

DIVISION IV.

Possessor's recourse against the Drawer and Indorser.

S E C T. I.

Whether value presumed given, by the Person who holds the Bill.

1672. February 9. MR ROBERT MERCHISTOUN *against* THOMAS ROBERTSON..

No 116.

A precept for victual upon tenants, (with a correspondent receipt,) found obligatory against the person in whose favour it was drawn, for payment of the price, not demanded until after 16 years.

It was not presumed that value was given, when the precept was granted, it not bearing so.

IN a reduction of a decret given by the Commissaries of Edinburgh, against Thomas Robertson, for payment of the price of 56 bolls of bear, sold by Mr James Winrame, and which was arrested at Merchistoun's instance as a creditor to Mr James: The reason libelled was iniquity, in so far as, albeit there was a subscribed receipt produced to make Robertson debtor, yet it depended upon a precept granted by Mr James Winrame, who must be presumed to have received payment, and, by subscribing the precept, might have been compelled in law to cause deliver the victual; especially seeing, he did never pursue for the price thereof these sixteen years bygone; and that the pursuer was content to make faith, that truly he had made payment when he received the precept. And for the receipt subscribed, it was not relevant *per se* to make him debtor, seeing it is most ordinary for buyers of victual to subscribe receipts to those that deliver the same, that the tenants or chamberlains may count with their masters, but they are seldom retired by the merchants; and if, after so long time, they should be sufficient to prove a debt, it would be of a general and dangerous consequence. It was *answered*, That the precept and receipt were opposed, bearing a receipt upon the tail of the precept, upon the account of Mr James Winrame, the drawer; so that if payment had been made, the precept or receipt would have born the same; and a precept being of the nature of a factory, unless it bear for an onerous cause, is not in law obligatory. THE LORDS, before answer, ordained Mr James's oath to be taken, if truly he was paid when he granted the precept; but, in case he denied, they decerned Robertson to be liable, and affozied from the reduction.

Fol. Dic. v. 1. p. 100. Gosford, MS. p. 243.