

1758. July 31.

JAMES FERGUSSON *against* WILLIAM BLAIR in Nether Shannoch-hill.

JAMES FERGUSSON brought an action against William Blair upon a bill of the following tenor: 'Down, January 31. 1744. Gentlemen, Against the term of Candlemas 1745, pay, conjunctly, to me or order, in the dwelling-house of John Moir, steward-clerk of Monteith, the sum of five hundred and twenty-five merks Scots, value of JAMES FERGUSSON. — To Robert Campbell of Torry, and William Blair in Nether Shannoch-hill, conjunctly and severally. Accepts ROBERT CAMPBELL. Accepts WILLIAM BLAIR.'

The words JAMES FERGUSSON were evidently written with a different ink from the other parts of this bill.

It was *objected* by the defender, That this bill was void and null, for that the name of James Fergusson, as drawer, was not adhibited to it till the intending of this process. That, by the act 1696, 'it is declared, That, for thereafter, no bonds, assignations, dispositions, or other deeds, be subscribed blank in the person or persons names, in whose favour they are conceived; and that the foresaid person or persons be insert before or at subscribing, or at least in presence of the same witnesses who are witnesses to the subscribing, before delivery.' This act was found to extend to bills, 9th February 1711, Brand against Anderson, *voce* BLANK WRIT; and the time of inserting the drawer's name, in the case of bills, which require no witnesses, must necessarily be either before or at subscribing. In the case of Walkinshaw *contra* Campbell, 8th January 1730, *voce* BLANK WRIT; a bill taken payable to the bearer, was found null upon this statute; and, in a very late case, Douglas and Hood *contra* Logan, 9th November 1748, No 41. p. 1438.; a bill was found null for want of the drawer's subscription.

Answered, The bill in question remained always in the custody of James Fergusson the drawer, to whom it was originally delivered, and was subscribed by him before it was produced in judgment. Although the act 1696 should be understood to apply to bills, yet that would not annul the bill in question; for, in practice, it has always been held sufficient, that the drawer's name be filled up, before the bill is produced in judgment. This is an indulgence allowed in consequence of the usual practice in commercial transactions, that the drawer often delays to adhibit his subscription, till he comes to make use of the bill. And this does not occasion that sort of confusion, which it was the purpose of the act 1696, by prohibiting blank writs, to prevent; for it is not the practice to transfer these blank bills to other persons, who may fill up their name as drawer; because the facility of indorsation renders that method altogether unnecessary: and therefore it would be hurtful to commerce, without being attended with the benefit, which the act 1696 proposed, if bills were found null, wherever the drawer's name was not adhibited before or at subscribing. This construction of the act of Parliament has been established by several decisions; and was first introduced by a decision 27th July 1738, Henderfon *contra* Davidson, No 35. p. 1435.; and afterwards

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The drawer's name may be filled up in a bill kept in his own custody, at any time before it is produced in judgment.

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confirmed by a latter decision, 25th November 1748, Elias Cathcart *contra* Henderfon, No 41. p. 1439. ; where the Lords repelled the objection to a bill, That it was signed by the drawer after the death, not only of the debtor, but of the creditor in the bill, to whom it was made payable; upon this medium, That it had been signed by the drawer before it was produced in judgment, and had been in possession of the drawer, from its date, for the creditor's behoof.

'THE LORDS repelled the objection to the bill.'

Act. *Johnstone.*

Act. *Will. Graham.*

W. Johnstone.

Fol. Dic. v. 3. p. 76. Fac. Col. No 130. p. 241.

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The objection, that a bill was not subscribed by the drawer till after the acceptor's death, found not relevant against an onerous indorsee.

1761. November 24.

SHAW *against* FARQUHAR.

EDWARD SHAW, on death-bed, drew a bill upon himself for L. 20 Sterling, and accepted it payable to David Shaw at the Whitfunday following. This bill he delivered to a third person for David's behoof; and, after Edward's death, it was delivered to David; who, after he had put his name to it as drawer, indorsed it for value to Farquhar. Farquhar brought a process for payment before the Sheriff, and recovered decreet. Edward Shaw (junior) suspended, and repeated a reduction upon the following grounds:

1mo. As the bill was not signed by the drawer till after the acceptor's death, it is void and null. A bill is either to be considered as a mutual contract betwixt the drawer and acceptor, or as a mandate by the drawer upon the acceptor. If it is considered as a mutual contract, it is not complete until both parties have signed it; and if one of them dies, it cannot thereafter be completed by the subscription of the other party. If it is looked on as a mandate, it must be subscribed by the drawer before the death of the person on whom it is drawn. Upon these principles the Court decided, 9th February 1711, Brand *contra* Anderson, *voce* BLANK WRIT; and 27th July 1738, Henderfon *contra* Davidfon, No 35. p. 1435.

Answered for Farquhar: That David Shaw is expressly mentioned in the bill as creditor and drawer; and, *2do*, That he put his name to it the moment it came into his hand, and before the indorsation; and that it is sufficient, if a bill is signed by the drawer before it is produced in judgment; though it should be after the death of both the creditor and acceptor; as is proved by Mr Erskine's opinion, B. 3. tit. 2. § 28.; and by the decision Elias Cathcart *contra* Henderfon, 25th November 1748, No 41. p. 1439.

2do, This bill was granted on death-bed without value, in order to constitute a legacy; and therefore must be void.

Answered, That the bill was delivered to a third person before the acceptor's death for the drawer's behoof; and, no deed, after delivery, is presumed to be a *donatio mortis causa*. Neither was it entirely without value; for it is proved, that David Shaw had laid out a small sum of money for the acceptor, and had done