

No. 1. The Trustees answered : When a person sold goods as factor or mandatary for a third party, the price, though taken payable to the factor himself, was yet truly and substantially *in bonis* of the constituent ; and was accordingly affectable for payment of the constituent's debts, not for those of the factor ; 9th June 1669, Street *contra* Home, No. 4. p. 15122 ; 15th March 1707, Hay *contra* Hay, No. 9. p. 15128 ; Dec. 1731, Lord Strathnaver *contra* Macbeath, No. 10. p. 15129. If Johnstone was insisting against Duncan for payment of this supposed separate debt, Duncan would not be allowed to plead compensation upon the price of the indigo, which was only due to him *factorio nomine* ; so neither, on the other hand, could he be allowed to defend himself against the real creditors, by pleading compensation upon a debt due by Duncan.

In giving judgment, the Lords laid some stress upon the circumstance of *the price being still in medio* ; and with that, as in additional *ratio*, adhered to the interlocutor of the Lord Ordinary.

Lord Ordinary, Stonefield.
Clerk, Ross.

For Johnstone, J. Swinton, jun.
For the Trustees, R. Blair.

R. H.

Fac. Coll. No. 16. p. 35.

1770. February 16.

ANDREW STEWART, Writer to the Signet, *against* JAMES BISSET, Merchant in Perth.

No. 2.

A creditor to whom a sum of money was sent by his debtor, and received, in order to be applied to a particular purpose, not allowed, upon the bankruptcy of that debtor, to plead retention of the money, or to apply it in compensation of his own debt.

JOHN MACDONALD, merchant in Inverness, was debtor to Stewart by a bill for £18. 10s. which he had accepted. When the bill became due, and a demand was made by Stewart's correspondent at Inverness, he was told by Macdonald that he had sent the contents to Bisset at Perth to be paid to the holder of the bill. This appeared to have been the fact, Bisset having acknowledged that the money was sent him for that purpose ; but that having called at the house of Coutts & Co. at Edinburgh, he was told the bill had been sent to the North ; and as he did not chuse to keep the money idle, he had given credit for it in his books to Macdonald, with whom he had transactions, and who at that time was in his debt.

Macdonald became bankrupt ; and Stewart having made a demand upon Bisset for the money impressed into his hands to take up the bill, Bisset maintained his right to apply the same to his own debt, and that he had done so accordingly. The pursuer having brought an action against Bisset, the Lord Ordinary assoilzied the defender ; when in a reclaiming petition, it was

Pleaded for the pursuer :

1^{mo}, Where one person delivered money to another to be paid to a third party, and the money was received on these terms, the receiver became bound

to the third party as his mandatary or *negotiorum gestor*; and an obligation was constituted between the receiver and the third party, which the receiver was bound to implement. When money accordingly was delivered and received expressly for behoof of a third party, it made no difference upon the receiver's obligation, that he was creditor to the person by whom the money was impressed. If the receiver indeed insisted for application of the money to his own debt, the transaction in favour of the third party would not take place; but if no such application was insisted on, the property of the money was transferred, and remained in the receiver's hands on account of him in whose name it was delivered; 9th February 1759, Stalker against Ayton, No. 77. p. 745.

2do, If the pursuer had been debtor to Bisset at the time Macdonald delivered the money to him, it was clear that Bisset could not, in any other settlement betwixt him and Macdonald, as creditor to the pursuer, have retained the sum impressed, without suffering it to be applied to the payment of Macdonald's own debt. Of course it must be equally clear, that as the pursuer was *not* indebted to Bisset, he was entitled to draw the money from him; or, in other words, that as Bisset, had he been the creditor to the pursuer, could in that right have retained it in any question with Macdonald; so, in the present case, he was under the same obligation to restore it.

3tio, If Bisset, when the money was delivered to him, had granted an obligation to deliver it to the pursuer, and that such obligation had been transmitted to him, it could not be denied but that an obligation was thereby created in favour of the pursuer which Bisset was bound to fulfil. The present case was equally strong; for though no obligatory writing was given, it was acknowledged that Bisset agreed to receive it for the pursuer's behoof, and to apply it in payment of the bill that was due.

4to, The pursuer's demand was well founded in law; and in point of equity was still stronger. When Macdonald proposed to impress the money into Bisset's hands for the purpose of paying the pursuer's bill, had he declined to receive it on these terms, or insisted on applying it to his own payment, Macdonald would have remitted it through some other channel. Trusting also to the transaction that had taken place, the pursuer abstained from diligence; whereby he might, before Macdonald's bankruptcy, have recovered that money, which Bisset, by *inverting* the intended application, had turned to his own behoof.

Answered for the defender :

1mo, Without denying that there might be a *jus quasitum tertio* by the stipulation of other parties without the third party's knowledge, it was evident that no circumstances of that kind occurred in the present instance. It was not the intention of Macdonald and the defender to create a *jus quasitum* to any person whatever; they could have no particular person in view, as they could not know to whom the bill might be indorsed; so that all that the defender and Macdonald meant, was to get a debt of Macdonald's paid, and to do him a service.

No. 2. *2do*, Though a writing might have been so conceived as to operate a delegation, and make the defender *ex promisso*, and directly liable to Stewart, such a transaction bore no analogy to the present circumstances. But if in a writing the defender had been taken bound to Macdonald, and Stewart's payment only pointed out as the mode in which he was to discharge himself of the sum, the case to which assimilation was made, there could be no doubt that there was no obligation constituted in Stewart's favour, which could tie up the defender from making payment to any other creditor of Macdonald, who should insist for it in a legal mode.

3tio, The pursuer, it was admitted, made no demand upon the defender of the money till after Macdonald's bankruptcy; and, as, prior to that event, the money, as Macdonald's property, might have been attached by whoever, as a creditor of Macdonald's, had an interest to do so, the supervening contingency necessarily rendered the right of the pursuer, or of any other creditor, ineffectual, and that of the defender's preferable to all. Whatever might have been the case before, the bankruptcy created a *medium impedimentum* to the defender's paying away the money. No debtor could be so hardy as to ask, nor any creditor so foolish as to agree, that he should give out of his hands a sum which belonged to his debtor after that debtor had become bankrupt: So that, upon that event, though he had not applied it before in payment of his own debt, which was the case, he was, both in law and equity, entitled to retain it.

It was the general opinion of the Court that the right to this money was vested in Stewart, and that Bisset could not invert the property either to another's or to his own behoof; and it was farther observed, that as Bisset had undertaken a *trust*, he was guilty of a breach of it in not applying the money according to its original destination.

The Court accordingly altered the Ordinary's interlocutor; and found "the defender James Bisset liable to the petitioner in the sum libelled, with the expense of extracting the decret."

Lord Ordinary, *Elliock*.
Clerk, *Ross*.

For Stewart, *Cosmo Gordon*.
For Bisset, *Maclaurin*.

R. H.

Fac. Coll. No. 24. p. 58.

1777. July 16.

ELLIOT against M'KAY.

No. 3.

THE particulars of the case, No. 153. p. 2692. *voce* COMPENSATION-RETENTION, relative to compensation against a bill which had lain over without any demand for a considerable time, will be found in APPENDIX, PART I. *voce* BILL OF EXCHANGE, No. 4.