

‘ was a waiver or renunciation of any recognition
 ‘ prior to the treason so committed as aforesaid, and
 ‘ that the appellant is bound thereby. And it is fur-
 ‘ ther ordered and adjudged, that the residue of the
 ‘ said interlocutors, with the alterations or varia-
 ‘ tions before mentioned, be, and the same is here-
 ‘ by affirmed.

1744.

 CALDER, &C.
 v.
 PROVAN.

For Appellant, *Ro. Craigie, C. Erskine.*
 For Respondents, *Will. Hamilton.*

PATRICK CALDER of Redford, and } *Appellants ;*
 WILLIAM ANDERSON, Surgeon, }
 MARY PROVAN, - - - - *Respondent.*

12 *January*, 1744.

PACTUM ILLICITUM.—BILL OF EXCHANGE.—Action sustained upon a gratuitous bill which had been granted by a man in security of a promise of marriage, the marriage not having taken place.

Costs.—£40, given to Respondent.

[*Elchies voce* Bill of Exchange, No. 25; Rem. Dec. II. No. 30 ;
 C. Home, No. 193 ; Mor. Dict. 9511.]

MARY PROVAN raised an action against Calder and No. 70. Anderson, concluding for restitution and payment of a bill for L.100, which had been granted to her

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by the former, on her agreeing to marry him, and which she had deposited in the hands of Anderson. Anderson acknowledged that the bill had been lodged with him, and that he had given it to Calder. It was further stated in defence to the action, that the bill was gratuitous, and at any rate that it was granted in a drunken frolic, and never intended to be obligatory, as might be inferred from the circumstance of its having been returned to Calder through the hands of Anderson.

The Lord Ordinary allowed a joint proof, from which it appeared, that Calder, being in a public house in company with some other persons, and considerably intoxicated, conversed much with Mary Provan, (the servant maid,) expressing a great fondness for her; that in the course of the evening they retired together into another apartment, where they remained shut up for about an hour, (but it was not pretended that any unlawful intercourse passed between them); that Provan afterwards came into the room where the company were, and shewed them a paper, which she said was given her by Calder for promising to marry him, or (according to one witness) as a proof of the sincerity of his intention to marry her; but Anderson, and another person, upon examining it, told her it was a bad bill; and then she carried it back to Calder, who wrote and delivered to her another bill, which they told her was a good bill, for L.100, payable at Whitsunday then next; that at Anderson's desire she wrote her name upon the back of it, and left it in his hands upon his promising to be answerable for it, or to pay her the L.100, &c.

The Lord Ordinary (8th July, 1741) found
 “ that there is no evidence that any sinister me-
 “ thod was used by the pursuer to obtain the bill in
 “ debate, nor that the same was granted in the way
 “ of a joke or drunken frolic ; and finds it proven,
 “ that the same having been granted after a long
 “ conversation between the pursuer and Calder,
 “ and after a former bill, which was objected to as
 “ void, was, as is presumed, retired, and the bill
 “ now pursued on granted in place thereof, the bill
 “ is to be presumed to be the result of a lawful
 “ transaction between the pursuer and defender
 “ Calder ; and finds this is supported by the decla-
 “ ration the pursuer made of the cause of granting
 “ the bill, as mentioned in the evidence adduced,
 “ and therefore finds that the same was binding up-
 “ on him, the said Calder ; and finds it proven that
 “ the defender Anderson did receive the bill upon
 “ the sole account of the pursuer, and that he did
 “ wrong in delivering the same up to Calder ; and
 “ therefore repels the defence that the bill was gra-
 “ tuitous, and finds the defenders conjunctly and
 “ severally liable for the sum of L.100 Sterling, and
 “ annual rent thereof, from the term of payment.”

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This interlocutor was altered by the Court, who sustained the defences, and assoilzied ; but upon advising another reclaiming petition, (23d July, 1721) they again altered, and decerned in favour of the pursuer, and to this judgment they afterwards adhered.

The appeal was brought from the interlocutors of 8 July 1741, 23 and 31 July 1742, and 7 January 1743. Entered, 25
Jan. 1743.

Pleaded for the Appellants :—It is apparent from the whole circumstances of the case, that the

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bill was taken without any intention to create a debt upon the appellant, Calder, but as a mere joke against him, who was in liquor at the time; and that it was with the same view that he and the respondent were sent by the company into a separate room, without the suspicion of any unlawful commerce or other transaction which was to pass between them. It is likewise evident that the respondent did not think the bill of any use, as she immediately put it into the hands of the other appellant, instead of preserving it herself, or entrusting it to her own relations in the house.

But supposing the bill to have been obtained by her seriously, still she cannot be entitled to recover upon it in a court of justice. It is admitted that it was given gratuitously; and when it is considered that it was so given by a drunk man to the servant girl in a public house, whom he never saw before, the circumvention must be obvious. That there was any consideration *ex turpi causa*, is not pretended; but if there was, it would only make the respondent's case worse; for all securities obtained by women of that sort, even though deliberately, and from men knowing what they do, are in courts of equity set aside.

Pleaded for the Respondent:—It cannot be held that the bill in question was obtained by any unfair practices on the part of the respondent, whose character was perfectly unblemished. On the contrary, the whole transaction was a scheme on the part of the appellants to inveigle and delude the respondent, whom they have treated in the most fraudulent manner.

Bills granted either in consideration of secret services, or in recompence for a breach of a pro-

mise of marriage, (a reliance on which may have drawn the person to whom it was made into several steps which she would not otherwise have taken,) ought not to be rendered ineffectual, in favour of one who was not only privy to all the most exceptionable parts of the transaction, but confesses himself to have been the contriver of the whole; nor yet in favour of his confederate who, having been likewise privy to the whole design, contrived under pretence of friendship, and upon a promise to be responsible for the value, to get the bill into his own hands.

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After hearing counsel, “it is ordered and adjudged, &c. that the several interlôcutors complained of be, and the same are hereby affirmed; and it is further ordered, that the appellants do pay, or cause to be paid to the respondent, the sum of L.40, for her costs in respect of the said appeal.”

Judgment,
 12 January,
 1744.

For Appellants, *R. Craigie, W. Murray.*
 For Respondent, *Will. Hamilton, C. Erskine.*