These specialties exempted that case from the general rules for which the chargers contend. It is farther to be remarked, that, in the case *Grosset* against *Murray*, it was proved, by the evidence of the most eminent merchants, that, when bills are indorsed in security, or to be applied in extinction of a debt when paid, the indorsee is not held in practice to be bound even to protest such bills, unless he be particularly desired. Grosset admitted the justice of this rule; but he ultimately prevailed by showing that it was not applicable to the circumstances of his case.

"The Lords suspended the letters *simpliciter*."

OPINIONS.

AUCHINLECK. The question is, What was the nature of the right granted to Falls, whether in payment or in security only? The bill was transmitted by Porterfield, taken by Falls, under the condition when paid. This did not bind them to take it in payment, but to do the needful for recovering payment. Were they not obliged to do some diligence, their correspondent would have been in a miserable situation. The next question is, Whether there was proper negotiation in this case? A bill, payable at sight, differs from a bill payable at a day certain; for the holder of a bill at sight may present sooner or later at his conveniency: but here the bill was not accepted by Borthwick, when presented: intimation ought to have been to Porterfield: this neglected, no recourse.

GARDENSTON. If the *porteur* negotiates, and does not obtain payment, he has recourse; but not, when, instead of negotiating, he sits with his hands across.

ALEMORE. This bill was contended to be in payment. Suppose Falls had ordered the money to be sent to a particular person, any loss thence arising would have been theirs: So here they ordered a bill on Edinburgh at sight. The case of *Cumming* against *Alexander* is not fit to be a precedent. The case *Murray* against *Grosset* was determined upon this, that exact negotiation was always required. The like was determined in the case of *Haliburton and Brebner*.

PRESIDENT. This bill was granted *in solutum*, so far that Falls ordered the money to be sent, and got the bill upon sight in return of that order.

COALSTON. Upon the supposition that here a security alone was received, which I incline to believe, I doubt whether there was any need of negotiation at all.

1766. *June* 18. ANN MURRAY *against* ELIZABETH DREW.

BILL OF EXCHANGE.

The Drawer of a Bill, bearing to be "for value received," having, in the course of an action on the Bill given different and inconsistent accounts of the cause of granting; *found* that he must prove onerosity.

DAVID Drew, merchant in the isle of Whithorn, acquired some fortune by

merchandise. He had a sister-german, Elizabeth Drew, and a sister uterine, Ann Murray, the pursuer and defender in this action. On the 12th May 1760, David Drew executed a disposition of his whole estate, heritable and moveable, in favour of Elizabeth Drew, his sister-german. He burdened her with a legacy of £100 sterling to the children of Ann Murray, and with an annuity of £3 sterling to Ann Murray herself,—" it being an express condition of this grant, as to her, that she shall behave herself to the satisfaction of Hugh Hawthorn of Castlerig." On the 2d March 1761 he granted a factory for the management of his affairs to Alexander Laurie, son-in-law of Elizabeth Drew. This factory proceeded on the narrative, that " in the present state and circumstances of my health, I cannot manage, follow forth, and pursue my business and affairs as formerly." On the 21st March 1761, David Drew, as it is said, signed, as acceptor, a bill, drawn on him by Ann Murray, for the sum of £65 sterling, bearing for value received, and payable fourteen months after date: Neither the body of the bill, nor even the word *accepts*, is in the handwriting of David Drew. In December 1761, David Drew died, and was succeeded in his fortune by Elizabeth Drew, his universal disponee. In July 1763, Ann Murray insisted, before the Sheriff of Wigton, in an action against Elizabeth Drew, for payment of the bill of £65 sterling. By her first plea, before the Sheriff, she set forth that the bill had been granted as a donation, or as a remuneratory acknowledgment of her services in managing the mercantile and domestic concerns of David Drew. She afterwards pleaded more definitely, that, if it were necessary to prove the bill onerous, she was ready to prove, by her own oath, that she had performed services to her brother, and that she got the bill for those services. The Sheriff found that no action could lie upon the bill, because it was acknowledged to be a legacy or donation. This judgment being pronounced, Ann Murray preferred a reclaiming petition, wherein she set forth that her procurator had given an imperfect view of the arguments which she had furnished to him; that the remuneration for her services had no connexion with the bill; and that those services still remained due. She pleaded that she had been in the practice of borrowing from and lending to her brother, David Drew; that at the date of the bill matters were stated between them; and that there came out in her favour a balance of £65 sterling, the sum for which the bill was granted; and this also she offered to prove by her own oath. The sheriff-substitute, without allowing Elizabeth Drew to see and answer this reclaiming petition, *de plano* allowed Ann Murray to instruct the onerosity of the bill by her own oath. Elizabeth Drew removed the cause from the Sheriff by advocation. Before the Lord Stonefield, Ordinary, Ann Murray pleaded a new defence in support of the bill, namely, that she had put a sum of money into the hands of her brother, in order that he might therewith purchase goods for her in England, and that, as his health prevented him from so purchasing, the bill was granted by him as a document of the money having been put into his hands.

