No 7.

The Lords found the libel and reply relevant and approven; and therefore decerned Torphichen to re-fund the sum.

Fol. Dic. v. 1. *p.* 105. *Stair, v.* 1. *p.* 56.

1708. *January* 29. Fulton *against* Johnston.

No 8.

The possessor of a bill having raised a process of recourse against the drawer, and thereafter indorsed the bill; in a new process for recourse, at the indorsee's instance, his knowledge of the former process, which rendered the bill litigious, found relevant to subject him to the oath of the indorser.

Fol. Dic. v. 1. *p.* 105. *Forbes, p.* 233.

*** *See* The particulars *voce* Litigious.

1728. *June.* M'Aul *against* Logan.

No 9.
An onerous indorsee, who knew, when he received the indorsation, that the sum had been arrested before the drawer's name was filled up, was obliged to give way to the arrestment.

In a competition between Archibald M'Aul in Killoside, and Hugh Logan in Littlecreoch, M'Aul arrester, was preferred to Logan an indorsee; because, 'it 'consisted with the indorsee's knowledge, that the arrestment was laid on before 'the signing of the bill by the drawer.'

At the time the indorsation was taken, the indorsee, knowing of the arrestment, saw that the bill was not signed by the drawer, but then got him to add his subscription.

In a petition for the indorsee, it was *argued,* That there is no law or custom enjoining the drawer of a bill to sign at the time of acceptance, otherwise the bill shall be null. Neither can such consequence be founded on the reason of the thing, or the nature of the contract. It is the acceptance which constitutes the transaction. There is no obligation imposed on the drawer. A bill is not a contract between the drawer and the acceptor. If it be a contract at all, it is *ab una parte tantum obligatorius,* as *mutuum* or *stipulatio* in the civil law. In the case of a draught, the drawer often pays without at all subscribing. In that case, it may be the drawer who is the debtor, and the drawee will have recourse on him, although there is the name of but one of the parties on the bill. If the debtor in a bill sign it, it is good, whether he be drawer or acceptor. In this case, however, the drawer's name is in the body of the bill which ought to be held sufficient.

This bill is holograph, which does away any argument founded on the risk of forgery. In the case of the Kirk of Bogrie,* a bill was reduced accepted while blank in the drawer's name, not simply because it wanted the drawer's name, but because it fell under the act of Parliament against blank writs.

The drawer of the bill in question, by not having signed it, has transgressed no law. And the indorsee's knowledge, that there was an arrestment upon a

* Examine General List of Names.

No 9.

bill, which *sua natura* is not arreſtable, could not put him in *mala fides* to take the indorſation for payment of a juſt debt. If the bill be found null, the conſequence would be injurious to commerce. Many creditors on bills cannot write. In a caſe, Ewart *contra* Murray,* a bill, blank in the drawer's name, was ſuſtained, where the creditor had put his name to a receipt at the bottom of the bill, for a partial payment. Whence it appears, the want of the drawer's name in its proper place can be ſupplied *aliunde*.

Answered: Bills of exchange would be void, as wanting the ſolemnities of writs required by ſtatutes, if they were not excepted by the cuſtom of merchants. Cuſtom, therefore, muſt aſcertain, whether the ſubſcription of the drawer is requiſite or not. As to foreign bills, it is unqueſtionable that the drawer's ſubſcription is eſſential. Inland bills were introduced in imitation of foreign bills, therefore muſt follow the ſame rule.

A bill is a mandate upon the acceptor to pay; and, when accepted, an obligation on the acceptor to pay to the poſſeſſor. There is likewiſe an obligation on the drawer, viz. to pay to the poſſeſſor if the acceptor fail to pay; ſo the argument in the petition is without foundation.

There may be an obligation upon the perſon ſigning a mandate, though the *mandatarius* do not formally ſign it; but the preſent queſtion is, whether the acceptor can be bound where there is no mandate.

A bill accepted without a drawer is equivalent to a promiſſory note; which, if not holograph of the obligant, would be null. *See* 29th January 1708, Arbuthnot againſt Scot, Forbes, p. 233. *voce* PROMISSORY NOTE.

Bank bills, and notes of trading companies, are particularly excepted from act 1696, c. 25. relative to blank writs. The notes of private individuals have not the ſame privilege.

The caſe of Ewart againſt Murray can have no effect on the preſent queſtion; for though the defect of the drawer's name may be ſupplied, it does not follow, that, *before* that defect was ſupplied, the bill was good. The bill was not good at the date of the arreſtment.——The petition was refuſed.

For Arreſter, *Chas Areskine*. For Indorſee, *Jas Cochrane*.

Fol. Dic. v. 1. *p.* 105. *Session Papers in Advocates' Library.*

1748. *June* 22. BOUACK *against* CROLL.

No 10.
A perſon proved to have known of the aſſignation of a leaſe, before he obtained a ſub-tack, decerned to remove.

BEATTY having right by ſucceſſion to a tack, ſuffered Croll, his brother-in-law, and who had been ſervant to his predeceſſor, to keep the natural poſſeſſion, during which he aſſigned the tack to Bouack, to be entered on at the Whitſunday following; but, before the term, he ſubſet the lands to Croll, making the commencement of his ſubtack a term preceding the date.

Bouack warned Croll, and purſued a removing, in which it was *pleaded*, That the defender's right was firſt clad with poſſeſſion.

* Examine General Liſt of Names.