

No 25.
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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,

' Dear sister, I always designed to make a bond of provision in your favour, for L. 500 Sterling, and I assure you I will do it upon demand.'

Answered, The letter only expresses what was the writer's present intention, and does not import any obligation upon him. If it is obligatory, it is to grant a bond of provision; and, as it does not set forth the terms thereof, must be understood according to the ordinary terms of provisions, and be payable at the granter's death; as also to imply such conditions as might be reasonable for a brother giving a gratuitous provision to a sister to adject thereto, such as that she should marry with his consent, at least she should marry suitably, which she has not done, her husband being one of the defendant's tenants.

Replied, The promise was not wholly gratuitous; the defender and pursuer were both left unprovided by their parents, so that she had gone to service; but he, who was bred a merchant, and was set up, though with small stock, persuaded her to live with him, and direct his family, which she did for fifteen or sixteen years, during which time he made a considerable fortune. The letter contains no conditions, but is a positive promise; and her marriage has not been so unsuitable as is alleged, her husband's stocking upon his farm being worth L. 200 Sterling, and he having a term to run of twelve or thirteen years of a farm paying L. 78 Sterling.

THE LORDS repelled the defences, and found the defender obliged to pay the sum of L. 500 Sterling, with interest from the date of the execution of the summons, or grant bond therefor at the sight of the Lord Ordinary.

Act. *Ferguson.* Alt. *R. Craigie.* Reporter, *Justice Clerk.* Clerk, *Forbes.*

Fol. Dic. v. 4. p. 23. D. Falconer, v. 2. No 238. p. 290.

No 26.
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bond for a
sum, found to
oblige him to
grant it, free
of all clog-
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S E C T. V.

Obligation to grant a Right.—Whether such an Obligation be equivalent, as if the Right were granted.

1629. December 16. HUNTER against His TENANTS.

IN a removing, the defender defending with a contract of wadset, and actual possession by the pursuer's author, the same was repelled against this removing pursued by a singular successor. *Item,* The said contract providing, that the defender shall be kindly tenant for the old duty, after the redemption; this also was found not to defend him against this pursuer, because it was conceived

No 27.