of the point, that a ſuperior is not obliged to receive an univerſity adjudger as his vaſſal.

With regard to the collateral point of law, whether, in the caſe of an univerſity or corporation diſponee a ſuperior would be obliged to receive or not, Bankton ſtates, that no deciſion has been given; and he inclines to think that the act 20 Geo. 2. c. 50. as it contains no exception with regard to univerſities or corporations, would oblige the ſuperior to receive them. Erſkine, however, b. 2. tit. 7. § 7. inclines to the oppoſite opinion; and indeed the act laſt mentioned does not appear ſo ſtrong in favour of the univerſity or corporation diſponee, as the act 1469, c. 36. is in favour of the adjudger.

A ſimilar deciſion to that here reverſed, is given by Dalrymple, 11 December 1712, Maſter of Church and Bridge Work of Aberdeen, againſt the King's College of Aberdeen, where the deciſion of the Court of Seſſion in the preſent caſe is alſo mentioned.

Caſe 41. David Gregory of Kinnairdy, - - *Appellant*;
James Anderſon Grazier in Aberdeen, - *Reſpondent*.

24th *May* 1716.

Donatio inter virum et Uxorem.—During the ſubſiſtence of a marriage a wife and her ſiſter, who have an equal right to a bond, convey the ſame to the huſband. He afterwards makes his will, appointing his wife executrix and univerſal legatee, for behoof of the grandchildren. After the death of the huſband, the grant formerly made by her to him was not revocable as a *donatio inter virum et uxorem*.

Preſcription.—The preſcription of 40 years not to be counted, from the date of an aſſignment of a bond, but from the time of receiving the money thereon.

Onerous cauſe.—An aſſignment of a bond, bearing to be for onerous cauſe, from the circumſtances of parties as executrix and truſtee, found not to prove the onerous cauſe of the aſſignment in a queſtion near 50 years from the date thereof.

Truſt.—A diſcharge granted by an executrix to a manager for her under a will, who had a ſalary, of all his receipts and intromiſſions, in general terms, was not ſufficient to diſcharge him from the intromiſſion with a bond, which the deceaſed diſponed to the widow, his executrix, for the good of his grandchildren.

Coſts—30*l.* given againſt the appellant.

HUGH FRASER of Eaſtertyre, and Thomas Fraſer of Strichen, as his cautioner, being indebted by bond in the ſum of 1000*l.* Scots to Patrick Dyvie; the ſame was afterwards aſſigned to Dr. William Guild, Principal of the college of Aberdeen. Dr. Guild dying inteſtate, and without children, his ſiſter Chriſtian was confirmed his executrix, who with her ſiſter Margaret, in Auguſt 1661, aſſigned that bond to Thomas Cuſhney, the ſaid Chriſtian's huſband.

Thomas Cuſhney by his will and teſtament, in 1664, appointed his wife Chriſtian his executrix and univerſal legatrix of all his eſtate

estate real and personal, in trust for the respondent, and Thomas his brother, the testator's grandchildren by Jean Cushney his only child; ordaining his said wife to give up an inventory of his estate, and to employ the same for the payment of his debts, and the good and welfare of his grandchildren; giving his wife only a life-rent out of his said estate; and he appointed the appellant and two other persons overseers, and ordered his wife and grandchildren to pay 50 merks Scots to each of them yearly for their pains and trouble. This will and testament was also subscribed by Christian the wife of Thomas Cushney and Jean the daughter, in token of their assent thereto. After Cushney's death, the appellant pursuant to the trust and during the widow's lifetime, received the produce and profits of the estate of the deceased, and accounted to her for the same.

