

1711. July 4.

JANET CUNNINGHAM, Daughter to the deceased ALEXANDER CUNNINGHAM,  
Writer to the Signet, *against* JAMES AGNEW, Merchant in Edinburgh.

ALEXANDER CUNNINGHAM having paid a bill of L. 9 : 10s. halfpenny Sterling to Gavin Thomson, drawn upon him by James Agnew, and not bearing value in Cunningham's hand ; the LORDS sustained action of recourse to Janet Cunningham, as representing Alexander her father, against the drawer, for re-imburement : Notwithstanding that the defender offered to prove, by his own account-book, that Alexander Cunningham had accepted the said bill for the price of the merchant goods taken off by him from the defender, and was content to give his oath of verity in supplement of the count-book ; and cited *Gail Observ. lib. 2. cap. 20. Voet. Comment. in Pandect. tit. de Fide Instrum. § 12. Huber. Prælect. Ibid.* where merchant books are said to be fully probative, if confirmed either by the oath or death of the merchant : For the LORDS found, That the defender's count-book having been irregularly kept, is not probative ; and refused to allow the same to be adminiculated by his oath.

*Fol. Dic. v. 1. p. 99. Forbes, p. 516.*

No 114.

An acceptor paid a bill drawn upon him, payable to a third party, without bearing value in his hands. The Lords allowed his heir action of recourse for reimbursement.

1712. July 10.

GEORGE WILSON of Sands, *against* GEORGE M'KENZIE in Stonehive.

GEORGE WILSON insisted against George M'Kenzie, for re-payment of L. 60 contained in a bill drawn by George M'Kenzie, and directed upon Alexander Deuchar and George Wilson, payable to John Campbell, Deuchar's servant, and indorsed by him to the Treasurer of the Bank, who got payment thereof from George Wilson.

*Alleged* for the defender : He cannot be liable to this action of recourse ; because, *imo*, The bill was drawn by him only upon Alexander Deuchar, as a fund of credit to negotiate as he best could for his own behoof ; and the security being refused, when offered to the Bank, so directed and singly accepted by him, George Wilson's name was thereafter added to the direction by Deuchar, who prevailed with Wilson to accept the bill conjunctly and severally with him, upon his giving back-bond to Wilson to relieve him of all hazard from his acceptance ; and Deuchar, by his servant's indorsing the bill thus accepted to the Treasurer of the Bank, got up the money ; so that the defender had nothing to do with Wilson, who accepted not by any order from him, but upon the faith of Deuchar's obligation of relief. *2do*, As when a bill bears not an order to place the value to the drawer's account, (in which case the account is the rule) nor an order to pay as per advice, (in which case the letter of advice regulates) there is no recourse competent to the acceptor paying, against the drawer ; so when a bill is drawn, without bearing value in the hand of the person drawn upon, if he design to have

No 115.

Found in conformity with the above, that value is not presumed to be in the acceptor's hands, unless expressed.