the electors after a neglect of twenty days; and that devolves upon other persons who must execute it.

2d. Neglect to comply with the directions of the foundation charter, in instances where such omission is not objected to, cannot invalidate these directions, but the electors, whose power flows from that charter, must be ever bound by the conditions thereof.

It is not by the charter necessary, that there should be any public disputation or comparative trial, such, as by the act of the commissioners of visitation, *anno* 1690, seems to be required in the case of *masters and regents;* but, it is required that programmes be published, and that notice be given in all the places of Scotland most famed for literature, to the end that proper persons may offer themselves as candidates, and that *trial* be taken of their *qualifications.* Now, as trial may be taken without public disputation, and, as upon notice given, men of worth and learning might be found willing to offer themselves as candidates for a divinity chair, though the appellants had had power, as they had done, to supersede the directions of the foundation charter; it would have been a very improper exercise of that power, to stifle the notice intended by the charter to be given to all learned men, to foreclose themselves thereby from all comparison upon trial, and to fix, without any invitation of learned men to be candidates, or any examination, upon the minister of a country parish, to fill a Professor of Divinity's Chair in a public University.

After hearing counsel,

It was ordered and adjudged, that the interlocutors complained of, be, and the same are hereby affirmed, with £50 costs.

For the Appellants, *A. Hume Campbell, R. Dundas.*

For the Respondents, *Dun. Forbes, Wm. Hamilton.*

Mr ARCHIBALD MURRAY, *et al.*, Trustees for the Creditors of JOHN LOWIS of Merchistoun, ... } *Appellants;*

The Honourable FRANCIS CHARTERIS and his Guardians, ... *Respondents.*

1734.

MURRAY, &c. *v.* CHARTERIS, &c.

House of Lords, 3d April 1734.

BANKRUPTCY—ACT 1696—HERITABLE BONDS—INFEFTMENTS—USURY—ONEROUS CAUSES.—(1) Heritable bonds granted long before the bankruptcy, but no infeftments taken upon them until within sixty days thereof, held ineffectual, reserving objection to the bonds otherwise. (2) Objection was stated to the bonds otherwise on the grounds of usury, and that they were not granted for onerous causes. Held usury not relevant; but held the bonds sufficient to instruct their onerous causes. In the House of Lords affirmed as to usury, but reversed *quoad ultra*, and held the bonds did not instruct their onerous causes without some farther proof thereof.

John Lowis, Esq. of Merchistoun, was apparent heir, and succeeded to a very opulent estate, real and personal; but soon after being possessed thereof, his affairs fell into disorder, and he became bankrupt. Thomas Menzies of Lethem and William Scott Blair of Blair, having been engaged along with him in several transactions, became bankrupt also.

It was agreed between the creditors and the bankrupts, that the bankrupts should convey and make over all their estates real and personal, to the appellants, as trustees for the whole creditors, towards payment of their debts, which was done accordingly.

Amongst the creditors was Colonel Francis Charteris, now deceased, who appeared and claimed as a creditor of Mr Lowis, by two *heritable bonds*, one for £3745, 4s. 4d., and the other for £1000, upon which bonds he had taken no infeftment for many years, till the bankruptcy came to be discovered; but then, the appellants alleged, the infeftments were taken with the view of establishing in him a preference for his debts, in prejudice of all the other creditors, whose debts were secured by personal bonds only.

The claim lodged, amounted, principal and interest, to the sum of £6000, which made it necessary for the appellants to investigate the grounds of it. Upon doing which, they found that Mr Lowis never borrowed or received one shilling from Colonel Charteris,—that the foundation and origin of the whole claim was, the misfortune of losing about £200 at gaming, for which he gave his note or bill, which came into the hands of Mr Charteris, and that Mr Lowis, fearing the consequence of having the matter discovered to his father, was induced to grant new bills, notes, bonds, &c., for such money forbearance, &c., till, by frequent renewal of securities,

with accumulations, and usurious exactions, the Colonel obtained the two heritable bonds in question.

The appellants brought an action against the Colonel to have these bonds and securities set aside and declared void, as being obtained by imposition, and without valuable consideration.

The appellants also superadded another action, founded on the statute of 12th Queen Anne, against usury.

Separately, it was contended by the appellants under the Act concerning notour bankrupts, "That all bonds upon "which infeftment may follow, granted by the said bankrupt, "should only be reckoned as to this case of bankruptcy, to be "of the date of the sasine lawfully taken thereon." And, that in virtue of this Act, the Colonel's infeftments were void, because his heritable securities must be considered as of the date of the sasines, and these having been taken within sixty days of bankruptcy, were consequently void, and therefore he could have no preference in virtue thereof. Further, that the bonds were granted in security of prior debts.

The Lord Ordinary, after condescendence and production of documents, pronounced an interlocutor, finding "That "both the said bonds bearing date so many years before Mr "Lowis' bankruptcy fell under the Act 1696, in regard the "infeftments were not taken till within sixty days of Mr "Lowis becoming bankrupt, reserving to the creditors to be "heard how far the bonds were reducible otherwise, and that "they were usurious and illegal." Feb. 10, 1731.