In 1666, Christian the widow executed an assignation of the said bond for 1000*l.* Scots due by Fraser of Eastertyre and Fraser of Strichen, the nature and object of which are differently stated by the parties. The appellant mentions, that he being creditor to the said Thomas Cushney, and also to his said executrix, she for payment of what was so due to the appellant assigned the said bond to him, reciting the same to be for an onerous cause. The respondent, on the other hand, states, that Christian the widow was then very old and infirm, and that she executed the said assignation (ignorantly thinking she had a title to do so) and left in it a blank, with intention to fill it up with the name of the respondent (who was then under age,) or with the name of some other person in trust for him, in order, as she thought, to save him expences afterwards: and that after the death of Christian, the appellant continuing to direct the respondent in his affairs, took all the respondent's papers into his custody, and put his own name in the blank of the aforesaid assignation.

An appriſing was after the date of the assignation obtained against the debtor's estate, in name of Christian the widow: in 1667, the appellant gave him a charge of payment on the bond, but it was not till 1682, that the appellant received payment of it.

The respondent having confirmed himself executor to Thomas Cushney his grandfather, in 1711 brought an action before the Court of Session, of count and reckoning against the appellant as overseer under Cushney's will, in which he charged the appellant with sundry articles as received by him, and among others, with the contents of the said bond for 1000*l.* Scots with interest received by the appellant.

After sundry proceedings in this action, the Court, on the 10th of June 1715, "Found it proved that the appellant had received "the sum in the said bond, and was accountable for the same; "but not for the other articles claimed." And to this interlocutor the Court adhered on the 24th of the said month of June.

The appellant then contended that no trust appeared in the said assignation; on the contrary, it was mentioned to be for an onerous cause: but, though there had been a trust, it did not appear

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that the respondent had right to the whole, since he had a brother, Thomas Anderson, who was entitled to a moiety: and, though there could have been any claim or demand by the respondent, yet the same was prescribed, the assignation being dated in 1666, and no action commenced till 40 years after. The Court, on the 8th of July 1715, "found that Thomas Cushney had right and "title to the whole debt in controversy, and that the respondent "and his brother Thomas had right and title thereto from Cush-"ney; and therefore the respondent had good title to the half "thereof, and remitted to the Lord Ordinary to hear parties' "procurators on the respondent's title to the other half thereof, "which belonged to Thomas Anderson; and also to hear parties "on the onerous cause of the disposition in favour of the ap-"pellant; but repelled the objection and allegeance of pre-"scription."

The appellant then stated that he had paid several debts upon the respondent's account, which would more than compensate any demands against him; and the cause being pleaded before the Lord Ordinary, his lordship, on the 26th of July 1715, "found "that Thomas Cushney had right to the haill sums in Strichen's "bond, and repelled the objection against the libel, and sustained "the defence, that the appellant had paid a debt for the respon-"dent or his grandfather to *Forbes of New* relevant to compense "*pro tanto* and to be proved *scripto*, and granted diligence for "proving the same." And upon a reclaiming petition against the first part of this interlocutor, the Court, on the 30th of the said month of July "decerned against the appellant for the sur-"plus of Strichen's money over and above what was alleged to "have been paid to *New*, and ordained the surplus to be liqui-"dated."

The appellant afterwards contended that the said trust, if any was, had been discharged; and he founded upon a discharge, dated the 4th of August 1670, executed in his favour by Christian as executrix to Thomas Cushney, reciting the appellant's faithful services to her in her affairs, and that he had made a just account with her; and therefore she discharged the appellant of all his receipts and intromissions and of all others entrusted to him preceding the date thereof, dispensing with the generality thereof as if every particular were therein inserted: and he likewise contended that the assignation by Christian to her husband during the marriage was void and revoked by the posterior assignation to the appellant. The Court, on the 21st of December 1715, "Found that Christian Guild having ratified her husband's tes-"tament after dissolution of the marriage could not revoke the "disposition made by her to her husband in so far as concerns "her interest in the sum due by Tyre and Strichen, and that the "appellant being by Thomas Cushney's testament overseer both "to his relict and also to the respondent, that the narrative of the "relict's assignation to the appellant could not prove the same "to have been granted for an onerous cause in prejudice of "the respondent: and that the general clause in the dis-

"charge

" charge by the relict to the appellant does not extend to this
" subject."

