

form, by law and custom. It is not disputed, that the bill in question may be supported as a good ground of action, and be transmissible by assignation, having the common solemnities of law; but that it can pass by indorsement, which is an extraordinary privilege, will never be allowed. And this is the opinion of Marius and Scarlet, who maintain, in general, without any distinction, that no man can effectually indorse a bill, but what is made payable to himself and his order.

THE LORDS preferred the indorsee.

*Fal. Dic. v. 1. p. 96. Rem. Dec. v. 1. No 78. p. 154.*

1727. June 28.

GILBERT GRIERSON *against* EARL OF SUTHERLAND.

THE present Earl of Sutherland, when Lord Strathnaver, did, upon the 22d October 1702, draw a bill for the sum of 2400 merks Scots, payable to the Earl and Countess of Sutherland; and adds, 'This, with their receipt, shall oblige me to repay the like sum to you or your order.' This bill wants the address, but was notwithstanding accepted by David Sutherland of Kinnauld, and indorsed upon the back, by the Earl and Countess of Sutherland, to James More; who underneath acknowledges the receipt of the contents: Whereupon David Sutherland, the acceptor, retiring his bill, indorsed it again to Sir Robert Grierson; from whom it was derived to the present pursuer; who insisted in a process against this Earl of Sutherland, the drawer of the bill, upon his above-mentioned obligation.

It was first excepted against the bill, That it was addressed to no body; that the acceptor ought to be fully designed, to prevent uncertainty; that custom has established this, which is the mother of bills; and, therefore, without it, the bill is not complete, and cannot be the subject of an action or diligence.

*Answered* for Mr Grierson: Albeit the bill was not directed to David Sutherland, this was supplied by the acceptance; and seeing *constat de persona*, the objection was of no moment; no law having established this as a necessary solemnity of a bill; it is sufficient that there is an acceptor, to make it complete; and Mr Forbes, in his treatise on bills, § 6. says, 'That a bill, though not addressed to the acceptor, may be accepted by him;' which he supports by the opinion of *Marius*, a noted author on the subject of bills: It is believed not to be a case only in imagination, that a bill may be directed to one, and another step in and accept it; which acceptance would be good to bind him, and give him action for repayment. But whatever is in that, the direction is no more than an ascertaining of the person, to whom the bill is to be presented for acceptance; and when that direction is wanting, and an acceptor appears, it must be presumed, that the direction was given by the drawer to the possessor; and intimation to the person who accepts; which is sufficient to constitute the contract; so that an action may be founded upon it.

THE LORDS repelled this exception.

No 49.

No 50.

A bill accepted, without being addressed to any person, sustained.

An obligation to repay, engrossed in a bill, found indorsable.

No 50.

It was excepted in the *next* place, That the bill being indorsed by the late Earl and Countess of Sutherland, to James More their fervant; who, in consequence of it, received payment; the precept became void, and could not again be transmitted by indorsation; the obligation to repay being a subject, that could only transmit by assignation, and not by indorsement.

