

No 44.

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.*

No 45.

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

several pieces of service for him; *L. 19. § 5. ff. De donat.*; and Fountainhall, v. 2. p. 499. 4th June 1709, *Burden contra Oliphant, voce DEATH-BED.*

No 45.

The principal defence insisted upon for Farquhar against the reduction was, That though what is above pleaded for Shaw were well founded, these exceptions are not relevant against him, as being an onerous indorsee: That no objection to a bill can be pleaded against an onerous indorsee, but what appears *ex facie* of the bill; unless it shall be proved, that he was in the knowledge of that objection; which cannot be pretended in the present case. Thus an objection, that a bill of L. 40 was granted for a game-debt, was repelled when pleaded against an onerous indorsee, 26th January 1740, *Nielson contra Bruce, voce PACTUM ILLICITUM.* It may perhaps be true, that the exceptions of falsehood; or *vis et metus*, are relevant against an onerous indorsee; because, in such cases, there is no bill granted; but, in the present case, the bill was voluntarily and legally constituted, and intended by the drawer to be effectual.

*Answered for Shaw:* That the bill in question was null and void for the reasons above pleaded; and this must affect the onerous indorsees, as well as the exception of falsehood, or *vis et metus*. That whatever might be the law with regard to a bill granted in commerce among merchants, the same privilege cannot be allowed to a bill intended only as a security. The law has said, that a legacy, or *donatio mortis causa* cannot be constituted by a bill, bearing to be granted for value; and therefore, the bill in question labours under as clear a nullity, as if it had been forged or extorted by force.

'THE LORDS found the objections proponed against the bill not competent against an onerous indorsee; and therefore assolizied from the reduction, and found expences due.'

A.R. Wight.

Alt. Will. Wallace junior,

Clerk, Pringle.

*Fac. Col. No 65. p. 149.*

1777. July 25.

ROBERTSON and ROSS against BISSETS.

No 46.

THE LORDS refused action on a bill, the drawer of which had died without subscribing it; and the subscription had been adhibited by his heir and representative. See This case *voce BLANK WRIT.*

*Fol. Dic. v. 3. p. 76.*

1785. February 8.

ANNE DRUMMOND against CREDITORS of JAMES DRUMMOND.

No 47.

JAMES DRUMMOND subscribed as the acceptor of a bill drawn in these terms: 'Against Martinmas next, pay to Anne Drummond, or order, the sum of 1035 merks, for value.' But there was no subscription of the drawer.

A bill not subscribed by the drawer, sustained as a document of debt.