

1712. July 16.

ANDREW CHEAP, Brother to JAMES CHEAP of Rossie, *against* JAMES ARNOT of Woodmill.

ANDREW CHEAP having charged Woodmill to make payment of L. 253 : 12s. Scots, with annualrent and penalty, contained in his bond 11th November 1608 ; and of L. 100, with annualrent and penalty, contained in his other bond, dated 27th April 1709 : He suspended, upon this ground, That the charger having received payment of L. 20 Sterling, by a bill drawn by the suspender, 26th February 1709, upon David Harden of Aberuthen, payable to the charger, conform to his receipt on the back of the bill ; that L. 20 Sterling must be imputed *in solutum pro tanto* of the sums charged for, seeing the bill doth not bear value received.

*Alleged* for the charger : Value being presumed to be received in all bills, though not bearing value ; present value is presumed to have been given in this case. Because, *imo*, That is to be presumed, which is most ordinary, L. 114. ff. de R. 7. And the ordinary way of dealing in bills is by delivering present value in money or goods. And men of business, when they draw bills payable to their creditors, take receipts of the sums in the bills in part of payment of the debts owing by the drawers ; or qualify the bills, so that the persons drawn upon, shall take such receipts from the possessors : For that otherways, the drawer of the bill should have no security for the sum in the bill, nor instruction that the debt was paid. It would mar commerce, and prove a snare to merchants and others, knowing no such distinction of bills bearing value, and those not bearing value, if the latter should be interpreted in satisfaction of anterior debts.

*Answered* for the suspender : It is indeed ordinary to give present value for bills, and value received is implied betwixt persons no otherways concerned together but by that single bill : But, in the present case, the suspender being debtor *ab ante* to the charger, and giving a bill not bearing value received, the presumption of present value given ceaseth. The charger would not agree to give the suspender a receipt in part of payment : Because he had a mind to be fully secured, and knew not if the bill would be accepted and paid.

THE LORDS found the sum in the bill founded on by the suspender to be imputable in payment of the bond prior to the date of the bill ; unless the charger prove, by the suspender's oath, That the bill was granted for another cause.

*Fol. Dic. v. 1. p. 100. Forbes, p. 620.*

1715. February 15. MRS AUCHINLECK *against* ENSIGN MILLAR of Mugdrum.

LIEUTENANT DOUGLAS draws a bill upon Ensign Millar, for paying to himself, or order, L. 30 Sterling, as the balance of a stated account betwixt them. This

No 119.

A bill drawn payable to a creditor, not bearing value received of him, understood to be in satisfaction *pro tanto* of the debt, and not that the creditor gave present value for it.

No 120.

An indorsee to a bill is presumed to have given value for it.

No 120.

bill is accepted, and by the Lieutenant indorsed thus ' Pay to Grace Douglas, or order, the within contents' ; and further indorsed by her to Mistress Auchinleck in the same way. The acceptor suspends upon a back-bond relative to, and restrictive of, the bill granted by the drawer to him. And the question being, Whether an indorsation, not bearing value received from the indorser, does so denude him, that the contents of the bill could not be affected by his creditors, or by an obligation restrictive of the bill ?

It was *alleged* for the suspender, That we, having scarce any laws or decisions touching the present question, it falls naturally to be determined by the laws and practice of other nations. And, as to this, the French King's Ordinance in 1673 is plain, That the property of such a bill is not transmitted, where value is not mentioned to be received. And Mr Savary, a French writer, in his *Avis & Conseils sur le Commerce*, in the 34th *avis* states the present case plainly, and determines it in the suspender's favour. *2do*, Mr Scarlet, who does not confine himself to the customs of any particular nation, but takes in what is law and practice all Europe over, does, in his 12th rule of the 8th chap. thus determine the present case, ' if the indorsment have no more than, ' Pay for me to N. N.' and it be not expressed from whom the value was received, then it is looked on as no more than a single order ; and the indorser is still considered as the principal possessor of the bill.' *3tio*, Supposing the indorser had actually gotten payment from the acceptor, and granted discharge ; and that, upon clearance betwixt the drawer and acceptor, the drawer had got up this bill, he would be no doubt justly founded against the indorsers for the repetition of the money ; because it would stand proven, by the discharge, that they had uplifted the money by virtue of a naked order, which did not bear that they had paid the value ; and which would necessarily force them to prove, by his oath, that value was paid, though not expressed. And, it is certain, there is still recourse for repetition where value is not expressed ; but none where it is expressed, unless the repeater will redargue value by the receiver's oath.

*Answered* for the charger, That the French King's Ordinance is no rule to us ; for, by it, a blank indorsation in France is void, which, nevertheless, by the laws of Scotland and England is valid. And, therefore, that article, above cited, being expressly contrary to our daily custom, ought not to be regarded. And in general it is a rule with us, and in England, That, in all bills, value is presumed to have been paid by the possessor, except it be otherwise made appear, either from the form of the draught of the indorsment, or from the circumstance of the persons ; or by oath of party. Thus, No 177. p. 1535, value was presumed to have been given by the possessor of a bill, though it bore not value received, unless it were proven by writ or oath that no value was paid. Again, 16th January 1709, Swinton and Executors of Bonnar *contra* Representatives of Thom, No 118. p. 1536., by an order to deliver to a bearer a sum of money, and take his receipt, value was presumed to have been given, though

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.

No 120.

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 Kaimis, 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 Kaimis, as an instruction of payment. Whereupon Ker having insisted against Bassanden for repayment of the sum, it was alleged for him,

No 121.  
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