1742. *January* 23. MARY PROVEN *against* CALDER.

No 60.
A gratuitous bill granted *intuitu matrimonii* sustained, although marriage did not follow.

CALDER, and his companion, Anderson, being one evening in an ale-house at Falkirk, and Calder, in his cups, offering to kiss the servant-maid, was desired to retire with her into another room; from whence, after a short interval, she returned to the company with a bill of L. 100 Sterling, saying, she had got it from Calder upon a promise of marriage, and gave the bill to Anderson to be kept for her. This was made the foundation of a process of exhibition and payment, at the servant-maid's instance, against these gentlemen, in which a proof being admitted before answer, the foregoing fact came out. The defender, Calder, denied that any thing criminal had passed betwixt him and the pursuer; nor was such a thing alleged on the part of the pursuer. But some of the Judges being impressed with the notion that this bill was *præmium pudicitiæ*, and was the means made use of by Calder to debauch an innocent young woman, the defender's lawyers were obliged to state some of their defences so as to meet this suspicion. Admitting that it is highly criminal to attempt the chastity of a virtuous woman, they observed that it may be attended with very bad consequences to countenance a process of this nature, without distinction of persons; as it would infallibly furnish bad women, or those of a suspected character, with an opportunity to pick the pockets of young men, who in drunkenness, or otherways in hot blood, would be an easy prey to them. 2*dly*, That though an obligation granted as a reward after the fact is committed, may be effectual in law, such as a bond granted *causa adulterii*, yet that the law does not countenance an obligation granted upon the condition of doing an unlawful act; action cannot be sustained upon such an obligation, which would be giving countenance to wickedness, and encouraging the same by a solemn judgment. And therefore, as the bill in question is supposed to have been granted, in order to entice the woman to submit to the granter's unlawful desires, it is null as granted upon the condition of doing an unlawful act.

The first argument could only be answered by a supposition, of which there was no evidence, that Mary Proven, though a common servant in an ale-house, was a most virtuous woman, and would not have been drawn to prostitute her body without a very strong temptation. The same supposition was insisted on in answering the second argument. And indeed, upon this supposstion, there is some foundation for distinguishing the present case from those where the condition of the grant is, to commit an action wicked in itself, such as murder or perjury, which ought never to be countenanced by sustaining action for the premium. But, as the yielding to a man's desires is unlawful only as to the manner, and as the temptation may be great to excuse the frailty, there appears to be a tolerable good foundation for awarding damages to the person

No 60. thus corrupted; and consequently, to sustain action upon a bill granted for such a cause.

"It was carried, by a narrow plurality, to repel the defences, and to find the defenders, conjunctly and severally, liable for the L. 100 Sterling."

Patrick Calder thought himself so much injured by this judgment, that he brought an appeal to the House of Lords; and the judgment was affirmed.

Rem. Dec. v. 2. No 30. p. 46.

*** C. Home reports this case.

MARY PROVAN happening to be in a public-house with Calder and Anderson, Calder, in his cups, made love to Mary, and, as alleged, proposed marriage to her; and, upon her expressing some diffidence of him, as he had formerly deserted other girls, he, in order to give her assurances of his sincerity, granted her a bill for L. 100 Sterling; thereby meaning, as she averred, that he should pay the same in case he should not fulfil his promise of marriage, which bill she gave to Anderson, upon his promising either to return the bill to her when she should call for it, or to pay her the sum therein contained. Calder having resiled, and likewise got the bill from Anderson, Mary brought an action against them both, concluding against Anderson the depositary for exhibition and delivery of the bill; and, in the second place, in case of failzie, both against him and Calder for payment. In this process, a proof before answer was allowed of what passed at the time the bill was granted, and, in consequence thereof, several witnesses were examined.

Pleaded for Anderson, That he acknowledged the bill was put in his hands, but not with any serious purpose of being kept for the pursuer; so far from it, that, as the whole affair, from first to last, was transacted in the way of joke, it was understood by every body present, that the bill was not to be made use of, and that he ought to re-deliver the same to the granter, which accordingly he did; and that, even supposing it had been deposited in his hands in terms of the libel, he could only be liable in damages in case the bill should be found valid.

And for both the defenders, it was *urged*, That a bill being granted to the pursuer for L. 100 Sterling, and put into Anderson's hands for her behoof, were facts not relevant to be proved by witnesses; that our law was very jealous of parole evidence, and never admitted the same in matters of importance. If the pursuer had libelled a special *casus amissionis*, or lost *casu improviso*, the necessity of the thing must have made way for a proof by witnesses; but, if people give trust, they must follow the faith of those they do trust, and have no reason to complain of being denied a proof by witnesses, when it was in their power to provide themselves with better evidence. And with respect to the fact, that the pursuer trusted Anderson with the bill, it was said to fall under the act 1696, as a species of trust, and not probable otherwise than by writ or oath.

No 60.

