

tion, in respect that Chalmer, if he did not restore the money to his constituent, stood bound to pay it to Sir James Rothead's next of kin; but that Mr Murray's death having put an end to the latter branch of the obligation, nothing remained but a simple claim of restitution, which may be subjected to compensation or retention; and he added, that the same exception would have been competent against Mr Murray himself, had Sir James's executor's been *aliunde* satisfied of their claim against Mr Murray.

' Found, That the contract betwixt Mr Hugh Murray and Andrew Chalmer, was a mandate which expired and became ineffectual by Mr Murray's death; and that thereby Andrew Chalmer was in the common case of one having his debtor's money in his hand, for which he was obliged to account; and that therefore retention is competent to him until he be relieved of his cautionary engagements.'

Fol. Dic. v. 3. p. 149. Rem. Dec. v. 2. No 54. p. 82.

No 82.

1783. July 4. LESLIE and THOMSON against DAVID LINN.

LESLIE and THOMSON, insurance-brokers in Edinburgh, were employed by M'Lean, a merchant in Leith, to get insurance on a ship done for him at Glasgow. The brokers, in effecting this insurance, had the policy taken out in their own names. Accordingly, a loss having happened, one of the underwriters granted his bill for his share, in favour of Leslie and Thomson. This bill, however, was by him transmitted to M'Lean, who had previously got the policy into his custody; upon which M'Lean indorsed and delivered it to Linn.

Leslie and Thomson insisted for delivery of the bill to them, on this ground, That M'Lean having been previously indebted to them, they, with a view to avail themselves of the possession of the policy, for operating their payment in the event of a loss, had accepted the commission from M'Lean; and, for their further security, had the policy made out in the above manner. In a process of multiplepounding, appearance having been made for Linn, they, in support of this claim,

Pleaded; The bill in question being payable to them, and not to M'Lean, the indorsation in favour of Linn by the latter, cannot confer the special privileges competent to indorsees of bills of exchange. Linn, therefore, in this competition, stands on the same footing as M'Lean himself would have done; and the question is, which of the parties has right to the contents of the bill, as the insured value, in part, payable by the underwriters.

An insurance-broker is to be considered as a factor acting on commission; and as it is established, that a factor is entitled to retention of the subject of his factory, for satisfaction of debts due to himself by his constituent, so it is lawful for an insurance-broker to retain possession of the policy for security or pay-

No 83.

An insurance-broker found entitled to retain a sum received for a loss, in payment of a debt due by the assured to the broker.

No 83.

ment of debt owing to him by the party on whose commission he acts. This rule is founded on the practice of merchants, and in England has been exemplified by a judgment of the Court of King's Bench, in February 1778; *Godin versus London Assurance Company*; *Burrow's Reports*, v. 1. p. 490. In this particular case, the policy was made out in the names of Leslie and Thomson; and therefore, though M'Lean actually got it into his custody, the effect respecting the latter, is the same as if it had still remained in the possession of the former.

Answered; As to the power of retention competent to a factor, it is not disputed. But an insurance-broker, acting in his proper sphere, is not a factor. If, indeed, the insured, besides commissioning him to make the insurance, which is his peculiar office, were further specially to authorise him to retain the policy, and in the event of a loss, to recover the sums underwritten, then he might so far assume the character of factor, and plead the privileges of such. But whilst his employment is not thus extended beyond its proper limits, his commission is strictly confined to the effecting of the insurance, by making the bargain with the underwriters; upon doing which, it is his duty instantly to deliver up the policy to his employer, who may have immediate occasion for it, as in the event of his transferring the cargo so insured to a purchaser. As for the policy in this case being framed in the name of the insurance-brokers, that circumstance must pass for nothing, as being unauthorised by M'Lean.

THE LORD ORDINARY 'preferred David Linn to the principal sum, and interest contained in, and due by, the accepted bill produced.'

THE COURT, however, altered that interlocutor, and preferred Leslie and Thomson. *See INSURANCE.—FACTOR.*

Lord Ordinary, *Ankerville*. For Leslie and Thomson, *Blair*. For Linn, *Wight*. Clerk, *Home*.
S. *Fol. Dic. v. 3. p. 149. Fac. Col. No 110. p. 173.*

SECT. XII.

Whether good against an *Actio Depositi*.

1697. February 23.

No 84.

A party obtained assignation to an adjudication, and gave back-

SIR FRANCIS SCOT of Thirlestane, and JAMES SCOT of Bristo, *against* SCOT of Hartwood-myres.

ARNISTON reported Sir Francis Scot of Thirlestane, and James Scot of Bristo, who had led an adjudication against Scot of Hartwood-myres, for debts owing