

from Lord Stair, b. 1. tit. 11. § 7. first referred to, does not meet the present question. Lord Stair, when he mentions ' payment made *bona fide* by a posterior order,' must have meant, payment made on a bill, or an order on the back of a bill: For instance, a person takes two drafts, first and second, of the same bill; he indorses the first, and delivers it, or sends it by post, to the indorsee: The second he holds some time in his hands; and afterwards sends it with a posterior order, or indorsation, to a different person, who makes the first demand. The person drawn on pays *bona fide*.

The other citation from Stair, b. 3. tit. 1. § 12. that ' intimation being, by *our proper custom only*, a necessary solemnity, holds not in *orders*, which stand for ' assignments among merchants, *strangers* especially, *qui utuntur jure communi gentium*;' this passage regards foreigners, and throws no light on the present question.

The argument that a bill prior in date is preferable to an assignment intimated, and consequently to a second bill, is inapplicable; for no conveyance of a debt, not constituted by bill, can have the privilege of indorsation of a bill, so as to be effectual without intimation. A bill not indorsed, would not be preferable to an assignment intimated, before the bill was presented to the debtor; consequently would not be preferable to a bill posterior in date, first intimated.

It is of no importance, that the petitioner's bill was first payable. For the second bill contains no intimation to the persons to whom it was directed, that any former bill had been drawn. It was a simple draft, to pay a certain sum, at a certain day. It was presented and intimated to the debtor before the prior bill. The first intimation completed the conveyance, whatever was the term of payment: Nor can the time when the competition occurred make any difference.

Lord Ordinary, *Elhier*. For Petitioner, *H. Home*. For Respondent, *Jas. Geddes*.

*Fol. Dic. v. 1. p. 97. Session Papers in Advocates' Library.*

---

## SECT. VIII.

### Indorsation.

1754. July 8.

JOHN MITCHELL, Merchant in Edinburgh, *against* ALEXANDER BROWN,  
Merchant there.

ALEXANDER BROWN having accepted a bill drawn upon him by Thomas Scot, merchant in London, 20th October 1713, for the sum of L. 51 : 5s. Sterling, payable to himself, or order; the first of April thereafter, to reimburse Thomas Scot, of a bill drawn by Alexander Brown upon him, payable to Robert Wilkes, on the said first day of April: Upon the 3d of the said month of April, when both these

No 62.

After the holder of a bill, had written on the back of it, that he had drawn a separate bill

No 62.  
for the amount; that second bill having been dishonoured, it was found that the first might still be effectually indorsed away.

bills fell due, Mr Scot suffered the bill, payable by him to Wilkes, to be protested for non-payment, and drew a bill upon Brown for the L. 51 : 5s. payable to Alexander Mitchell at London, or to his order; and immediately, of the very same date, writes upon the back of the bill, formerly accepted by Alexander Brown, ' April 3d 1714, This day, at 14 days sight, drawn on you for the contents of this bill, payable to Alexander Mitchell, or order, value passed to your credit, ' Thomas Scot ' Alexander Mitchell indorsed this new bill to his brother, John Mitchell; who having protested it against Mr Brown for non-acceptance, returned the same to London. Upon which Mr Scot, 11th May 1714, indorsed to Alexander Mitchell the bill formerly accepted by Mr Brown, and noted on the back as aforesaid, who reindorsed it to John Mitchell. John Mitchell protested the bill against Mr Brown for not payment, and charged him with horning; who suspended, upon these grounds: *1mo*, The indorsation, 11th May 1714, ought not to be regarded; because, long before, the bill was passed by Scot, the indorser, to the suspender's account of credit, as the charger knew. And the cause of the suspender's accepting this bill, payable to Mr Scot's order, was his accepting the bill to Mr Wilkes, as is instructed by the letter of advice to which Mr Mitchell's bill relates; therefore, till Wilkes be cleared, the suspender cannot pay Scot's bill. *2do*, Mr Scot having indorsed the bill charged on when he was bankrupt, not for money presently advanced, but for satisfying his bill of the 3d April, protested for not acceptance, the indorsation is reducible upon the act of Parliament 1696, as was decided 16th January 1713, Campbell of Glenderuel *contra* Graham of Gorthie, p. 1120.