The appellant having brought no proof of the payment to Forbes of New, conform to the interlocutor 26th July 1715, the Lord Ordinary, on the 10th of January 1715-16, circumduced the term against him, and decerned for principal, interest, and penalty, in terms of the libel. The appellant having reclaimed, the Court, on the 9th of February 1716, " Assoilzied " the appellant from the penalty in Strichen's bond, and allowed " the decreet pronounced by the Lord Ordinary the 10th of January to be extracted for the half of the other sums there decerned for, but as to the other half granted diligence till " the day of June next to the appellant, for recovering " instructions of his compensation by the payment to *Forbes of New*, and for recovering the grounds of compensation, whereby " the half of the sums alleged to belong to the respondents' " brother Thomas Anderson is pretended to be compensed, " reserving *contra producenda*." The appellant afterwards presented a representation to the Lord Ordinary, which was refused on the 28th of February, and a reclaiming petition to the Court, which was also refused on the 29th of the same month.

Entered 14 March 1715-16

The appeal was brought from " an interlocutor of the Lords of " Session of the 10th of June 1715, and the affirmance thereof " the 24th of the same month, and also of an interlocutor of " the said Lords the 8th of July following, and likewise " from an interlocutor of the Lord Fountainhall Ordinary " in the cause of the 26th of the said month, and of an interlocutor of the Lords of Session of the 30th of the same month, " and of an interlocutor of the 21st December following, and " of another interlocutor of the said Lord Ordinary the 10th of " January 1716, and of an interlocutor of the Lords of Session " the 9th of February 1716, and from an interlocutor of the " said Lord Ordinary of the 28th of the same month, and also " from an interlocutor of the Lords of Session of the 29th of the " same month."

Heads of the Appellant's Argument.

The respondent has no title to the bond in question since he claims it by a deed from a wife to her husband during marriage, which by law is void.

1469, c. 28.

Though the respondent had any title, yet that is prescribed by the act of parliament 1469. c. 28.; for the assignment of the bond to the appellant is in 1666, and no action was ever commenced against him for it till 1711, which is more than 40 years, in which time all actions by the law of Scotland are barred.

Though the action were not barred, yet the very deed of assignment of the bond to the appellant bears the same to be for an onerous cause, or valuable consideration, and therefore it is the greatest hardship in the world to oblige the appellant, now almost 50 years after the date of the assignment, to condescend upon

 and

and prove the particular onerous caufe or valuable confideration for which the fame was granted; for it ought to be prefumed both from the deed itfelf, and from the length of time that there was a valuable confideration.

Though the faid bond had been affigned only in truft, yet that truft is prefumed to have been executed, and the fame accounted for; fince in Auguft 1670, four years after the faid affignment, the executrix of Cufhney, under whom the refpondent claims, granted a general difcharge to the appellant of all his receipts and of all things entrufted to him, which certainly at fuch a length of time is to be prefumed to include this affignment.

Heads of the Refpondent's Argument.

With regard to the prefcription, the refpondent claims only fuch fums as the appellant, his truftee, has received within thefe 40 years; for he received payment of the forefaid bond in 1682, (as appears by the appellant's releafe to the debtors) which is not 40 years ago.

Cufhney's widow could not convey the faid bond to the appellant, fhe and her fifter having conveyed it before to her hufband in 1661, to which the appellant is a fubfcribing witnefs; and receipts and vouchers under the appellant's hand were produced in court, to prove that he acted as truftee for the widow and grand children according to the will.

