

No 185.

goods, upon which William craved compensation against John's annual legacy ; therefore, they sustained John's oath, and the quality adjected thereto, viz. That the said goods sent to him by his brother Robert were gifted to him ; and rejected the compensation craved upon the furnishing of these goods." This is against the brocard *nemo donare præsumitur quamdiu debet*. But all these circumstances foresaid accumulated induced the Lords.

*Fountainball, v. I. p. 63.*

1682. *March, November, December.*

GRANT & GILCHRIST *against* PRINGLE.

No 186.

THE affording horses and carts to carry away household furniture from one person to another, found not to infer that it was gifted by the one to the other.

\* \* \* This case is No 242. p. 6032. *voce* HUSBAND AND WIFE.

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S E C T. XI.

Money given upon Receipt.

1703. *January 7.* GEORGE OGILVIE *against* ALEXANDER ABERCROMBIE.

No 187.

Receipt granted for money, in general implies an obligation to re-pay.

GEORGE OGILVIE of Newrain, as executor confirmed to George Abercrombie of Tillybody, pursues Alexander Abercrombie of Skeith for 300 merks contained in his ticket, bearing, he had received that sum from the said George Ogilvie in name of Abercrombie of Tillybody. *Alleged, 1mo*, The ticket was null, wanting writer's name and witnesses. *Answered*, Offered to prove by his oath the subscription was his, and he had not repaid the money nor counted for it. THE LORDS repelled the defence, in respect of the answer. *Alleged, 2do*, The ticket was not binding, containing no obligation to repay, but only the naked receipt of the money, and so was a pure gratuity and donation ; for Tillybody being his near cousin, and unmarried, he was in use to give his near relations some small acknowledgments ; and Mr Ogilvie, now pursuer, being his factor and trustee, he took a receipt for instructing to Tillybody, that, according to his order, he had given the money ; and if there had been the least design of ex-

acting it, he would have either insert that it was borrowed, or else an express obligation to repay. *Answered*, Any writ acknowledging the receipt of money, (except to debtors or tenants) imports in its very nature a tacit obligation to repay, and donation is not presumed, but either *mutuum* or *commodatum*, unless you instruct *quo titulo* you received it, *et quo jure* you retain it. THE LORDS were clear, that receipt of money did in the general imply repayment; but in this case of an old rich man having no children, and in use to gratify his poor friends with such like favours, and this pursuer being the very person who took these tickets without inserting a clause for payment, this omission must be construed against him *qui potuit legem apertius dixisse*, and therefore found it not obligatory in this circumstantiate case.

No 187.

*Fol. Dic. v. 2. p. 150. Fountainhall, v. 2. p. 172.*

1711. June 11.

WILLIAM DONALDSON, Tailor in Torphichen, *against* ROBERT WALKER in Craftandie.

IN a pursuit at the instance of William Donaldson, as having right from Agnes Donaldson in Craftandie, against Robert Walker, for payment of 400 merks contained in John Walker his father's receipt, as follows, I John Walker in Craftandie, grant me to have received from James Boog in Boogstoun, in name of Agnes Donaldson in Craftandie, the sum 400 merks Scots, as witness my hand at Hollhouse the 11th of November 1704;

THE LORDS sustained the receipt as a ground of debt against the defender, the pursuer proving the same to be holograph: Albeit it was *alleged* for the defender; *imo*, Seeing the receipt bears neither borrowing nor lending, nor any obligation to pay, it is presumed that Agnes Donaldson was owing so much money to John Walker, and that he received payment upon his receipt from Boog, as trustee or debtor to Agnes Donaldson; *2do*, Though the receipt were in the terms of an obligatory ticket, yet it is null, for not mentioning the writer; for these words, As witness my hand, import only that John Walker subscribed the paper, consequently the pursuer cannot now, since the act of Parliament 1681, be allowed to supply it by proving holograph: In respect, it was *replied* for the pursuer, *imo*, It is a jest to say, that the receipt infers any presumption that Agnes Donaldson was debtor to John Walker in the like sum, for it is only in bills or precepts among merchants that value not expressed is implied: So that the presumption lies *e contra*, That he was but an interposed person, receiving her money from Boog, which was the reason why the receipt is not conceived in obligatory terms: *2do*, These words, As witness my hand, relate equally to the body of the writ as to the subscription, and so prove holograph. (See PROOF.)

No 188.

THE LORDS were clear that a paper granting the receipt of money implied an obligation to repay, unless granted to a debtor.

*Fol. Dic. v. 2. p. 149. Forbes, p. 506.*