

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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diligence proceed upon it, in terms of the acts 1681 and 1696. Supposing the Earl had survived the eight months, and continued with the regiment until the sum in the order had been due to him for subsistence, still summary diligence could not have proceeded. A proof must have been taken, that Captain Wardlaw had actually received so much, which would have required an ordinary action; demonstration of itself, that the writing was not a bill of exchange, but simply a conditional and eventual mandate, which not bearing value, value was not to be presumed.

The cause for which the mandate was given could only be conjectured. Captain Agnew was a man of substance at the date of the order, but had lost his fortune by the South Sea scheme. Although not opulent for some years before his death, he never made any demand, either on the representatives of the drawer, or on the acceptor.

Pleaded for the pursuer, Before one obtains a bill, by the ordinary course of business, he pays the value. Therefore, it is presumed, value is received from the creditor in the bill, unless it appear he was the servant of the drawer, receiving it upon his account. Captain Agnew was not the factor or servant of the Earl of Forfar; and the bill being payable *to order*, plainly implies that the money belonged to the Captain, because he might have indorsed the bill. Bills payable for behoof of the drawer ought not to bear *to order*, because the money must be retained by the receiver for the drawer's use, when he pleases to call for it.

The bill in question is a foreign bill, and must be regulated by the law of such bills, established by decisions; particularly Scot against Laing, No 117. p. 1535; Swinton against Tom, No 118. p. 1536; Ker against Brown, No 121. p. 1539. In these instances the Court found, 'That a bill is presumed to have been for value received of the person to whom it was payable.

The pretence that the bill was conditional, is frivolous. A fund is indeed pointed out for payment of the sum, but that becoming ineffectual, the drawer can no more, on that account, be liberated, than if no particular fund had been mentioned.

Bills of bottomry are examples of bills properly conditional; they are payable, by express stipulation, only on the arrival of the ship; and, on account of this risk, an immense interest is stipulated; which, on account of that risk, is not illegal. Suppose one to draw on his factor for rents that shall become due at next term, would the drawer's representative be free, in consequence of his ancestor's death before the term?

A bill of the kind at issue is a money bill. Where the fund specified fails, the debtor remains liable as if no fund had been mentioned, *utile per inutile non vitiatur*.

The COURT found, that the order founded on, though it did not bear, yet presumed value.

Lord Ordinary, *Grange*.A&t. *And. M'Dowal*.Alt. *Ja. Graham*.*Fol. Dic. v. 1. p. 99. Session Papers in Advocates Library.*