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only be paid their shares after his debts were cleared; which made those debts a burden on their shares. And, *3tio*, Legacies of all kinds are only due *deductis debitis*, in so much, that if an executor has made payment *bona fide* to the legatees, and creditors of the defunct afterwards claim, an action of repetition lies against the legatees proportionally; Stair, B. 3. T. 8. § 70.

Pleaded for the defenders; *1mo*, The predecease of the executor nominate did not invalidate the testament, but any of the legatees might have confirmed upon it; and although the eldest son confirmed as next of kin, yet the testament was the rule observed in settling the childrens' proportions of the funds. The person who is confirmed as executor, whether as nominate, or as nearest of kin, comes to have the sole administration, as representing the defunct, and is alone liable to the defunct's creditors. *2do*, A legacy, indeed, is not due unless there be a sufficient fund for the payment of it, after deducting the defunct's debts; but if there be a sufficient fund, as there was in this case, and the legacy is accordingly paid, the subsequent insolvency of the executor, without clearing the defunct's debts, although he was left sufficient for doing it, cannot subject the legatee, even though he should be one of the defunct's children; because such legatee does not take by succession or intromission, but by gift, and the defunct had the absolute disposal of the free effects, after deducting his debts. This testament did not burden the legatees with the payment of debts, but only declared their legacies to be a proportion of the free surplus, after deducting debts, and they received no more. And, *3tio*, Legatees receiving their money in this way think themselves *in bona fide* to use it, and have no action to oblige the executor to apply the funds retained for payment of the debts; and it would be very hard if the creditors, by neglecting to claim payment from the executor while solvent, should have it in their power to subject the legatees, at a great distance of time, to make good the debts out of the money they had thus *bona fide* received, and perhaps consumed.

THE LORDS assoilzied Isobel and Rachel Strachans.

Act. *D. Rae.* Alt. *Johnstone.* Clerk, *Pringle.*

D. R. *Fol. Dic. v.* 3. *p.* 374. *Fac. Col. No* 241. *p.* 440.

1761. *February* 11.

MARION WRIGHT and her Husband *against* MARGARET and MARY WRIGHTS.

No 36.
Legacy cannot be constituted in the form of a bill.

JOHN WRIGHT of Easter-glins died in 1751, leaving issue, Thomas Wright, who succeeded him in his land-estate, and Margaret and Mary Wrights, who succeeded to the executry.

Thomas Wright the son had a natural daughter named Marion, who, at the age of ten, had been taken into John Wright's family; and a year before his death, when she was about 16 years old, received from him a bill drawn in her

favour for 1000 merks Scots, payable the first term of Martinmas after his decease.

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In a process at Marion's instance against her father the heir, and against Margaret and Mary Wrights the executors of John, before the Sheriff of Stirling, for payment of this bill, the Sheriff having, before answer, ordained the pursuer to condescend on the value for which the bond was granted; Marion condescended, 'That she had served John Wright as his house-keeper for seven 'years and upwards, and that the bill had been granted in payment of her 'wages for said service.' At the same time she acknowledged, that there had been no particular stipulation for wages. The Sheriff sustained the bill as a good ground of debt, and decerned for payment.

Pleaded for Margaret and Mary Wrights, in a suspension of this decree; From the charger's own condescendence, it is plain, that no value was given for this bill; she was but ten years old when she went to live in Mr Wright's house, and she was only seventeen when he died, so that her services when in his family were of very little value; he did not keep a servant less upon her account; and, at any rate, her aliment, during that time, was a sufficient recompense for her supposed services. The bill therefore must be considered as a mere donation or legacy; which is further evident from this, that it was taken payable at the first term after the granter's death, which might not have happened for 20 or 30 years from the date. A writing of this kind is null and improbative by the law of Scotland, being destitute of those solemnities required by the act 1681. It is true, that bills are an exception from the statute, and have many extraordinary privileges; but then they must be confined to their own proper sphere of facilitating commerce; when converted to other uses, they have no privilege, and are altogether improbative, as not clothed with the legal solemnities. The constituting a donation or legacy, is a transaction in which trade is no way concerned; and therefore a bill granted in that view, and for that purpose, is a null deed; so it has been found in a variety of cases, 13th February 1724, Hutton *contra* Huttons, No 19. p. 8062.; Home, 9th November 1722, Fulton and Clerk *contra* Blair, No 16. p. 1412.; 3d December 1736, Weir *contra* Parkhill, No 17. p. 1413.

Answered for Marion Wright; There is no doubt of Mr Wright's intention to bestow this liberality upon her; and the intention was highly reasonable; she attended and nursed him during the last years of his life, as it became a dutiful child towards an aged and declining parent. Had she not been in her grandfather's house, she might have been in other service, and earning a stock for herself. It will therefore be hard if she is allowed nothing in name of wages from her grandfather, when it evidently appears to have been his intention that she should have them. The bill cannot be considered as gratuitous. The onerous cause was seven years service and attendance upon her grandfather. In the case Fulton and Clerk *contra* Blair, it was acknowledged, that no value was paid for the bills; and the decision seems to imply, that if any onerosity had

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been condescended on, the bills would have been sustained; besides, there does not appear any solid reason why a man may not make a present by bill; and if it bears value, why it should not be binding as effectually as if value had been given. The onerous cause is the will of the accepter, which says, he shall be owing such a sum to the drawer. In the case of Barber *contra* Hair, 8th February 1753, No 311. p. 6097. the Court sustained blank indorsations to bills by a husband to his wife upon death-bed. Indorsations are new draughts upon the accepter in favour of the indorsee, and are of the same nature with bills; yet these indorsations were sustained, though acknowledged to be on death-bed, and gratuitous.

Replied for the suspenders; The case of Barber against Hair does not apply. The only question there was, Whether a gratuitous indorsee was entitled to take the debt? This was no constitution of a new debt, but only a transmission of a debt formerly created; and although value is absolutely necessary to the constitution of a bill, yet where once constituted, there is no doubt that it may be properly transmitted by indorsation without any value paid by the indorsee. Such indorsations are every day practised, and are indeed necessary in the course of trade, as bills are often put into the hands of trustees in order to recover payment.

Suggested on the Bench; That though the writing founded on was not a proper bill, it might be sustained as evidence of a legacy, along with other circumstances; but the plurality were of opinion, that it was totally null.

THE LORDS found, that the bill in question appearing to be of the nature of legacy, was not a sufficient ground of action, and would not be astructed by collateral evidence.

For the Charger, *Walter Stewart*. For the Suspender, *Macqueen*. Clerk, *Kilpatrick*.
J. C. *Fol. Dic. v.* 3. *p.* 374. *Fac. Col. No* 20. *p.* 37.

*** See a similar decision 29th Jan. 1782, M'Arthur Stewart against Fullarton, No 13. p. 1408. *voce* BILL of EXCHANGE.

1769. *December* 13. SCOTS *against* CARFRAE.

No 37.
A legacy, to be divided at the legatee's death, among her children, falls by the legatee's predecease.

WILLIAM SCOT executed a testament, by which he appointed his son James his sole executor, and universal legatary, with a clause, whereby he obliged him to pay 'to Isobel Swanston, my well-beloved spouse, the sum of 1500 'merks, and that at the first term of Whitsunday or Martinmas after my de- 'cease, with annualrent after the term of payment; and which sum of 1500 'merks, the said Isobel Swanston shall leave and distribute among her daugh- 'ters at her death, as she shall think fit.'