

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.

No 188.

. Fountainhall reports this case :

1711. June 12.—JAMES BOOG of Boogston, being debtor to Agnes Donaldson in 2000 merks, he gave her an heritable bond for her security; and she being an old illiterate woman, who could neither read nor write, she commonly employed one John Walker, her door-neighbour, to receive her annualrent from Boog, and give receipts in her name; and particularly in November 1704 he uplifts 400 merks of her bygone annualrents, and gives Boog a discharge in these terms: ‘ I John Walker in Craftandie, grants me to have received ‘ from James Boog, in name of Agnes Donaldson, 400 merks, as witness my ‘ hand,’ &c. Walker and Agnes Donaldson both deceasing, William Donaldson, heir and assignee to the said Agnes, pursues Robert Walker, son to the said John, for repayment of the said 400 merks. *Objected, 1mo,* The ticket was null, as wanting writer’s name and witnesses. *Answered,* It was holograph, which needs not these solemnities; for it bears, ‘ in witness whereof I have ‘ subscribed these presents,’ which is equivalent to these words, ‘ written and ‘ subscribed.’ THE LORDS found, whatever presumption these words, ‘ In ‘ witness whereof I have subscribed these presents,’ might infer of holograph, yet it was no plenary probation. Whereon they offered to prove holograph *comparatione literarum*, and by witnesses who saw it subscribed of the date it now stands. *2do, Alleged, Esto* it were holograph, yet *non probat datum*, and so might be on deathbed, and can never affect the heir. *Answered,* Suppose it once to be holograph, it will always stand good to affect the dead’s part of the moveables. And accordingly the LORDS found so. *3tio, Alleged,* The receipt neither bears borrowing nor lending, nor any obligation to repay, so that Walker *suum tantum recepit*; and Agnes Donaldson being debtor to Walker in 400 merks she sent it to him by Boog, her debtor, to pay him by delegation, and he could not refuse Boog a receipt of it, but there is nothing in it to prove it was Donaldson’s money, or received for her use. And if she sent it to him, the receipt could run in no other terms; and liberation is rather to be presumed than obligation. *Answered,* These words, ‘ received in name ‘ of Agnes Donaldson,’ imply a clear trust, that he was no more but an interposed person, and a hand to receive her money, as her *negotiorum gestor* and trustee, especially seeing it is instructed that Boog owed her 2000 merks, and no vestige that she owed Walker a farthing; and it is a jest to say, the receipt presumes Agnes was debtor to Walker, which only holds in bills and receipts amongst merchants, where they do not bear value received. THE LORDS repelled the allegances, and found, by plurality, (some dissenting) that the money was presumed to be Donaldson’s, unless they would produce some evidence that Walker was creditor in that sum to Donaldson, the receipt being proved to be holograph. (See PROOF.)

Fountainhall. v. 2. p. 644.