

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 affoizied 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.*