

1795. June 5,

The HEIRS of ROBERT SELBY, &c. against JAMES JOLLIE.

No 46.

A person holding an heritable subject in trust, and having a right of retention over it for debts owing to him by the proprietor, is not liable for the claims of tradesmen, for meliorations made upon it by desire of the latter.

THIS is a sequel of the case, reported 26th November 1793, Creditors of Brough against Jollie.

Mr Jollie purchased an area for John Brough, in consequence of a commission from him; and with his consent took the rights to it in his own name. Brough having afterwards become bankrupt, it was found that Mr Jollie was entitled to retain the subject, in competition with Brough's other Creditors, till he should be relieved of certain cautionary obligations which he had undertaken for him.

As Brough, however, before his bankruptcy, and while the area stood in Mr Jollie's name, had employed various tradesmen in erecting a building upon it, the interlocutor, sustaining Mr Jollie's right of retention, "reserved to the parties to be heard, how far individual tradesmen, Creditors of the said John Brough, have a right to insist against Mr Jollie for payment of work done, or materials furnished by them to the subjects in question."

The cause having been remitted to the Lord Ordinary, in order to have this point settled, Alexander Ritchie, slater, and the Heirs of Robert Selby, plumber, claimed from Mr Jollie payment of accounts due to them for work done on the subject; and

Pleaded; 1st, As, *ex facie* of the records, Mr Jollie was absolute proprietor of the subjects, the pursuers were not bound to know that he held them in trust for Brough, but were entitled to rely on him for payment.

2dly, Although Mr Jollie purchased the subjects for Brough's behoof, still, as the rights were taken in his name, the property was vested in his person, 24th January 1672, Boylston against Robertson, *voce* TRUST; and Brough's right consisted merely in a personal obligation against him, to denude, consequently Mr Jollie must be liable for sums expended on them.

3dly, Even granting that the property was in Brough, as the value of the subjects burdened with Mr Jollie's right of retention was encreased by the operations of the pursuers, and consequently his security rendered broader, he has been *locupletior factus* by their means, and is therefore bound to repair their loss; Stair, B. 1. Tit. 8. § 6.; Erskine, B. 3. Tit. 1. § 11.

Answered; 1st, Although the rights of the subjects were taken in Mr Jollie's name, the pursuers knew that he held them in trust for Brough. The latter alone superintended the erection of the building, and employed the pursuers, and other tradesmen, for that purpose. It is therefore from him they must seek payment. The defender could only be subjected on the footing of tradesmen having an hypothec upon houses, for sums laid out in building or repairing them; a thing unknown in our law, unless in the case of repairs made within burgh, by order of the Guild Court.

2dly, The decision Boylston against Robertson has been long considered to be erroneous. It has been often found both before and since, that although a factor or trustee purchase a subject in his own name, the substantial right of property is nevertheless vested in his constituent; 9th June 1669, Street against Home, *vocce* SURROGATUM; 15th March 1707, Hay, IBIDEM; 4th January 1744, Sir John Baird, IBIDEM; November 1765, Alison, IBIDEM. If Mr Jollie had become bankrupt, his creditors could not have attached the subject in question for their payment.

3dly, As Mr Jollie can in no event get more than payment of his debt, he cannot properly be said to be *locupletior* by the sums laid out by the pursuers. He is *certans de damno evitando*, equally with them, but a claim of recompense lies only against the *captator lucri ex aliena jactura*; 3d December 1735, Lowrie, No 45. p. 6240.

The Lord Ordinary reported the cause.

Some of the Judges thought Mr Jollie was liable, both because he was to be considered as proprietor, and Brough merely as his agent in erecting the building and employing the tradesmen; and because an advantage had accrued to him from the operations of the latter; for as he did not dispute that the original price of the area was a burden on his right, if no building had been erected upon it he would have had no security for his debt.

A considerable majority were, however, of an opposite opinion. It is admitted, (it was observed), that the pursuers were employed solely by Brough; it is also clear, that he was substantially and ultimately the proprietor of the subjects; the personal obligation, which arises against the *locator operarum* attached on him alone. Now, as the pursuers are not *creditores hypothecarii*, Mr Jollie could only be subjected on the principle, *nemo debet locupletari aliena jactura*. But to apply this rule here, would be extending its operation too far, for in this way persons would be brought under it, whose *lucrum*, (if it can be

so called), reached only to a recovery of a just debt, and a claim of recompense lie against every heritable creditor, whose security was rendered broader by meliorations made at the desire of the proprietor.

THE LORDS assoilzied the defender.

Lord Ordinary, *Dreghorn.* Act. *Baird.* Alt. *Dean of Faculty Erskine, Cullen.*
Clerk, *Menzies.*

R. D. *Fol. Dic. v. 4. p. 219. Fac. Col. No 173. p. 408.*

Furnishing to a wife; see HUSBAND and WIFE.

Recompence if due for the *præcipuum* of an heir-portioner; see HEIR-PORTIONER.

If due by a tenant to a landlord for obtaining a division of commony; *see* COMMONTY.

Tradesmen's wages; *see* JURISDICTION—Of Justices of Peace—Sheriff Court—Town-Council of Burgh.

Factors' recompence; *see* FACTOR.

See APPENDIX.