On the 12th June 1765, the Lord Ordinary assoilyied Elizabeth Drew.

On the 27th November, and 13th December 1765, and on the 12th February 1766, he repeatedly adhered. Ann Murray reclaimed, and answers were put in to her petition.

ARGUMENT FOR THE PURSUER :—

The bill in question bears to be granted for value, and it cannot be disproved but *scripto* or *juramento* of the drawer : the value given was money lodged in the hands of David Drew for the purchase of goods which, in fact, he did not purchase. The pleas, that the bill was a donation, or remuneratory, or for the balance of accounts, were pleas injudiciously and unwarrantably made by a country procurator ; and the consequences would be dangerous were such hypothetical allegations held equivalent to the formal assertion of the parties themselves, or of their counsel in the Supreme Court. But, supposing the bill to have been gratuitous, it is not a decided point that a donation may not be constituted in the form of a bill. Bills were first received into Scotland with a view to mercantile transactions, and in some sort contrary to the nature of legal securities : At first they respected foreign commerce, afterwards they were extended to inland trade, at last they came to be used in all transactions indiscriminately, whether of a mercantile nature or not. Thus bills are every day drawn and accepted by men who do not come under the denomination of merchants. Thus, in practice, inland bills, instead of being reputed mercantile transactions, are considered as mandates given by one party and accepted by another. Now the proper idea of a mandate is that of a contract purely gratuitous ; insomuch, that, if a valuable consideration intervene, it is no longer a mandate, but the contract *locati conducti*. The last decision of the Court pronounced upon this question shows that a donation may be properly constituted by a bill. On the *8th February* 1753, a question was determined between *John Barbour* and *Agnes Hair*. Humphrey Barbour, some days before his death, delivered two bills to his wife, indorsed blank, and used expressions, at delivery, implying his desire that she should keep them to her own use. The executors of Barbour pursued her for delivery of those bills. " The Lords found the bills in question were properly conveyed to the defender, and therefore sustained the defence against the delivery." Were bills an inhabile method of making a donation,—*a fortiori*, the indorsation of bills, especially when indorsed blank, is an inhabile method of making a donation. The inexpediency in the one case is greater than in the other : for a bill indorsed blank may be lost or stolen, and thus may be transferred without the intention of the indorser, whereas an acceptor can never bind himself without intention. But supposing the plea urged by the pursuer's procurator to have been true, namely, that the bill was granted on account of services performed to David Drew, it follows that the bill was not gratuitously granted. The acting in the quality of a servant is a valuable consideration ; a bill for money, granted on such account, cannot be gratuitous, and it is customary to grant bills for servants' wages in this form.

ARGUMENT FOR THE DEFENDER :—

The bill in question is in itself suspicious : the name of David Drew is adhibited to it, and no more but his name : even the word *accepts* is in another hand. The bill bears to be granted some few days after David Drew had formally declared himself unable to manage his own affairs. It is made payable at the distance of fourteen months ; that is, it was plainly to be due not till after the death of the granter : add to this the various and inconsistent accounts which the pursuer has given of the cause for which the bill was granted, and

a violent suspicion will arise that David Drew was imposed upon; possibly by signing as acceptor when he meant to sign as drawer. The pursuer, after having pleaded before the inferior Court that the bill was granted as a donation, or as remuneratory of services, cannot be admitted to plead upon causes totally different. That a donation cannot be constituted by bill is a point determined, *13th February* 1724, *Huttons* against *Hutton*; *9th November* 1722, *Fulton and Clark* against *Blair*; and *3d December* 1736, *Weir* against *Parkhill.* The case *Barbour* against *Hair* was determined upon this, that the delivery of an indorsed bill was equivalent to an absolute immediate payment of money. Although mandates be considered, in the Roman law, as gratuitous contracts, bills cannot be considered in that view. They cannot be considered as gratuitous between the debtor or acceptor, and the creditor or *porteur.* He who has effects in his hands, is bound to accept or obey the order to pay. He who, without having effects in his hands, obeys the order, is still entitled to commission, exchange, or other valuable consideration. The pretence of the bill having been granted as remuneratory of services done to the brother, cannot be received without full evidence, and the pursuer's offer to prove this by her own oath, will not be considered as evidence; when it is acknowledged that other causes of granting the bill were also assigned by her, and in like manner offered to be proved by her own oath. As often as she found herself driven from one defence in fact, she resorted to another; and, for proving all those defences, however contradictory and inconsistent, she still made reference to her own oath.

