

No 42.

consent of the mandant, this was also virtually adhibited by the subscription of the indorfation.

Supposing the bill null, there was a debt to John Kirkby, which he might transfer by an order on his debtor to pay; he did it before arrestment; and, on this foundation, the indorsee must be preferred.

*Answered:* The bill is null, and could not be transmitted by indorfation: Neither does it appear Mr. Chalmers was ever intended to have been the drawer; so that his indorfation is nothing.

The respondent affirms the goods to have been Kirkby's senior, with whom his son, a young man, unforisfamiolate lived, and assisted him in his trade: And, by threatening to arrest a cargo, in the son's possession in the Isle of Man, for the father's debt, the respondent got part payment, and draughts for the remainder, by the son, which the father accepted; whereupon he is now competing. But it is not very necessary to distinguish whose property the goods were; for, it is to be observed, that the Kirkbies' true name is Gafs, which they changed on retiring out of England, having failed in their circumstances; and the young man indorfed the bill to his father, by the name of John Gafs, who indorfed it for value in account. The date of the indorfation by Chalmers does not appear; so that it must be held as immediately before the protest; and the father, who was then in the Abbey, could not indorfe it for value in account, to the prejudice of his prior creditors: And indeed, suppose neither of the Kirkbies or Gaffes broken, an indorsee, for value in account, did not become proprietor of the bill, and ought not to be allowed to compete with creditors.

THE LORDS adhered\*.

For the Indorsee, *Miller.*

Arrester, *W. Grant.*

Clerk, *Kirkpatrick.*

*D. Falconer, v. 2. No 57. p. 56.*

1750. July.

A. against B.

No 43.  
Found that a  
writer cannot  
give horning  
on a bill,  
wanting the  
subscription  
of the drawer.

THE Ordinary on the Bills reported a doubt, stirred by a writer to the signet, Whether he ought to give horning on a bill, which, though it bore the drawer's name in the body of the bill, had not his subscription to it; and the LORDS were of opinion, 'That he ought not to give horning on it.' For though it might be true, that the bill might be holograph, in which case the drawer's name in the body of the bill was equal to a subscription, yet still it would not justify the giving horning; for if it required a proof of holograph, to support the bill; that was reason enough for not giving horning; as a writer cannot give horning, but on a writ *ex facie* valid.

*Fol. Dic. v. 3. p. 76. Kilkerran, (BILL OF EXCHANGE.) No 24. p. 88.*

\* This is probably the case, mentioned by Mr Erskine, B. 3. tit. 2. §. 28. as observed by Lord Tinwald; in which, Mr Erskine says, it was found; that, if a bill appear in judgment without the drawer's subscription, though it should be indorfed by the creditor, it is null. — Lord Tinwald's MS. is not in the Advocate's Library.