.

*Fol. Dic. v. 2. p. 16.*

No 23.

1723. January 2.

KENNEDY *against* KENNEDY.

HUGH KENNEDY disposed his estate upon death-bed in favour of his son, and failing him, to Sir John Kennedy. After the son's death, this deed being called in question by Hugh Kennedy of London, a remote heir, Sir John Kennedy *alleged*, That the son, apparent heir at the time, had homologated the deed, which made it unquarrellable by any remoter heir; and he produced a missive letter in these words: 'Depend on it, I shall adhere to that right my father made failing me in your favour; and that you may give the more credit to what I here aver, I have made no other title to my estate, but have used the same as my evident.' It was *pleaded*, That this did only import a resolution, but no direct ratification or homologation; which accordingly the LORDS found. See APPENDIX.

*Fol. Dic. v. 2. p. 16.*

No 24.

1737. January 28. PATRICK ROBERTSON *against* MACKENZIE of Fraserdale.

THE deceased Lord Prestonhall, *anno* 1710, granted a bond to Agnes Cockburn, his servant, bearing, That he was justly resting and owing her the sum of

VOL. XXIII.

52 O

No 25.  
Found that  
a bond for an  
onerous cause,  
bearing, that,  
in case it was

No 25.  
resting un-  
paid at the  
creditor's  
death, it  
should belong  
to the debtor's  
heir, might be  
gratuitously  
assigned, al-  
though rest-  
ing at the  
creditor's  
death.

1000 merks, which he obliges himself, his heirs, &c. to pay to her at Martinmas then next, after which is subjoined the following clause: 'And in case the said Agnes Cockburn shall not call for the said principal sum, and uplift the same, with the annual rents thereof, before her death, then, and in that case, the said sum, with the annual rents thereof, or what part of the same shall be resting unpaid at the said time, is hereby declared to belong to Alexander Mackenzie of Fraserdale, my son, with the burden of the said Agnes Cockburn, her burial, in such way and manner as she shall appoint before her death.' Agnes assigned this bond to Patrick Robertson, who, after her death, intended a process against Fraserdale, as representing his father, for payment.

The defence was, That the bond being granted partly for wages, partly as a remuneration for faithful services, was plainly intended as a fund of maintenance for the said Agnes Cockburn; not that she should have liberty to alienate the same in prejudice of the defender, to whom, by the tenor thereof, it was to belong, in case she died without uplifting the same. It was owned she might have spent the money, and that her creditors, during her life, could have attached it; but, that her power and property therein died with herself; therefore the bond fell to be considered as conditional, payable to Agnes, secluding heirs or assignees; and, failing her uplifting it, to the defender.

2dly, The clause imports a return in favour of the granter's heir, which is more than a simple destination, so that a prohibition to alter gratuitously is implied; of consequence, the pursuer should prove the onerous cause of granting the assignation; for the narrative thereof, bearing that the assignee had made payment to the cedent of sums equivalent to the bond assigned, is not evidence sufficient of the onerosity; otherwise, every person who was under a prohibition to alienate gratuitously, might render such limitations elusory and ineffectual.

Answered; That the clause, upon which the defence is founded, imports no more than a substitution in favour of Fraserdale, whereby the debtor was taken bound to pay the money, in case it remained unuplifted, which could not disable the creditor, to whom it was payable simply, without any condition to dispose thereof. It is true, Agnes preferred Fraserdale to her own executors, but there is nothing in the bond that shows she intended to tie up her own hands; 2dly, The assignation was granted for an onerous cause, and the narrative thereof presumes the fact to be so, the cedent and assignee not being conjunct persons; but, whether onerous or not, is no way material, seeing she could have gratuitously altered the substitution.

THE LORDS found, That the bond being for an onerous cause, Agnes Cockburn could assign it gratuitously.

*C. Home, No 51. p. 90.*

No 26.  
A letter from  
a brother to  
a sister, pro-

1751. November 29. MARGARET KER against KER of Keith.

MARGARET KER, and John Stevenson, her husband, pursued Alexander Ker of Keith, her brother, upon a missive letter wrote by him to her, in these terms,