

it did not express value received. Further, where the statutory law of a country allows indorsations to be signed blank, the possessor is still to be looked upon as full proprietor of the contents. Now, in the act 1696, anent blank writs, indorsations of bills are excepted. The reason whereof is, That they might pass blank through many hands for the expedition of commerce. Therefore, by our law, blank indorsations are authorized. *2do*, The form cited out of Scarlet, (Pay for me to N.), is like a factory or mandate, and does not denude the indorser of the property of a bill. But this cannot be applied to the present case, where the indorsements on the bill are not in that form.

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THE LORDS found, the indorsation presumes value, and cannot be taken off, but by a contrary probation.

For Millar, *Leith.*Alt. *Spotiswood.*Clerk, *Sir James Justice.**Fol. Dic. v. 1. p. 99. Bruce, No 67. p. 81.*

1715. July 22.

KER against BROWN.

THE lands of Merfington being set in sub-tack by Brown of Bassanden to Andrew Ker, Andrew draws a bill, of the date of the sub-tack, upon Home of Kaimes, ordering him to pay to Bassanden L. 199 Scots, which, with his receipt, should be a sufficient discharge of the equivalent sum due by him to the drawer: The bill was accordingly paid, and the receipt given up to Ker by Kaimes, as an instruction of payment. Whereupon Ker having insisted against Bassanden for repayment of the sum, it was alleged for him,

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Found in conformity with
No 117. p.
1535.

1mo, That all receipts of money do imply an obligation on the granter to be accountable and repay, unless the receipts be granted on the granter's own account; which cannot be here, where the pursuer's precept is only of the nature of a mandate by him to the defender to receive it; and he having received accordingly *tenetur ex mandato* to refund. And if it were otherwise, the greatest merchants might be ruined, who use frequently to give such mandates to their servants. *2do*, This bill was only a mandate for the granter's behoof; because, *1mo*, It does not bear 'value received' of the defender, which, in this case, would have been very necessary, because it bears, 'Value of the acceptor,' and for that value a full discharge to him; and since no such value is granted to the defender, which it ought to have done, since value in another case is expressed, the draught must only be understood as a mandate to receive the money for the drawer's use. Especially seeing, *3tio*, The precept is not in the ordinary style of bills where value is given; for it says, 'And this, with the defender's receipt, shall be a sufficient discharge, &c.;' whereby the design of the parties appears to be, that he should be accountable, and his receipt of the money should be probative against him. *4to*, Suppose the acceptor had refused to accept, or pay, then Bassanden would not have had recourse against the drawer, unless he had proven he had the draught for value; and, till that was proven, the draught was plainly for the

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use of the drawer; and, till the value be made appear, the contents of the bill ought to be presumed to belong to the drawer, and not to the defender; since, to presume value in this case, were to make the value express 'of the acceptor' to be of no more use than if it had not been express, or to make a necessity to express value from the acceptor, and not to express the value of the procurer of draught. *5to, Separatim*, supposing that value is presumed, though not express, yet that is only where there is no other dealing betwixt the parties; for where the drawer is debtor, the draught not bearing value, is presumed to be in satisfaction of the debt, as was found Andrew Cheap *contra* Arnot of Woodmill, No 119. p. 1537. Therefore the pursuer being debtor to Bassanden for his sub-tack-duty, the draught of this money payable to him, must be interpreted to be in satisfaction of the said tack-duty, unless Bassanden prove *scripto vel juramento* of the pursuer, that value was given the time of the draught besides the tack.

Answered for the defender: That a bill is indeed a mandate, but not always for the behoof of the mandator, but of the person (most frequently) to whom it is payable, and therefore the possessor of the bill has recourse against the drawer, upon a protest for not acceptance or payment. *2do*, A bill is of a mixt nature, being not only a mandate, but an assignation, and therefore as an assignee in *rem suam*, could not be obliged to repeat to the cedent sums paid by virtue of his assignation, neither ought the creditor, by bill, to be accountable to the drawer for any payment made by his draught. *3tio*, The *contractus mandati* is properly between the drawer of the bill, and the person on whom it is drawn; and the payment of the money to the creditor, is but an execution of the mandate; and so cannot furnish action to the drawer against him, unless the draught had been for his own behoof.