By Cufhney's will his widow is only to life-rent his eftate; and though fhe be named executrix and univerfal legatrix, yet he expreffes that his intention was to empower her to make an inventory of his perfonal eftate, and to manage all for the good of his grand-children: That his will might not be altered, he added a claufe to it, which his wife and daughter fubfcribed, whereby they confent to every article therein recited, and bind themfelves never to do any thing prejudicial to the will, and to which the appellant is a fubfcribing witnefs. Nor does it appear, that the widow ever defigned the contrary; for nine months after the date of the affignment there was an apprifing on the faid bond, at her inftance, againft the debtor's eftate; and the aforefaid blank in the affignment, in which fhe intended to put her grandfon's name, *is filled up with the appellant's name, in a different hand and ink from the body of the writing.* Nor is there a fum fpecified in the affignment as the valuable confideration, which is neceffary and ufual according to the forms practifed in Scotland. The appellant contended, that he had paid two debts of Cufhney's, one to Innes of Towybeg, and the other to Forbes of New, which were the onerous confideration thereof: But that thefe debts were not the onerous confideration appears by the appellant's giving the refpondent a bond in 1688 (22 years after the affignment) to relieve him of Innes's debts, becaufe the appellant had received 50*l.* of the *Mafter of Salton* upon the refpondent's account, which is acknowledged in the faid bond of relief for paying that debt.

The refpondent does not fue in right of his mother and grandmother, but as heir at law and executor of his grandfather Cufhney,

ney, to whom the ſaid bond was conveyed by his wife and her ſiſter; and therefore her diſcharge to the appellant could not invalidate the reſpondent's right, nor could it comprehend or acquit the appellant of his future actings, he having received the ſaid ſum twelve years after the date of that diſcharge. And that bond being ſecured by a real right, no general words in a diſcharge can be an acquittance of it.

Judgment, 24 May, 1716.

After hearing counſel, *It is ordered and adjudged that the petition and appeal be diſmiſſed, and that the ſeveral interlocutors therein complained of be affirmed: And it is further ordered, that the ſaid appellant do pay, or cauſe to be paid, to the ſaid reſpondent, the ſum of* 30*l. for his coſts in this Houſe.*

For Appellant, *Rob. Raymond. Will. Hamilton.*
For Reſpondent, *Nathan Lloyd. James Steuart.*

Caſe 42.

Andrew Porteous in Deboig, - - *Appellant*;
Thomas Fordyce, and Janet Scott his Wife, *Reſpondents*.

26th *May* 1716.

Cautioner.—A perſon who had, without confirming, intromitted with his father's effects, which were left to him by will for payment of debts, is, upon application of the creditors, ordained to intromit with the effects upon inventorying the ſame, and finding caution to make the ſame forthcoming: he accordingly finds caution, and upon a ſubſequent application for ſummary intromiſſion with ſome of the effects, the Court refuſed the ſame, and ordained him to confirm the teſtament and proſecute in common form; but he neither inventoried the effects, nor confirmed the teſtament: the cautioner was liable for the whole goods intromitted with.

Proof.—A debt againſt this cautioner ſubſtantiated by the oath of the intromitter in another cauſe.

Coſts.—40*l.* coſts given againſt the appellant.

ROBERT Scott of Gilleſbie, deceaſed, grandfather of the reſpondent Janet, by his will and teſtament, dated the 25th of December 1706, bequeathed all his perſonal eſtate to Thomas Scott his ſecond ſon, with expreſs directions to pay the ſeveral debts in the ſaid will mentioned, and appointed the ſaid Thomas his ſole executor. Amongſt other debts in the ſaid will mentioned and ordered to be paid, Robert Scott charged himſelf as debtor to the reſpondent Janet in the ſum of 4573*l.* 13*s.* 8*d.* Scots.

After the deceaſe of the ſaid Robert Scott, the ſaid Thomas poſſeſſed himſelf of ſeveral of the goods and effects granted to him as aforeſaid, but did not confirm himſelf executor to his father. The reſpondent Janet, and other creditors of the ſaid Robert Scott, in July 1708, brought their action againſt Thomas for payment of their debts, and by a petition preſented for them ſtated heir apprehenſion that Thomas Scott, his mother and brother Francis might confederate and waſte the funds appropriated for the payment of their debts, and therefore prayed, that