

No 64.

A second petition was presented, which was likewise refused; and without answers.

In that second petition, it was argued, that the decision Innes against Flockhart, was erroneous. It was urged, that a bill ought not to be accounted entirely null, because of a clause stipulating for a penalty. Much stress was laid on the decision Alifon against Crawford, (*voce* WRIT,) where an indorsation of a bond, in the words, 'pay the contents,' was held to be good, as being in effect a new bill.

Lord Ordinary, *Grange.* For Petitioner, *Geo. Ogilvie.* For Respondent, *Wm Grant.*

See No 21. p. 1419. *Session Papers in Advocates' Library.*

1741. July 10.

ANDREW FORBES, Merchant in Rotterdam, *against* ABEL FONNEREAU.

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A bill being drawn by a merchant abroad, payable to his correspondent in Britain; or indorsed to him for value in account; the property is not thereby transferred, unless, in so far, as by payment or acceptance of bills drawn on him, the correspondent is creditor to the merchant.

THE said Andrew Forbes had frequent intercourse and dealings with his brother, Alexander Forbes, merchant in London, in the way of their business; and as Andrew's business made it necessary for him to have a correspondent in London, to answer the draughts he had occasion to make from time to time, on account of his being in advance for his employers; so he was in use of drawing or indorsing, to his brother Alexander, the bills of his Scots employers, and making draughts on him, payable to such other persons as he had occasion to be debtor to, in the way of his business. Alexander died in 1740; and, in pursuance of the way of dealing betwixt the two brothers, Andrew had indorsed to Alexander bills to a pretty considerable extent, some of which he had recovered payment of, but a considerable part of them were outstanding at the time of his death. They generally bore to be drawn or indorsed to Alexander, for value in account with Andrew; others simply for value. Andrew drew on his brother Alexander for sums equivalent to the bills he had remitted to him, the balance on either side coming pretty near. All these draughts Alexander accepted, and a considerable part of them were duly paid; but Alexander dying, and leaving his affairs in confusion, great part of Andrew's draughts on his brother Alexander, were returned back to Andrew, which occasioned a considerable balance to come out on Andrew's side. Abel Fonnereau being creditor to Alexander, obtained himself confirmed executor-creditor; and gave up, in inventory, those Scots bills which were drawn and indorsed by Andrew. Whereupon Andrew raised a process for having it declared, That the property of those bills remained with him, and they ought either to be delivered up, or the money made furthcoming, where payment has been recovered by Abel Fonnereau. And the question betwixt the parties was, Whether these bills, drawn or indorsed by Andrew, payable to his brother, and bearing generally to be for value in account, did remain the property of Andrew, notwithstanding of Alexander's having accepted draughts for equivalent sums? Or if, by their being originally payable or indorsed to Alexander, and his after accepting of equivalent draughts by Andrew to his creditors, they

became absolutely the property of Alexander, though, in the event, some of Alexander's acceptances to Andrew had not been paid.

Pleaded for the pursuer, That though the indorvation of bills purchased for value, or where the intendment of such indorvation appears to have been to transfer the property, as is the common case among persons residing in the same country, the simple indorvation may have the effect to vest the property of such bills in the indorsee; yet, in transactions of this nature, betwixt a merchant abroad, transmitting bills to his factor or correspondent here, by indorsements for value in account, such indorsements can never have the effect to transfer the property; because, in such case, it is undeniably evident from the *res gesta*, and particularly from these words, *value in account*, that the indorsee is no purchaser of these bills: That he is but a hand employed by the merchant abroad, to receive the money, for which he was to be accountable; so that, however such bills were thereby nominally vested in the factor or correspondent, whereby he might be enabled to uplift the money, or discharge the bills for the behoof of his constituent; yet so long as the money was not received, and the bills themselves outstanding, they continued to be the property of the indorser; upon his risk and account: If the simple indorvation, under these circumstances, did *eo ipso* transfer the property of the bills, the indorsee would, from the moment of such indorvation, become liable to the indorser for the equivalent sums; which is manifestly too absurd to be maintained; more especially, that, from the course of their correspondence, and former account, as balanced and stated in Alexander's books, it appears, he did not consider these bills as his own property, but as the property of his brother Andrew; see 5th June 1669, *Street** and the late case betwixt Mr Alexander Arbuthnot and George Ainslie† Therefore, taking it for granted, that the property of these bills was not transferred to Alexander; it is inconceivable, how Alexander's accepting the bills, which his brother Andrew drew upon him a few days before his death, should, as it were, by the force of magic, from that moment, transfer to Alexander the property of the bills in question, when these very bills were forthwith protested for not payment, and returned upon Andrew, who was thereby put under a necessity to retire and pay his own draughts. Nay, it may be doubted, supposing Alexander had actually paid those bills which his brother drew upon him, if thereby the property of the bills in question would have been absolutely transferred to Alexander; because, however he might have been entitled to have applied the proceeds of the Scots bills for his own reimbursements; the property of the bills, so long as they were unpaid, must still have remained with Andrew; and if any of the debtors had failed, he, and not Alexander, must have sustained the loss.