But granting the facts were true, as alleged by the pursuer, the bill is gratuitous, and so not binding, as decided, Weir against Parkhill, No 17. p. 1413.—A promise of marriage, which one is at liberty to retract next moment, may be the impulsive cause to make a deed; but surely it will never be understood an onerous cause to make the deed be considered any thing else than as a donation. *Lastly*, The bill was granted *intuitu matrimonii*, and consequently must fall to the ground, as *causa data, causa non secuta*, since marriage has not followed; and it can never be supported on the supposition that it was only a penalty upon Calder, to be forfeited in case he refused to implement the marriage, as penal stipulations cannot be constituted in the shape of a bill. A promise of marriage, under a penalty, is not effectual, more for the penalty than for the marriage itself; there is *locus pœnitentiæ* with regard to both, *l.* 5. *in fine*, *C. De sponsal*, 21st January 1715, Young, No 68. p. 8473.

Answered for the pursuer, That there is nothing more frequent in our law, than to sustain a proof by witnesses, where the question is concerning the tenor of writs of importance; and that all lawyers agree in this, that *chirographum apud debitorum repertum*, is only a presumption which may be defeated by circumstances; amongst which this is one, if the writ was not given up by the creditor, but came into the debtor's hands in an unwarrantable way, as Lord Stair observes in several places. And as to the point, whether the depositation in Anderson's hands is a thing likewise probable by witnesses, the pursuer believes it is a general rule, that the delivery or receipt of moveables, of whatsoever kind, is probable by witnesses, with one exception, the borrowing or receiving of current money, which can only be proved by oath or writ of party. Upon this principle it is, that, in actions of exhibition and delivery, the having of writs of the greatest importance is probable by witnesses, see 14th February 1629, Farquhar, *voce* PROOF. And as to the observation, that the depositation in Anderson's hands is a species of trust, and therefore not probable by witnesses since the act 1696, it could have no weight; since that act has hitherto been understood only to take place where writs and securities are taken in the name of one person in trust, and for the behoof of another. It was likewise observed, that there was no evidence in the present case, tending to show the bill in question was granted in joke; nay, that the very contrary appeared from the evidence of two witnesses who were present. And as to the objection, that a donation could not be constituted by way of bill, it was *answered*, That though it has been found, that donations *mortis causa* cannot be constituted by way of bill, yet the decisions do not at all apply to a *donatio inter vivos*, which is the present case; for the reason why a *donatio mortis causa* is not good by way of a bill, is, because it implies a *tractum futuri temporis*, which is inconsistent with the nature of a bill, which does not apply to a *donatio inter vivos*; but, in fact, it was granted for a truly onerous cause, viz. The pursuer's consent and promise to marry the defender Calder, which

No 60. was promising to make over herself and her effects to her husband; and, if that is not onerous, nothing surely can be so; neither is it a clear point, that such a promise may be resiled from; but if it could, it brings the party obliged at least under a natural obligation to perform; and which, of itself, it is thought, is a sufficient onerous cause. Neither is it true that the bill was granted *intuitu matrimonii*; on the contrary, from the whole circumstances of the case, it appears to have been intended to take place in the event no marriage followed; for in case the defender had implemented his promise, the bill would have fallen back to himself *jure mariti*. In a word, the true cause of granting it was, to induce the pursuer to accept of the proposal; and as she did accordingly accept of Calder's proposal, it can never be said that the bill was either granted *sine causa*, or that it is in the case of *causa data non secuta*.

THE LORDS sustained the defence, and assoilzied.

But, upon a reclaiming petition and answers, "THE LORDS repelled the defence, and found the defenders, conjunctly and severally, liable to the pursuer for the L. 100 Sterling." *See* PROOF.

C. Home, No 193. *p.* 325.

1753. *February* 7.

Sir MICHAEL STEWART of Blackhall *against* EARL of DUNDONALD.

No 61.
A bond obliging the granter to pay 100 guineas when the granter or his descendants should succeed to a certain Earldom, found void and null.

IN the year 1698, William Cochran of Kilmaronnock granted bond to John Stewart younger of Blackhall, of the following tenor: "I Mr William Cochran of Kilmaronnock, for an certain sum of money paid and delivered to me by Mr John Stewart younger of Blackhall, be thir presents, bind and oblige me, my heirs and successors whatsomever, to content, pay, and deliver, to the said Mr John Stewart, his heirs, executors, and assignees, the sum of 100 guineas in gold, and that immediately, so soon as I, or the heirs descending of my body, shall succeed to the dignities and estate of the Earldom of Dundonald, but longer delay, fraud, or guile."

This sum being claimed from the heir of the obliger, now become Earl of Dundonald, certain defences were made, and the cause being reported, the following objections to the bond were suggested by one of the judges, That the subject matter of the claim was a *sponsio ludicra*, which, however innocent and equal in the present case, is a sort of gaming which ought not to be encouraged, being an inlet to very bad practices; and therefore, that no process ought to be sustained upon the bond, as being *contra bonos mores*. To this it was *answered*, That a disposition by a remote heir of his hope of succession for a certain sum was sustained, though objected to as *pactum de hæreditate viventis*, Fountainhall, 29th July 1708, Rag *contra* Brown, No 37. p. 9492. And a party having taken a gold piece, under condition to pay a greater sum if