

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.