

1739. July 27.

DAVID INGLIS *against* The REPRESENTATIVES of JOHN WISEMAN.

No 9.

A bill containing a substitution found null; but a proof allowed that the sum had been paid to the acceptor.

THE subject of the dispute betwixt these parties was a bill drawn by Robert Waddell upon the said Mr John Wiseman, in the following terms :

‘ Pay to me, or order, or, failing me by decease, to my second son Alexander Waddell, the sum of, &c. the like value received by you, &c. signed Robert Waddell : Accepts John Wiseman.’ This bill was indorsed by the drawer to the said Alexander Waddell, and assigned by him to David Inglis, who insisted against the acceptor’s Representatives for payment.

*Objected* : The bill is null, as containing a substitution of heirs ; *which objection the Lords sustained*. Whereupon the pursuer endeavoured to support the writing, upon the footing of its being holograph of the acceptor Mr Wiseman.

—*Answered* : That it neither was, nor could be holograph, seeing the drawer’s name was adjected by the drawer himself. However, the Lords, before answer, allowed the pursuer ‘ to bring what evidence he could, that the sum in the bill ‘ was really paid to Mr Wiseman the time of granting thereof, and that the subscription thereto is the hand-writing of the said Mr Wiseman.’

In consequence of which a proof was led ; at advising whereof, the LORDS found ‘ proven, that the sum in the bill was paid to Mr Wiseman, and that he ‘ granted a bill therefor.’

The defenders reclaimed and *pleaded* : That a deed drawn in form of a bill, where there must be two different subscriptions, *viz.* of the drawer and of the acceptor, could never be holograph of either of them ; and particularly, it could not be understood as holograph of the acceptor, seeing a most material part of the writing, *viz.* the subscription of the drawer, cannot be in the acceptor’s hand-writing. *2do*, In common language, a deed can never be understood as holograph, where the person who speaks is not the writer. This is the present case ; the body of the bill may be the hand-writing of Mr John Wiseman ; but then he is there acting the part of an amanuensis to Robert Waddell the drawer : It is Robert Waddell who speaks in the bill ; and it would be more proper therefore to call it a holograph deed, if it were in the hand-writing of the drawer. *3tio*, The deed in question is a mutual contract, or it is nothing : It is an order or mandate on the one part, and, on the other part, a consent to execute the order or mandate. If the order be formal, and the acceptance formal, it is a good bill ; but, if either be informal, it is nothing at all, because the parts relate to one another. It is a mutual contract, the consent of the one can signify nothing without the consent of the other. The acceptance here indeed is formal ; but, if there be no order or mandate, the acceptance must go for nothing. Now, it is already found, that there is no evidence of an order or mandate ; for *an order to pay money to me, which failing, to my second son*, is good for nothing. In the next place, witnesses cannot at all be admitted in a case of this nature ; because, if the deed in question be a *literarum obligatio*, it is probative of itself, and

needs not the support of witnesses, unless it be challenged in an improbation. On the other hand, if it does not make a *literarum obligatio*, it cannot be the foundation of an action, it can have no effect in law; it may safely be laid aside, leaving the party who founds upon it to bring evidence of his claim in the best shape he can; and, when the matter rests there, it is obvious that witnesses cannot be admitted to prove a loan of money, or indeed to prove the delivery of money in any case. Than this no maxim is more fixed; nay, the practice of the Court goes a great deal further; if a bond be excepted against, as wanting some of the solemnities of the act 1681, it is not found relevant to prove the subscription by the debtor's oath, in order to support the bond; resting owing must be referred to his oath, or nothing; and this founded on the principles above laid down. Now, this argument concludes *a fortiori* to the present case. A bond wanting some of the solemnities of the act 1681, may be a good *literarum obligatio de jure communi*; and it may be plausibly argued, That if the debtor owns his subscription, he ought to be barred from making any objection on the act. But, with regard to the present point, if the deed pursued on be neither a bill nor a holograph writing, it is absolutely good for nothing; consequently not capable of being converted into *literarum obligatio*, by the support of any evidence whatever; and, if it could not be supported by Mr. Wiseman's acknowledgment of his subscription, supposing him alive, but that resting owing behaved to be referred to his oath, far less can it be supported by extraneous witnesses.

THE LORDS adhered. See WRIT.

*Fol. Dic. v. 3. p. 73. C. Home, No. 130. p. 218.*

1751. February 19.

HUGH CLERK against EDWARD KER.

EDWARD KER, merchant, and Hugh Clerk ship-master, in Irvine, submitted certain differences betwixt them; which they executed, by depositing in the hands of the arbiters accepted bills to each other for L. 20 Sterling; and mutual discharges; And thereon the arbiters, finding Ker liable in L. 13 gave up his bill to Clerk, causing him mark a payment of L. 7 on the back.

Ker suspended for this, among other reasons, That the bill was null, being granted instead of a submission; which ought to have been executed by a formal writ: Bills are allowed for the conveniency of commerce; but ought not to be sustained when they deviate from their proper nature.

*Answered*, A submission may be verbal; and it would have been a good way of making it effectual, to have deposited money to be disposed of by the arbiters: Bills are considered as money; so there was here no deviating from the proper nature of a bill.

THE LORDS found the letters orderly proceeded.

*Act. Pringle.*

*Alt. Lockhart.*

*Fol. Dic. v. 3. p. 74. D. Falconer, v. 2. No 199. p. 241.*

No 10.

Two parties submitted a law-suit, by accepting bills to each other, which they lodged with the arbiter, to be given to the party who should be found in the right. The bills were found good, notwithstanding of their conditional nature.