*Answered* for the charger: *1mo*, *Esto* the bill charged upon had been accepted by the suspender, for Mr Scot's reimbursement of a bill drawn upon him, payable to Mr Wilkes, that could not hinder Mr Scot to sell this bill, or procure credit upon it, to any he pleased; nor could it hinder the charger to lend his credit upon an accepted bill: What was between Brown, Scot, and Wilkes, was among themselves; but a plain accepted bill of exchange was transmissible without any embargo. And suppose the charger knew that Mr Scot had this accepted bill, to reimburse him of another bill he had accepted payable to Wilkes, that could not hinder the commerce of the other bill. Yea, what if Mr Scot procured credit upon this bill to loose Wilkes' bill, which any one would advance, trusting to the suspender's solvency? If Mr Scot did not loose Wilkes' bill, that cannot be imputed to Mr Mitchell: And the suspender was to lay his account, at his accepting the bill charged on, that it might go through many hands; and he was only to rely upon Mr Scot for his paying the other bill to Wilkes. As to the objection of indorsing the bill, after it had been past to the suspender's account of credit, and so previously noted on the back, it is *answered*, that the bill was not simply past to his credit; in which case it could not have been indorsed to another; but only *qualificate*, upon condition that he answered the other bill to Mr Mitchell; and seeing he refused to do so, it remained as a bill still to be indorsed, and very naturally, to Mr Mitchell. *2do*, Suppose Mr Scot had been bankrupt, the 11th May

1744, when he indorsed the bill charged on, he is not alleged to have been in these circumstances the 3d April preceding; and the indorsation, 11th May, was but in consequence of the bill drawn 3d April, and the same in effect as if it had been then indorsed, by the precedent note upon the back thereof, of the same date with the other bill. Besides, how can the act of Parliament 1696 be brought to regulate a bill of exchange, drawn by a London merchant, and indorsed to a London factor.

THE LORDS found the letters orderly proceeded.

*Forbes, MS. p. 79.*

No 62.

1727. June 28.

GRIERSON against EARL OF SUTHERLAND.

In this case, of which the particulars are stated, No 50. p. 1447. a bill drawn, payable to a third party, bore this clause, 'This, with the porteur's receipt, shall oblige me to repay the like sum to you, or your order.' The acceptor having paid the bill, indorsed the obligation for repayment; and, in a process at the indorsee's instance against the drawer, it was *pleaded*, that the indorsation was a valid transmission, not only because the obligation was contained in a bill, but that all obligations whatever are transmissible by indorsation; an indorsation being truly a bill. THE LORDS sustained the pursuer's title, in respect the obligation to repay was engrossed in the bill, and that the assignation implied an assignation.

*Fol. Dic. v. 1. p. 97.*

No 63.

1739. December 3.

THOIRS, against FRASER.

A BILL was drawn for payment of a sum, 'with annualrent and penalty.' It had been indorsed to John Fraser, whose creditor, Thoirs, arrested in the hands of George Fraser, who was debtor to John. George brought a suspension, on this ground, That the bill being null, as bearing annualrent and penalty, the indorsation, being but a relative writ, must stand or fall with the bill; therefore was likewise null.

THE LORD ORDINARY 'found the bill and indorsation void and null.'

*Pleaded*, in a petition: The indorsation bears expressly to be for value received. The nullity alleged against the bill is, that it stipulated a penalty and annualrent from a term preceding the date. It is acknowledged, that by a decision, Innes against Flockhart, in 1727, (No 19. p. 1418.), such bills are found to be null; and therefore no action is competent against the acceptor upon them: but it cannot be allowed, as a consequence, that if a bill, bearing penalty, should be drawn payable to a porteur for value received of him, the porteur would have no recourse against the drawer. The reason of the decision was not on account of defect of evidence in the writ, but because the Court would not sustain a writ of that nature for penal obligations. There is a strong feature of distinction be-

No 64.

An indorsation found to be a relative writ, which must stand or fall with the bill.