holden to compt; for in law *dies incertus pro conditione est;* and therefore ſhe was preferred *in toto.* *See* Mungal againſt Steil, Durie, p. 827. *voce* HUSBAND and WIFE; where a bond to pay a ſum to the huſband and wife, and their heirs, gave the wife no more right than ſhe would have had, albeit her name had not been inſert therein, and no mention made of her or her heirs. *See* DONATIO MORTIS CAUSA. No 6.

Act. *Sibbald.* Alt. *Forbes.*
Fol. Dic. v. 1. *p.* 105. *Durie, p.* 826.

1661. *July* 25. WEMYSS *against* LORD TORPHICHEN.

LADY Mary, Jean, Elizabeth, and Katharine Wemyſs, purſue the Lord Torphichen, alleging that their deceaſed ſiſter, Dam Anne Wemyſs, having a wadſet of 20,000 merks upon the barony of Errol, granted a bond of proviſion thereof to her daughter Jean Lindſay, thereafter Lady Torphichen, and to the heirs of her body; which failing, to return to the ſaid purſuers, with an obligement, that her ſaid daughter ſhould do nothing to prejudge the ſaid heirs of tailzie; which bond was delivered by the Earl of Wemyſs to the defender, then huſband to the ſaid Jean Lindſay, who obliged himſelf to make the ſame furthcoming to all parties having intereſt, as accords. Yet thereafter, during the marriage, the ſaid Jean Lindſay entered heir to her mother; and ſhe and the defender uplifted the wadſet ſum, paſſing by the bond of proviſion; which ſum being in place of the wadſet, and unwarrantably uplifted by the defender, contrary the bond of proviſion, known to himſelf, which he was obliged to make furthcoming; he ought to re-fund the ſame.—The defender *answered*, That the libel is noways relevant; for if his deceaſed Lady, Jean Lindſay, being fiar of the wadſet, did uplift the ſame, and contraveened the bond of proviſion, *nihil ad eum*, who is but a ſingular ſucceſſor, having right from his Lady, by contract of marriage, whereof there was a minute at the time of his marriage, expreſsly diſponing this ſum, without any mention or knowledge of the bond of proviſion; and albeit he knew the ſame after his right, *nihil est.* And as for his ticket, it can work nothing; for though the bond of proviſion were now produced, it being but a perſonal obligement, can oblige none but his Lady's curators or ſucceſſors; and if they will allege that he is either heir or ſucceſſor relevant, and his ticket to make it furthcoming as accords, *nihil novi juris tribuit.*—The purſuer *replied*, That albeit a ſingular ſucceſſor, for an onerous cauſe, might have uplifted the wadſet, and been free, yet the defender being as the ſame perſon with his Lady, and having no onerous cauſe but his contract of marriage, wherein there was a plentiful tocher of L. 20,000 provided to him beſides this, and having known the bond of proviſion, before the uplifting of the ſum; and ſo, *particeps fraudis*, he is liable to make the ſums received by him furthcoming. by the act of Parliament 1621; and alſo by the common law, *in quantum est lucratus alterius dispendio.*

No 7.
An heireſs of entail made up titles, neglecting the entail. She diſponed the ſubject, which was a wadſet, to her huſband. He uplifted the wadſet ſum; but was obliged to refund to the ſubſtitutes, although a ſingular ſucceſſor would not. He knew of the entail.

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.