"The Lords found that the pursuer must instruct the onerous cause of the bill in question, according to her allegations in Court."

Act. A. Crosbie. *Alt.* G. Wallace.

OPINIONS.

PITFOUR. The decisions *Hutton* and *Fulton* both proceed upon this, that a bill is not a habile method of constituting a legacy. The case *Weir* against *Parkhill*, 1736, collected by Mr Alexander Hume, was of a bill which bore, *in gremio*, payment of a legacy. Where the bill so bears *in gremio*, the objection is good: but to go farther, and to enter into the investigation of the cause, where a bill bears for value, would be going too far. There is no evidence of a gratuity in this case, nothing but the clatters of a country procurator.

AUCHINLECK. Bills have been introduced for the sake of commerce *contra communes juris regulas.* Bills for gratuities are void: not because so expressed; for, if such cause had been lawful, the expressing the cause would not have hurt the bill. This case gives a strong view of the bad consequences arising from the extension of bills to causes not commercial.

BARJARG. The bill bears for value, and this must be held to have been the cause until the contrary be proved.

JUSTICE-CLERK. Drew was *moribundus* when this bill was signed. It was signed nineteen days after he had granted a factory declaring himself incapable of managing his own affairs. The pursuer's procurator offered a clear categorical state of facts, asserting the bill to have been granted as a gratuity. The pursuer afterwards changed her ground, and, with equal precision, asserted

that the bill was granted for services. This, according to her latest assertions, is altogether false.

KAIMES. There is some difficulty in holding the acknowledgment of the procurator, that the bill was gratuitous, to be equivalent to the pursuer's own acknowledgment; but this difficulty is removed when her vacillancy, during the whole process, is considered.

GARDENSTON. The allegation of Drew's incapacity is nothing; for the only evidence of his being incapable arises from his being capable to grant a factory. There is no evidence that the bill is false. Services performed by a relation is an onerous cause.

COALSTON. The bill bears for value: the objector must prove the contrary. But here the difficulty lies, that the holder of the bill has given different and inconsistent accounts of the cause of granting.

PRESIDENT. Those decisions are good which found that bills debording from their proper form are not probative. The plea of services not relevant, as was determined 11*th February* 1761, *Wright*. The whole circumstances of the fact bear against the pursuer. The *onus probandi* lies on her to make out her last allegation that the bill was granted for value actually received by Drew.

1766. *June* 19. WILLIAM RORISON, Factor on the Sequestrated Estate of Barscob, *against* JAMES SHAW, servant to Patrick Heron, of Heron, Esq., and OTHERS.

Persons carrying off a tenant's cattle, while subject to the hypothec, not liable to the landlord who had done no diligence within three months.

[*Faculty Collection, IV.* 69; *Dictionary*, 6211.]

ROBERT M'LELLAN, of Barscob, granted a lease of the mains of Barscob and others, to William M'Clurg, for the yearly rent of L.40 sterling. The lease commenced with the year 1759, and ended with the year 1763. M'Clurg, the tenant, was a dealer in cattle, and, by bargains of that nature, became debtor to James Shaw and others. He granted bills to them in 1761, 1762, and 1763, for the sums in which he had thus become indebted. About the beginning of the year 1763, they demanded payment, as it is said, and he told them it was more convenient for him to pay them by the delivery of some cattle which he had to sell, than by payment in money. To this proposal of sale, Shaw and the other creditors agreed; they bought from him cows, sheep, &c., and it was agreed, as the creditors contend, that the cattle should be pastured on M'Clurg's grounds until the month of May 1763. Accordingly, M'Clurg kept the cattle till May 1763. On the 17th of that month, Shaw and the other creditors openly took possession of the cattle, drove them off M'Clurg's grounds without challenge, and gave him credit for their prices, by marking payment to that amount on the back of their bills. On the 2d August 1763, the Court of Session se-