To this *answered*, That the bill bearing an obligation to repay the sum to the acceptor or his order, shows it was intended to be transmitted in the common way of bills; that this is not in the case of a common bond; it is in form of a bill, and the proper subject of them: Nor is there any thing extraordinary or unusual, that the obligation to repay the money drawn for, should pass by indorsation. It cannot be refused, that the possessor of a bill can, by indorsement, transmit the action of recourse against the drawer; which is but an implied obligation to repay the money in case of non-acceptance, or failure of payment when it is accepted; and the argument would be every bit as strong, nay, much stronger in that case, why an assignation should be necessary; in regard when the bill was never accepted, all the essentials of the contract did not concur; and, that in effect, the action did arise only from the receipt of money, upon the part of the drawer; which is a better exception to its passing by indorsement, than that payment had been made upon the draught; which is said to have extinguished the bill; for, though the obligation, upon the acceptor to the possessor, was at an end; the obligation upon the drawer to the acceptor remained; and the obligation is what would have been implied, unless the bill had expressed value in the acceptor's hands; which, therefore, might well be expressed in the bill itself; and, being expressed, and taken to the drawer or his order, it may be transmitted by indorsation. If the obligation given to the acceptor, had been of a nature foreign to that of bills; the argument, for the necessity of assignation, would be of greater force; but, as in every case, the drawer is bound to repay the acceptor, where there was no value in his hands; the expressing what is implied, and making it reach not only to the acceptor, but his order, does not at all debord from the nature of a bill. But *2do*, Allowing the obligation in dispute, to be of the nature of an ordinary obligation, having nothing of the force or privilege of bills, the indorsation falls yet to be sustained; not indeed as a proper indorsation; but as virtually and formally a bill; and consequently an implied assignation; as all indorsations truly are; having the essentials, and even the form, of a bill. To illustrate this, let it be supposed, that, instead of a formal assignation, any creditor, in a liquid bond, writes a formal bill upon the back of the bond, addressed to his debtor, thus, 'Sir, Pay to Titius, or his order, the sum of L. 100 Sterling, value in your hands, by the within bond.' This, no doubt, is an effectual bill, and equal to an assignation. Does it make an alteration, if, instead of expressly mentioning the L. 100, the bill were shortly conceived thus, 'Pay the within contents to Titius?' If the former was a bill, this must be the same; and, therefore, all indorsations (which this last example is) are truly and

really bills; and, so the indorsation in question, had it not even related to a bill, would be good as a virtual bill, and an implied assignation.

*Replied to the first:* Obligations to repay, whether implied or expressed in the body of a bill, are only of the nature of a common ground of debt; which, though vouched by the bill and receipt upon it, has, in no country, been considered, as having the nature or privileges of a bill-debt: Accordingly, when the statute 1681, is looked into, it will be found; that nothing there is indulged with the privileges, but the obligation upon the acceptor and drawer, to the possessor; by no means the obligation that might arise to the acceptor, for repetition against the drawer; that was not understood to arise from the bill, as the privileged vehicle of commerce; but to arise from the common law *ex mandato*; and, therefore, was left to the disposition of common law.—*Replied to the second:* The form of bills is strictly to be adhered to; of which form, indorsations are not. Assignations are of as great consequence as bonds; and, if a simple indorsation, written by no body knows who, without witnesses, or any one solemnity required in law, should be found good to convey bonds and other writs, as well as bills; it would be the same, as if the Lords did find, that assignations, translations, and other such writs, were to be excepted out of the 5th Act, Parl. 1681, anent the solemnity of writs.

THE LORDS repelled also this exception, in respect the obligation to repay, was engrossed in the bill, and that the indorsation implied an assignation.

*Fol. Dic. v. 1. p. 96. Rem. Dec. v. 1. No 96. & 97. p. 189.*

1745. June 14. CREDITORS OF GLENDINNING against MONTGOMERY.

AFTER Magbyhill had poinded a parcel of sheep from Glendinning, a tenant, upon his protested bill; the other creditors of Glendinning arrested in his hand and pursued a furthcoming. In which it was *objected* to his poinding, That it had proceeded upon a bill not duly protested, in so far as, notwithstanding the protest was *ex facie* formal; yet in reality, neither the procurator for Magbyhill, whom the instrument bore to have protested the bill, nor Glendinning the acceptor, against whom the bill (which bore no place of payment) was protested at Peebles, which was not the place of his residence, were at the time present.

Whereof the Ordinary having allowed a proof, the fact came out by the depositions of the instrumentary witnesses to be, that Magbyhill had sent the bill to John M'Ewan clerk of Peebles, to whom one of the witnesses was apprentice, and the other a servant, with orders to protest it: That M'Ewan delivered the bill to the witnesses, desiring them to write out a protest thereon, and to insert therein the name of John Hunter indweller in Peebles, as procurator for Magbyhill; which accordingly they did, and subscribed, along with the notary as witnesses; though neither the said John Hunter nor Glendinning the acceptor was present.

No 50.

No 51.

A protest on a bill, which bore to be payable at no certain place, was sustained, taken at the head burgh of the shire, where the debtor had his residence.