

1707. *March 19.*

ALEXANDER SCOT, Writer in Edinburgh, *against* WALTER LAING, Servant to the Ducheſs of Buccleugh.

WALTER LAING being purſued by Alexander Scot, upon his promiſe to pay to the purſuer a bill of L. 30 Sterling, drawn by Colin Ramſay upon, and accepted by, John Melvill,

*Alleged* for the defender: That he could not be liable to the purſuer for the bill; becauſe, it doth not bear value received of him, and ſo was but a factory, or truſt given by Ramſay to Scot to receive the money. For inſtructing that a bill, not bearing value received, imports only a truſt in the perſon it is payable to, to receive the money for the drawer's behoof; a declaration under the hands of ſome Edinburgh merchants was produced, bearing, That when they draw bills payable to their ſervants, or any whom they truſt to uplift their money, they have no other ſecurity for the repayment or check upon the truſtee to count, ſave, that the bills do not bear value received. So that if the truſtee ſhould prove unfaithful, or ſhould die before ſending any letter of advice to the drawer or indorſer, that he received their money, the truſt could not be ſafely proved but by the want of value received in the bills.

*Answered* for the purſuer: We need not go, for a deciſion in this matter, to the precarious authority of merchants, who are divided in their ſentiments; ſeeing the Lords, proceeding upon a more ſure rule, viz. The principles of law, and the opinion of authors, have once and again ſolemnly determined, that bills not bearing expreſsly value received of the creditor, do imply that value was given for them, unleſs redargued by the creditor's oath or writ; as Mr Forbes obſerves, in his Treatiſe concerning Bills of Exchange, p. 49. 59. The pretence that merchants could not eaſily fix a truſt upon their ſervants, or correſpondents, to whom they make their bills payable for their own behoof; unleſs it were preſumed from the want of the words, 'Value received,' is frivolous: For if the truſtee be honeſt and exact, he will immediately, upon receipt of the drawer's money, give him credit in his books, whereby the truſt will be known whether he die or live; and if the ſervant or correſpondent do not answer the truſt repoſed in them, the drawer or indorſer has himſelf to blame for giving credit to ſuch. Again, is it any extraordinary thing to ſee merchants and others depoſite their money, without any receipt, in a confident's hand, to lie there till the owners have occaſion to make uſe of it, or draw it out with advantage? Do not many rich men in the country tranſmit their money to their agents at Edinburgh, to be lent out as a term upon ſecurity: And what have the owners of ſuch money to depend on, but the oath and honeſty of their doers? Beſides, our law has privileged bills of exchange as to the way and manner of proving truſt: Witneſs the act 1696 anent blank writs, in which bills are excepted. *2do*, If value were not preſumed, though not expreſſed, many people might be inſnared, who, by not knowing that

No 117.

Value preſumed to have been given to the drawer of a bill, by the party in whoſe favour it is drawn, though it bear not value received.

No 117. formality, might neglect to cause insert value received in bills truly onerous. *3tio*, The defender having promised payment of the accepted bill to the pursuer, it is *jus tertii* to him to object trust in the person of the pursuer, without instructing that he is creditor to, or represents Colin Ramsay the drawer. *Vide Forbes*, p. 83. (edition 1703.)

THE LORDS found, that value is presumed to have been given for the bill by Alexander Scot the creditor, though it bear not value received; unless the defender prove, by writ or oath of the creditor, that he paid no value.

*Fol. Dic. v. 1. p. 99. Forbes, p. 156.*

1709. January 26.

MR SWYNTON, as Factor to the Executors of the deceast WILLIAM BONNAR, Clerk of the Mint, *against* The Representatives of JOHN TOM, Merchant in Dundee.

No 118.

Value presumed to have been given by the possessor of an order, bearing 'to deliver to him a certain sum, and take his receipt.'

IN the pursuit at the instance of the Executors of William Bonnar, against the Representatives of John Tom, for repetition of L. 20 Sterling introritted with by Mr Tom, conform to his receipt, upon the following order: 'William Dippie (at length) please deliver to John Tom, bearer hereof, Twenty pounds Sterling, take his receipt, and this shall be your warrant, *William Bonnar*.' Which order, the pursuer *contended*, was presumed to have been given to Mr Tom under trust, to receive the contents for the behoof of Mr Bonnar: Because, albeit value is presumed to be given for bills in the ordinary known style; that presumption is taken off by the extraordinary tenor of this, which, *imo*, Bears not, 'Please to pay,' but only, 'Please to deliver:' And though payment implies right in the creditor who receives it, delivery does not, but may be made for causes obliging to count, as loan, &c. *2do*, The drawer orders his correspondent to take Mr Tom's receipt, which was needless for Bonnar's own security; since the simple getting up of the bill, *ut instrumentum apud debitorem*, was sufficient instruction of payment by the merchant law: And if a receipt was needful to Dippie, he needed not an order to look to his own security, *3tio*, It bears, Deliver to John Tom, bearer, and not to him or his order: And it is a common rule, that an extraordinary clause in a writ, *debet aliquid operari præter jus commune*.

THE LORDS affoilzied the defender: Because, value is presumed to have been given by Tom, unless the contrary were proved; seeing Pay and Deliver are words promiscuously used in bills and bonds of borrowed money. And the design of taking a receipt from Tom, was both to serve for an instruction of payment against him, and for a rule of counting betwixt Dippie and Bonnar.

*Fol. Dic. v. 1. p. 99. Forbes, p. 310.*