

ration, arrested in Logan's hand; and in the furthcoming he deponed as above; alleging the ground of his abstracting the bill was, that the principal debtor had engaged to give him security for his relief, in view of which he had accepted, but had not obtained it.

No 40.

The arresters insisted in their action; and the Lord Ordinary, 31st January 1745, 'Found that the said George Logan having got up the bill of L. 70 Sterling, which he acknowledged to have been wrote with his own hand, without any consideration by him given for delivery thereof, from the clerk to the incorporation, who had no power gratuitously to give it up, in prejudice of the incorporation; and that, further, it was delivered up by the clerk, to the intent that he Logan should accept a new bill of L. 60, William Clark, the original debtor, having paid the difference, Logan was *in mala fide* to detain the old, and refuse to sign the new bill; wherefore, and that it was still in the power of the creditor to supply the defect in the bill, as wanting the subscription of the drawer, at any time before production thereof in judgment: Found, that Logan was *personali exceptione* barred from objecting to the bill, the nullity of its wanting the drawer's subscription; and found him liable in the sum of L. 60 Sterling due of the debt, with the annualrents thereof.' And, 23d January 1747, Found, that after the bill had been out of the acceptor's hand, and in the possession of the incorporation, he could not lawfully retire his bill without their consent; and as there was no evidence of such consent, found that the bill was to be held as still in the hand of the incorporation; but prejudice to the defender to be heard on his objections to the bill, as to its form, or otherwise.' And, 24th June, 'refused a representation upon the point upon which judgment was therein craved;' to wit, how far the bill was void and null, as wanting a drawer.

THE LORDS, 6th July 1748, 'found the bill void and null.'

On a second bill, and answers; chiefly moved by this, that the contract was incomplete till the drawer's subscription was adhibited; that till then the acceptor had it in his power to refile; and if he had not got the opportunity of recovering the bill, he could have declared his refiling, and demanded it up;

They adhered.

A&C. Williamson.

Alt. H. Home.

D. Falconer, v. 2. No 5. p. 5.

1748. November 17. & 25.

CATHCART *against* The REPRESENTATIVES of DICK.

MARY M'HUTCHEON made a settlement of her effects on her sister Helen, wife to Elias Cathcart, who brought a process against the representatives of John Dick for L. 20 Sterling, contained in a bill accepted by Dick, payable to Mary

No 41.

A bill signed by the drawer, before producing it in Court, was

No 41.
found good,
although it
had lain by
unsigned till
after the
death, both
of the accep-
tor and cre-
ditor.

M'Hutcheon.—It was *alleged* for the defenders, That the bill was void, as having been blank in the drawer's name at Mary M'Hutcheon's death; and, though Elias Cathcart's name was now at it, as drawer, it was irregular for him to adject it.

This objection would, no doubt, have been sustained, had Mary been the intended drawer; but, it appeared to the Lords from the tenor of the bill in these words, 'Air, December 12th 1740. Against Candlemas next, pay to Mary M'Hutcheon, &c. at my house in Air, the sum of L. 20 Sterling, for value received in cash from your friend,' and other circumstances, that Elias Cathcart himself was the intended drawer.

THE LORDS therefore 'repelled the objection, that it was signed by Elias after the death of Mary; the same being signed by him before it was produced in judgment; and having been in possession of the said Elias from its date, for the creditor's behoof;' notwithstanding the doubt entertained by some, how a contract could subsist which had not been completed in the lifetime of the parties; 12th November 1742, Sandilands *contra* Dickson, No 38. p. 1436.

Fol. Dic. v. 3. p. 76. Kilkerran, (BILL OF EXCHANGE.) No 19. p. 84.

* * D. Falconer reports the same case:

ELIAS CATHCART, merchant in Air, pursued the representatives of John Dick in Guiltreehill, for L. 20 Sterling, due by bill drawn upon the said John, for value from the drawer, and accepted by him; payable at a term, to Mary daughter to Hugh M'Hutcheon, late provost of Air; as contained in a general disposition of her effects to her sister Helen, spouse to the said Elias, by whom the draught appeared signed.

Objected, That the acceptance remained blank in the drawer's name, in the hands of Elias Cathcart, till after the death of both John Dick and Mary M'Hutcheon, when he adhibited his subscription.

THE LORD ORDINARY, 27th January 1748, 'repelled the objection to the bill, that it was signed by Elias Cathcart after the death of Mary M'Hutcheon; the same having been signed by him before it was produced in judgment; and having been in possession of the said Elias from the date thereof, for the creditor's behoof.'

Pleaded in a reclaiming bill, A document informal at the time of the creditor's death, cannot be made formal afterwards: The contract must be understood as entered into at the time of the completion of the writ; and it involves a solecism for a person to become bound to pay money to one who is dead; as also in this case for one to contract with the dead, and on that contract to pursue his representatives on the passive titles, for a debt he was never liable in.

Answered, When a bill is accepted before signing the draught, and delivered, it is in the power of the drawer to sign it at any time; which right he cannot be deprived of by the death of the debtor: Also, where the credi-

tor is not himself the drawer, the draught may be signed after his death; as the right of credit is vested in his representatives.

Observed, That the draught being signed before production, was *fictitious juris* signed of the date.

THE LORDS adhered.

A& A. Macduvall.

Att. H. Home.

Clerk, Forbes.

D. Falconer, v. 2. No 15. p. 17;

No 43.

1749. February 14.

ANDREW BONNAR against WILLIAM GRANT.

PATRICK HENDERSON, merchant in Edinburgh, accepted a draught for the price of a quantity of tea, bought by him, as the property of John Kirkby, from James Chalmers; who adhibited no subscription as drawer, but indorsed it blank, and delivered it to John Kirkby, junior; and he having filled up the indorsation, indorsed it away. And it came, through several indorsers, into the person of Andrew Bonnar, merchant in Edinburgh, still blank in the drawer's name.

Andrew Bonnar protested it, and pursued Patrick Henderson for the price; who suspended, and raised a multiple-pounding on double distress, upon an arrestment, subsequent to the protest, used in his hand by William Grant, merchant in Rotterdam, as creditor to John Kirkby, senior.

A competition ensued; in the course whereof, Patrick Henderson and James Chalmers were examined, for discovery which of the Kirkbies were proprietors of the tea; and Patrick Henderson deponed, it was sold to him as John Kirkby's, whom he understood to be the elder, having formerly dealt with him: And James Chalmers, that he was employed to sell it by the younger, who he knew bought it, and gave his own acceptance for the price; and he knew nothing of its being the property of the elder, nor what transactions were betwixt them, nor whether they are partners.

William Grant arrested as creditor to Kirkby junior; and the Lord Ordinary, 24th November 1748, 'Having considered the oaths of James Chalmers and Patrick Henderson; and having likewise considered the arrestments now in process, in the hands of Patrick Henderson, as debtor to Kirkby younger, as well as Kirkby senior; preferred William Grant.'

Pleaded in a reclaiming bill: As it now appears, by the oaths in process, the goods were the property of Kirkby, jun.; the indorser by progress from him, who protested prior to any arrestment, must be preferred; notwithstanding any alleged nullity in the bill, as wanting a drawer; which was supplied by Chalmers's indorsation; for, considering it as originally a blank writ, that defect might be afterwards supplied by consent of the debtor and creditor; which was done by the subscription to the indorsation, and intimation by the protest, before a third party had any concern; and, considering it as a mandate, where there must be the

No 44.

A bill paid through several hands, blank in the drawer's name. The bill considered as without privilege; and the sum due by the acceptor carried by arrestment.