Pleaded for the defender, That he had no occasion to argue, how far an indorvation, bearing value in account, and where the indorsee is to account to the indorser for the sum in the bill when recovered, whether that would state the property of the bill in the indorsee, which, perhaps, is not so clear a point; but what he insists upon is, that Andrew having drawn or indorsed bills to him, and

* *Street* against Hume and Bruntfield, Stair, v. 1. p. 616. *voce* SURROGATUM.

† *Voce* FACTOR, from Kilkerran, p. 182.

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afterwards having made draughts on him for equivalent sums, that, from the time Alexander accepted of the draughts on him, he became full proprietor of those bills, which had been drawn or indorsed by his brother payable to him. For even supposing, as the pursuer states it, that these indorsations had been to Alexander only as factor, and that the design was to recover the money, and be accountable for it to his constituent; yet, whenever Andrew came to draw upon Alexander for an equivalent sum, the accepting of that draught was an accounting to Andrew, for the effects he had in his hands: He ceased then to be debtor to Andrew, and became debtor to the party to whom Andrew's draughts were made payable; consequently, as the onerous cause of his acceptance, the effects of Andrew, he had then in his hands, became absolutely his own property. If a contrary doctrine were true, this manifest absurdity would follow; the factor would be bound to make furthcoming the effects that had been put into his hands; he would stand absolutely bound to his employer's creditors; and, for his reimbursement, would only have a *pari passu* preference on these very subjects, in contemplation, and for satisfaction of which, he had accepted the draughts. Perhaps Alexander was not obliged to accept of draughts on him; for, until such time as he had recovered payment of the bills indorsed to him, he had strictly no value of his brother's in his hands. But if he did accept, it was an accounting for the subject of the bills indorsed to him before payment; and those bills which he formerly held for value in account, he now had for a just and onerous cause; consequently they were as much his property; as bills could be of any other onerous indorsee. *Lastly*, From the extract of the pursuer's books, it appears he looked upon those bills as become his brother's property by the indorsation; for, he debits Alexander with all the bills indorsed; gives him credit for the whole draughts made by Andrew upon Alexander; and states the balance as arising from part of those draughts being returned protested; not arising from Alexander's having failed to account for any of the bills indorsed to him: And this the defender thinks is a stronger argument against the pursuer, than any he can draw from the stating of the accounts by Alexander.

THE LORDS found Andrew Forbes pursuer, preferable to Abel Fonnereau, executor-creditor of the deceased Alexander Forbes, with respect to the Scots bills made payable to Alexander, or indorsed to him for value in account; except in so far as the executor-creditor shall make appear, that Alexander Forbes, either by payment, or his acceptance of bills drawn on him by his brother Andrew, stands creditor to Andrew. *See FACTOR.*

Fol. Dic. v. 3. p. 77. C. Home, No 175. p. 291.

No 66.

Scoring the indorsation, re-invests the indorser.

1752. January 7.

THOMAS and ADAM FAIRHOLMS, Petitioners.

A BILL was drawn, 2d October 1751, by Sir Robert Richardson, of the Engineer-company, residing at Perth, upon James Cockburn, Esq; at the Office of