2do, As to the value received, *answered*, That bills bearing no value, presume value received by the drawer, because, had he intended to make the procurer accountable, he would have so provided in his draught: For *verba sunt interpretanda, contra preferentem, qui potuit sibi clarius legem dixisse*: And so it was found, Mickiefon of Hill *contra* William Graham; and James Fairbairn *contra* James Goodfir*.

3tio, As to the style of the bill, *answered*, That these words 'this with his receipt, &c.' have the same import, as if the bill did bear value in their hands: But how can this infer that the possessor of the bill should account for the draught?

4to, As to the supposition of Kaimes his not accepting, *answered*, *1mo*, That this argument does not always conclude; for it is often provided by the indorse-

* Relative to these two cases, Forbes on Bills of Exchange, C. 3. §. 14. (Edition 1703.) writes thus: A bill expressing no cause, virtually implies *value received* — of —. Mickiefon of Hill against William Graham, where a bill being drawn upon the pursuer, by his brother, payable to the defender, without bearing, *value in account with him*, or *value received*, was found to import, that the defender had paid the value, unless the pursuer would prove *scripto*, or by the defender's oath, that no value was paid. And so it was also decided by two solemn interlocutors in presence, in the case of James Fairbairn and James Goodfir.

ment of bills, that the indorser should have no recourse, and yet he has right unaccountably to the contents. But, *2do*, The general proposition is wrong; for had Kaimes refused to accept and pay, the creditor would have had recourse against the drawer, unless he did prove, by the creditor's oath, that value was not given, or that the draught was for his own behoof:

5to, As to the sub-tack, *answered*, That the presumption of value received, is so forcibly inferred, from the words of the bill, that the Lords have even found, in a late case betwixt Baxter and the Lady Glenlee*, that a bill of the foresaid nature should not be imputed in payment of any extrinsic debt by the drawer to the possessor of the bill, albeit he was debtor by liquid bonds; but found, that the draught of the bill implied value received at the time.

6to, The drawer here was not debtor to Bassanden for any tack-duty at the time of the draught; for the tack was only granted of that date, but the tack-duty not payable for a year thereafter.

THE LORDS found the bill presumes to have been for value received of Bassanden, to whom the same was payable.

To which their Lordships adhered, after two several reclaiming petitions.

Act. Colvil.

Act. Fleming.

Clerk, Gibson.

Fol. Dic. v. 1. p. 99. Bruce, No 126. p. 165.

1731. *June.*

PATRICK M'DOWAL of Crichen, Writer to the Signet, *against* The DUKE of DOUGLAS.

THE Earl of Forfar, upon 8th July 1715, addressed an order to Captain Wardlaw, agent for his regiment, of the following tenor: 'Pay to Captain Thomas Agnew, or order, the sum of L. 111 Sterling, out of the first subsistence you receive for me, which shall become due eight months after date; subscribed, FORFAR. Accepted by *Captain Wardlaw*.'

The Earl of Forfar fell in the battle of Sheriff-muir, four months after the date of the order.

Captain Agnew lived ten years after, but never made any claim on the Earl's representatives for the sum.

Mr M'Dowal, a creditor of Captain Agnew, took up the claim as executor-creditor; and brought an action for payment against the Duke of Douglas.

Pleaded in defence, That although bills of exchange, though not bearing value, are presumed to be for value, yet the writing founded on is not a document of that description. It is an order by the colonel of a regiment on the agent, not payable at a fixt time, or simply to pay, at whatever time, but to pay out of a certain fund, *if* it shall arise eight months after date, implying a condition, that if no fund shall ever arise, either in consequence of death or otherwise, nothing shall be due. Consequently, although accepted, it could not be negotiated, nor

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* General List of Names.

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No 122.

An order on the agent of a regiment to pay when subsistence should be due, after a certain time, presumed given for value.