

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.

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, unforisfiliate 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.