

A majority of the Judges, on the other hand, thought that compensation was pleadable by Mr Ballantyne in its fullest latitude. That in determining the question, there was no occasion to enquire whether the Company was solvent or insolvent, dissolved or not dissolved, for in all these situations the same rule would hold: That when a creditor pursues a Company for payment, he cannot prevent any one partner from standing forward, and discharging the debt, although out of his own private funds. That, on the other hand, a creditor has it in his power to demand payment *in solidum* from any individual partner, without discussing the Company. And as every partner therefore may not only make an ultroneous offer, but may even be compelled to pay, so he also must be entitled to plead compensation, it being a general rule, that the obligation to pay always implies a right to compensate. It is true indeed, that the Company may, in certain situations, object to an individual partner being allowed to discharge their debt; but if they do not, such objection is *jus tertii* to the creditor. Thus, in the present case, had Blane been a private creditor of Bogle, he might have himself insisted on compensating his own half of the debt; but if he did not, the pursuers, even in that case, could not have opposed the extinction of the whole claim, by the compensation pleaded by Ballantyne.

THE COURT adhered to their last interlocutor, sustaining the defence of compensation. See SOCIETY. See Sec. 15. *h. t.*

Lord Ordinary, *Justice-Clerk.*

Act. *Maconochie, M. Ross.*

Alt. *Rolland, G. Fergusson, Cathcart.*

Clerk, *Sinclair.*

Fol. Dic. v. 3. p. 144. Fac. Col. No 69. p. 148.

1793. November 26.

THE CREDITORS OF JOHN BROUGH *against* JAMES JOLLIE.

IN 1786, James Jollie, writer to the signet, in virtue of a verbal mandate from John Brough, purchased for him, at a public auction, an area at the price of L. 2,200. The enactment of roup was, with Brough's consent, made out in Jollie's name, who became personally bound to pay the price, and fulfil the conditions of the sale.

Brough soon after paid the price of the area, and erected a large building on it.

In 1784, Jollie became cautioner for Brough, to the extent of L. 500; and in 1787, for L. 500 more.

Brough having become bankrupt in 1788, Jollie *contended*, That he was entitled to retain the area, and building erected upon it, till he should be relieved of both these cautionary engagements. His right to do so was disputed by Brough's other creditors, who

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A person purchasing a subject for another, in consequence of a commission from him, and, with his consent, taking the rights to it in his own name, is entitled to retain it, in competition with the other creditors of his constituent, till he is

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relieved of all
cautionary ob-
ligations
which he has
undertaken
for him.

Pleaded ; As Mr Jollie holds the subject merely as mandatary for Brough, he is bound to restore it free from all incumbrances, except those flowing directly from the commission under which he acted, such as the expense of management. That commission was precise in its terms, and limited in its object ; and as it also implied exuberant confidence, retention can be no more pleaded, in consequence of it, than it could against the *actio depositi* ; *voce* COMPENSATION ; *voce* BILL of EXCHANGE ; Stair, b. 1. tit. 18. § 6. ; 10th December 1760, Competition of Appin's creditors, No 79. p. 749.

In the case, Harper against Faulds, *infra*, b. t. it was determined that goods put into the hands of an artisan, in order to be manufactured, cannot be retained by him for any other debt, except the expense of the operation. It would be singular therefore, if, in the contract of mandate, which implies a greater degree of trust than the *locatio conductio operarum*, the mandatary should be so far entitled to invert the nature of his possession, as to retain the subject he was employed to purchase, till he should be relieved of all the separate obligations in which he was either previously bound, or which he should afterwards come under on his account.

Answered : When a person is disabled by bankruptcy from discharging the obligations he owes to another, he cannot demand performance of what that other owes to him ; and the solvent party is entitled to retain, for his security, any effects of the bankrupt he may have got into his possession, especially if he is cautioner for the bankrupt, because he is at all times entitled to insist on being relieved from his obligation, even although he has not been distressed for payment of the debt ; Erskine, b. 3. tit. 4. § 20. and 21. ; Macdowal, b. 1. tit. 24. § 34. ; 18th February 1662, Earl Bedford against Lord Balmerinock, *voce* MUTUAL CONTRACT ; *Voct. de Institor. Act. lib.* 14. tit. 3. § 9. ; Kames' Principles of Equity, 3d edit. vol. 2. p. 102. Neither does it make any difference whether the cautionary obligation has been undertaken by him before or after his obtaining the subject over which he claims a right of retention ; Fountainhall, v. 2. p. 657. 10th July 1711, Irving against Menzies, *infra*, b. t. June 1710, Martin against the Creditors of Archibald* ; 19th June 1744, Murray against Chalmers, No 82. p. 2626.

Besides, from the great length of time during which Brough allowed the property to continue in the defender's name, it is evident that it came into his hands not in consequence of a simple mandate, but that Mr Brough must have intended it to remain with him in trust, for his relief of all obligations in which he might be engaged for him.

Replied : Retention has never been sustained for relief of cautionary obligations, unless on the footing of previous consent between the parties, either direct or implied, of which, in the present case, there is no evidence ; 1st July 1709, Strachan against the Town of Aberdeen, No 30. p. 2570. ; 24th December 1746, Balfour against Lazini. No 35. p. 2575.

* Examine General List of Names.

The Lord Ordinary reported the cause on informations.

THE COURT, 5th June 1793, sustained the claim of retention.

On advising a reclaiming petition and answers, it was

Observed on the Bench; Mr Jollie, whether considered as a mandatary or trustee, is not bound to denude till relieved of his cautionay obligations. In the case, Harper against Faulds, the goods were put into the hands of an artificer, merely to perform a certain operation upon them, under an implied obligation to restore them whenever it was finished, upon receiving the price of his labour. It was therefore thought, that he could not be entitled to hold them as a pledge or security for debt in general; but it was admitted, that cautioners, factors, or trustees, stood upon a different footing.

THE COURT unanimously 'adhered to the interlocutor reclaimed against, in so far as it sustained the claim of retention maintained for James Jollie, reserving to the parties to be heard how far individual tradesmen, creditors of the said John Brough, had a right to insist against Mr Jollie for payment of work done, or materials furnished by them to the subjects in question, and also reserving to the creditors at large to insist against him for repayment of the original purchase-money of the area, without prejudice to any defences competent to him against these claims.'

Lord Ordinary, *Dregborn.*

For the Objectors, *Solicitor-General Blair, Patison.*

For Jollie, *Dean of Faculty Erskine, Cullen.*

Clerk, *Mitchelson.*

R. D.

Fol. Dic. v. 3. p. 143. Fac. Col. No 75. p. 166.

1794. *January 16.*

JOHN GLASS *against* The TRUSTEES for the CREDITORS of Charles Hutton.

CHARLES HUTTON, shipmaster in Culross, in consequence of a commission from John Glass, merchant at Stirling, purchased a vessel at Bergen in Norway, for their joint behoof.

John Glass advanced to Hutton a considerable sum more than his own half of the original price and expense of fitting out the vessel from that port. The vessel brought home a cargo, in which Hutton had no interest. A settlement afterwards took place between him and Glass, and a bill was granted for the balance due by the former; and it was agreed, that upon payment of it, they should have equal right to the ship.

Glass likewise paid a farther sum for repairs made on the vessel after the voyage.

Hutton became bankrupt while the vessel was lying at Culross.

The Trustees for his Creditors agreed, that the property of the ship should be wholly transferred to Glass, at an appreciated value, which he became bound to make furthcoming to those who should be found to have best right to it.

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A joint owner of a ship has a claim of preference or retention on it, for money advanced by him on its account, to the other proprietors, above his own share.