SECT. III.

Of Gratuitous Bills.

1722. *November* 9.

MARGARET FULTON and MARGARET CLARK *against* MARGARET BLAIR.

No 15.
Found that a legacy, or *donatio mortis causa*, cannot be habily and effectually constituted by a bill.

THE now deceased James Blair, upon death-bed, granted bills to the pursuers for L. 200 Sterling; for payment of which they insisted against Margaret Blair, the defunct's sister, upon the passive titles. It was acknowledged by the pursuers, 'That there was no value paid for the bills; that they were granted and 'accepted by James Blair, for *love and favour*; that when he accepted the bills, 'and delivered them to the pursuers, he was indisposed; and took them engaged 'by promise, not to show them to any body, so long as he lived; and that if he 'lived, and came to better health, they should give him back the bills.' The bills being thus acknowledged donations *mortis causa*, it was objected by the defender, that a legacy, or *donatio mortis causa*, cannot be habily and effectually constituted by a bill, bills being introduced for facilitating commerce, not to convey gratuities.

It was *answered*, That a donation *inter vivos* is habily constituted by a bill, much more a *mortis causa donatio*, for this reason, that many of the forms, essential to deeds *inter vivos*, are remitted in such as are of a testamentary nature. The pursuers admitted the question would have been much narrower, if the bills had expresly born the cause of granting; because bills are writs of a certain determined form and stile; and if, in any measure, the writ transgresses that form and stile, it is no bill, and has no privilege: But, whatever be the cause of granting, whether it be designed a *mortis causa* deed, or *inter vivos*, if the writ express no more but, *Sir, Pay to Titus, or his order, the sum of blank*, it is a good bill, and enjoys all the privileges; and this is according to the maxim, *expressa nocent, non expressa non nocent*.

Replied: A donation, whether *mortis causa* or *inter vivos*, cannot be constituted by a bill. Bills have their proper subject to which they are confined, namely, *exchange* and *commerce;* and when they relate to other subjects, they have no manner of privilege, but must be found null by the acts of Parliament relating to the solemnities of writs. And there is reason as well as custom for this, because, in all civilized countries, commerce has been highly cherished: And truly, besides the favour, there was a necessity from the nature of the thing, that some short form of writing should be authorised, for facilitating the transactions and dealings among traders; which, were they confined to the ordinary forms necessary in other cases, would, in a great measure, be inextricable. Now, neither the favour nor necessity of the case, can apply to donations in any degree. Add, that the quickness with which these bills circulate, being generally accepted, negociated, and discharged, within a narrow circle of time, is a sufficient guard

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againſt forgeries, which they would be greatly ſubject to, were they allowed to be proper vehicles, for conveying gratuities *inter vivos* or *mortis causa*. The purſuers acknowledgment, that a bill cannot be in the form or ſtyle of a *mortis causa* donation, is an unwary giving up of the cauſe. Can a tolerable reaſon be aſſigned, if a bill may relate to a *mortis causa* donation, that this relation muſt not be expreſſed in the bill? The defender takes it for a general rule, without exception, whatever is the true and lawful *cause* of granting a writ, may truly and lawfully be expreſſed in the writ; and ſhe ſubmits it, if their acknowledgment does not turn ſtrongly againſt the purſuers, That ſince a *mortis causa donatio* cannot be expreſſed in a bill, a *mortis causa donatio* cannot be the *cause* of a bill; and that a bill is not the proper vehicle for ſuch conveyances.

'The Lords found, That a legacy, or *donatio mortis causa*, cannot be habily and effectually conſtituted by a bill.' *See* Legacy.

Fol. Dic. v. 1. *p.* 95. *Rem. Dec. v.* 1. *No* 35. *p.* 72.

1724. *February* 13.

Katharine, Anna, and Christian Huttons, *against* David Hutton.

No 16.
Found, that a bill granted on death-bed, was not a legal method of conſtituting a debt or legacy, even to the effect of affecting moveables, in ſo far as the bill was gratuitous.

These purſuers inſiſted in a reduction of a bill for L. 350 Scots, granted by their father, when on death-bed, to his brother the defender: They alleged ſeveral circumſtances to infer that it had been unduly elicited; but principally inſiſted on this reaſon in law for avoiding of it, *viz.* That it was granted on death-bed, and that it appeared, from the defender's acknowledgment, to be gratuitous, at leaſt as to L. 300, and therefore was of the nature of a legacy, which could not be legally conſtituted by a bill; for a legacy ought to be contained in ſome formal and probative writ, ſuch as a teſtament duly executed: And though bills were probative in matters of commerce, yet in caſes ſo very foreign to that buſineſs, as the granting of legacies, their privileges could not take place. Thus in the caſe of Sir Robert Myrton againſt George Livingſton *, where Sir Andrew Myrton had accepted a bill, as an additional portion to his daughter, payable after his deceaſe, the Lords found the bill null, as not being in *re mercatoria*; and 9th November 1722, Fulton *contra* Blair, No 15. p. 1411. it was found that a legacy, or *donatio mortis causa*, could not be habily conſtituted by a bill. And if ſuch bills were allowed to be granted by one on death-bed, it would make way for many impoſitions upon weak dying perſons.

It was *answered* for the defender: That the law required no other ſolemnities to deeds upon death-bed, than ſuch as were neceſſary in other writs; and, therefore, as bills were probative of a gift, and were good when granted even without an onerous cauſe, by one perſon in health to another, there was no law incapacitating a dying perſon, when in ſound judgment, to give a donative to his friend in the ſame way. And the argument, from poſſible impoſitions, might be good

* *See* Provisions to Heirs and Children.