1714, 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. No 62.

THE LORDS found the letters orderly proceeded.

Forbes, MS. p. 79.

1727. *June* 28. GRIERSON *againſt* EARL of SUTHERLAND. No 63.

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.

1730. *December* 3. THOIRS *againſt* FRASER.

No 64.
An indorſation found to be a relative writ, which muſt ſtand or fall with the bill.

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. tween an onerous porteur and an acceptor. The drawer ſuffers no material prejudice, by annulling the acceptor's obligation; for, if a debt be truly due, he can ſtill enforce payment by an action. But the porteur, who pays his money ſolely upon the faith of the bill given him, has no other evidence or ſecurity for it. From the nature of the thing, then, the obligation upon the drawer for recourſe, and upon the acceptor for payment, are quite different; and proceed upon different principles. The porteur ought to have recourſe the more, on the very account, that no action is competent to him againſt the acceptor. It follows, that, although it has been decided, that a bill bearing penalty is null, as to the acceptor, yet recourſe upon it ought to remain againſt the drawer.

If a writ be found null, as not probative, it can have no effect whatever. But where the nullity ariſes from the nature of the obligation, or any circumſtance not proceeding from defect of evidence, a writ may be null as to ſome effects, and good as to others; thus adjudications, null in other reſpects, may be ſuſtained as ſecurities.

But this caſe is ſtill ſtronger than if John Fraſer had been merely the porteur. The recourſe is founded on an indorſation, which is a *ſeparate writ*, and does not depend on the bill. It is a diſtinct obligation on the indorſer. It is in fact a new bill. The ſhort expreſſion, 'Pay the within contents,' extended at length would be, 'Pay the within L. — Sterling, to ——— or order, value of him.' The only uſe made of the relative word 'within,' is to denote what the contents are. Thus, although there had been no bill, but only an account, the words, 'Pay the 'within contents,' would have amounted to a bill for the ſum; and the indorſee would have had recourſe on the indorſer or drawer. So in the caſe of Aliſon againſt Crawford, (*voce* WRIT,) indorſation upon a bond, was ſuſtained as a bill for the contents; the bond being evidence what the contents were, and that there was value in the debtor's hands. In the caſe Grierſon againſt E. of Sutherland, No 63. p. 1469. it was found, that an obligation to pay, contained in the body of a bill, was indorſable by the acceptor, after payment of the bill; upon this ſole principle, that all obligations are in ſome ſenſe indorſable; ſince every indorſation is a new bill; and the obligation, which is indorſed, ſerves to ſhow for what ſum it was drawn. If, then, indorſation be a new bill, there can be no queſtion, but that recourſe is competent to the indorſee; whatever be contained in the bill indorſed. It may indeed be argued, ſuppoſing the indorſation to be a new bill, that, as in the preſent inſtance, it was a bill *for the contents*; theſe contents being a ſum with annualrent and penalty, the indorſation, or new bill, laboured likewiſe under the nullity ariſing from that circumſtance. But both annualrent and penalty might, to the indorſee, be held to be a principal ſum; the indorſation itſelf bearing value received: In fact, however, the word 'contents,' ought to be underſtood to relate to no more than the principal obligation; the penalty being conditional, and exigible only in caſe of delay.

If the indorſation were to be conſidered as a mandate, it ought to be held to be a mandate or procuratory *in rem ſuam*; by which the *mandatarius* is commiſ-

No 64.

ſioned to receive the money due by the acceptor for his own behoof; and if ſo, from the nature of mandates it muſt follow, that if he has no action for recovery of the money, upon the right of the *mandans*, the *actio contraria mandati*, ought to be competent to him, upon that very ground. It would be unreaſonable to ſuppoſe, that becauſe the contract betwixt the *mandant*, and the perſon upon whom the order is given is null; therefore the contract, betwixt him and the *mandatarius*, conſtituted by all the forms required by law, ſhould be alſo void.

Let it even be ſuppoſed, that an indorſation is nothing, but the conveyance of a bill, as an aſſignation is of a bond; ſtill as indorſation includes abſolute warrandice, the indorſee muſt have recourſe. Suppoſe a bond aſſigned, with abſolute warrandice; although that bond ſhould want writer's name or witneſſes, or be otherwiſe null; undoubtedly the aſſignee would have recourſe upon the aſſigner. The law has as much eſtabliſhed an indorſation to be a probative writ, and valid tranſmiſſion, of a bill; as, an aſſignation, of a bond.

Anſwered: The diſtinction between drawer and indorſer, can have no effect. In the caſe Innes againſt Flockhart, the bill was not reduced as to the penalty only, but *in toto*; becauſe not being a good bill, it was no probative writ, as wanting the requiſite ſolemnities. In that ſituation, a bare ſubſcription can no more prove the indorſation, than it can the acceptance. It muſt be null and ineffectual in all reſpects. It would be ſtrange, to hold the ſame paper to be null, in reſpect to drawer and acceptor; and yet valid and obligatory, betwixt drawer and indorſee. Not being a proper bill, the aſſignation of it by indorſation, muſt be as little probative or obligatory, as the bill itſelf.

If the writing founded on is any thing, it is of the nature of a bond, as bearing annualrent and penalty; but as ſuch, not having writer's name and witneſſes, it is not probative.

The argument, that the indorſation is a new bill, will not ſerve the petitioner's cauſe; for the words 'pay the contents,' are equivalent to a repetition of the whole bill; conſequently, of the ſtipulation for a penalty. As a new bill, therefore, it is equally invalid as the relative one.

It is in vain for the petitioner to argue, that the indorſation has all the requiſites, which by law indorſations are required to have; for ſo had the acceptance all the requiſites of an acceptance, viz. *a bare ſubſcription*; yet it was rendered of no avail, in conſequence of the illegal ſtipulation for a penalty; for the ſame reaſon the indorſation muſt be equally ineffectual. If an irregular writing were to be ſuſtained at all; it ought to be ſo againſt the acceptor, rather than any one; becauſe he knowingly put his name to it; and thereby bound himſelf to the drawer, or his order, for the contents.

The nullity inſiſted on, is urged with the more favour, that the bill is of a very old date.

The Court refuſed the petition; and adhered to the Lord Ordinary's interlocutor, finding the indorſation, as well as the bill, null.

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 Aliſon 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.

No 65.
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