On reclaiming petition the Court adhered. June 19, 1731.

On a further production of documents with a reclaiming petition, the Court found that some of the old bonds for which the heritable bonds had been replaced, were granted for onerous causes, and that two heritable bonds were merely corroborative securities, and consequently to the extent of the said sums, fell under the description of the said Act 1696.

The cause coming before the Lord Ordinary, his Lordship reduced the two infeftments, and decerned, reserving to the appellants any objections to the bonds themselves on which these infeftments followed.*

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* The grounds on which the Court went in this part of the case which was not appealed, were, "That an heritable bond for money borrowed, granted long before the bankruptcy, if infeftment is not taken till after, or within sixty days of the bankruptcy, falls under the Act 1696."—*Vide* Elchies, vol. i, "Bankrupt" No. 5.

1734.

MURRAY, &C. *v.* CHARTERIS, &C.

Thereafter the appellants insisted in their second action on the ground of usury, and sought to have these bonds set aside on that ground, because more than 5 per cent. had been charged and taken, and that usury was exacted and taken by the Colonel, by his charging and receiving double interest for several years, upon £500, under cover of double securities, and that, therefore, his bonds should be declared void. They also alleged, that the bonds were not onerous, and that they did not instruct their onerous causes.

The Colonel having died, the action was revived against the respondent, Mr Charteris.

The Lord Ordinary reported the case to the Court, and
Nov. 15, 1732. the Court, of this date, found "the documents adduced for "instructing usury, not relevant, and find the bonds in ques-"tion sufficiently prove their onerous causes without the ne-
Jan. 11, 1733. "cessity of farther astriction." On reclaiming petition, the Court adhered to the first part of the interlocutor in reference to usury; but found "that the narratives of the bonds in "question did not sufficiently instruct the onerous causes of
Feb. 21, 1733. "the said bonds." The respondents reclaimed against the interlocutor, and the Court was pleased to alter the last interlocutor, and to adhere to their interlocutor of 15th November, finding "the bonds in question sufficiently prove their onerous
July 6, 1733. "causes, without the necessity of farther astriction."

The appellants reclaimed against this interlocutor, but the Court adhered.

Against these interlocutors the present appeal was brought to the House of Lords.

After hearing counsel,

Journals of the House of Lords.

It was ordered and adjudged by the Lords Spiritual and Temporal in Parliament assembled, That the former part of the said interlocutor of the 15th November 1732, whereby the Lords of Session found the documents adduced for instructing usury not relevant, be, and the same are hereby affirmed; but that the latter part of the same interlocutor, finding the bonds in question, sufficiently prove their onerous causes, without the necessity of further astriction, be, and is hereby, reversed. And it is further ordered and adjudged, That the said interlocutor of the 11th January 1833, whereby the Lords of Session adhered to the first part of their former interlocutor, but found, that the narrative of the bonds

in question do not sufficiently astrict the onerous causes of the said bonds, be, and is hereby affirmed, with this addition, *videlicit*, "without some further proof thereof, "by circumstances or otherwise." And it is also ordered and adjudged, That the said interlocutor of 21st February 1733, whereby the Lords of Session adhered to their interlocutor of 15th November 1732, finding the bonds in question sufficiently prove their onerous causes, without the necessity of further astriction; and the said interlocutor of 6th July last, adhering to the said interlocutor of 21st February 1733, be, and are hereby, reversed.

1734.

MURRAY, &c. *v.* CHARTERIS, &c.

For the Appellants, *Rob. Dundas, J. Strange, A. Hume Campbell.*

For the Respondents, *Dun. Forbes, W. Murray.*

[Fraser's Domestic Relations, Vol. i., p. 208.]

1741.

MARY DALRYMPLE (formerly GAINER), wife of Captain James Dalrymple, HELEN, ELIZABETH, MARY, and JEAN, their lawful Children, . . . } *Appellants;*

CAPTAIN JAMES DALRYMPLE, . *Respondent.*

DALRYMPLE, &C. *v.* DALRYMPLE.

House of Lords, 22d March 1741.

MARRIAGE—CONSTITUTION.—A declarator of marriage was raised by the appellant, on the ground that the appellant had been legally married to the respondent, at least, that by cohabitation as man and wife, and acknowledgment as such, she was entitled to that status, and his children to the status of lawful born children. Held, that she had not proved a lawful marriage, and that the cohabitation in this case was not relevant to infer marriage.

This was an action of declarator of marriage and legitimacy, raised by the appellant, Mary Dalrymple, against the respondent, on the ground that she was lawfully married to him at Kilkenny, Ireland, at least, on the ground of cohabitation as man and wife, and also, that the respondent had owned and acknowledged her as his lawful wife.

Her statement was, that the respondent, a Captain in the