1800. *December* 17.

WILLIAM BAXTER *against* BELL and MAXWELL and Others.

No. 4.

If a consignee sell his constituent's goods in his own name, and the purchaser *bona fide* believe them to be the consignee's property, the purchaser will be entitled, against the true owner claiming the price, to plead compensation on a debt due to him by the consignee.

WILLIAM BAXTER, merchant in Dundee, employed James Hutchison *junior*, merchant in Glasgow, to sell candle wicks for him on commission.

Hutchison had been in the practice of selling part of these candle wicks to Bell and Maxwell, soap and candle makers in Paisley.

The invoices which Hutchison sent along with the candle wicks, bore simply that they were purchased from him, and did not indicate that he sold them for behoof of a third party.

In return, Bell and Maxwell sometimes sold Hutchison candles for exportation; and, at stated intervals, the parties were in the practice of settling accounts, the balance being paid in cash, or by a bill at a short date.

At a settlement which took place between them in April 1794, a balance of £64. 9s. 10d. arose in favour of Bell and Maxwell, for which Hutchison granted his bill, payable in two months.

In October 1794, Baxter sent 99 bags of candle wicks to Hutchison, to be disposed of on the same terms as formerly.

Hutchison sold ten of these bags to Bell and Maxwell, for £42. for which sum he gave them credit in his books. Bell and Maxwell also put the following marking on the bill of Hutchison for £64. 9s. 10d. which then remained unpaid.

"Received ten bags bleached wick, 112 pounds each, at ninepence pound, "is forty-two pounds. (Signed)

"BELL & MAXWELL."

While matters stood thus, Hutchison died, leaving his affairs in disorder, and without having remitted to Baxter the price of the 99 bags of candle wicks; but he had transmitted him an account of the sales of them, with the names of the purchasers.

Baxter accordingly brought an action against all those purchasers who had not paid the price to Hutchison, concluding that they should now be ordained to pay it to him as the owner of the wicks.

Among others, the action was brought against Bell and Maxwell, who in defence stated, That Hutchison owed them a larger sum. They also asserted, in point of fact, that so far from knowing that the wicks which they purchased were the pursuer's property, they *bona fide* believed them to belong to Hutchison, and farther

Pleaded: The owner of goods entrusted to a third party for sale, must run the risk of the fidelity of his consignee. He cannot transfer this hazard to the *bona fide* purchaser. The opposite doctrine would be attended with the most ruinous consequences in commercial intercourse. The possession of moveables

No. 4. creates a presumption of property on which the purchaser is under the necessity of acting, and the fraud of the consignee creates no *vitium reale* in the subject sold; Stair, B. 1. Tit. 12. § 16. Ersk. B. 3. Tit. 3. § 34. 24th January 1672, Boylston, No. 6. p. 15125.

Answered: Compensation does not operate *ipso jure;* it must be pleaded, and it cannot now be pleaded by the defenders against the pursuer, who is not their debtor, November 1765, Alison, No. 15. p. 15132. Although a factor or mandatary should take a bond in his own name for his constituent's money, this will not give his creditors a right to the sum for which it is granted; 21st January 1781, Morison against the creditors of Stewart, (not reported) and *a fortiori*, if a factor sell his constituent's goods as his own, he will not thereby become the owner of the price.

The Lord Ordinary assoilzied the defenders; and on advising a reclaiming petition, with answers, the Court, with the exception of one Judge, and on the grounds stated for the defender, adhered to the judgment of the Lord Ordinary.

Lord Ordinary, *Craig.* Act. *Craigie, Hagart.* Alt. *H. Erskine, Baird.*
Clerk, *Menzies.*

R. D. *Fac. Coll. No.* 208. *p.* 477.

1808. *June* 7.

WILLIAM BALLENY, Trustee on the Estate of GEORGE ROBB, *against* HENRY RAEBURN and COMPANY.

No. 5.

Creditors who had received from their debtor a vendition *ex facie* absolute, but had at the same time granted a separate missive, obliging themselves to re-convey on payment of a certain debt, were found entitled to retain the right, in security of *another* debt afterward contracted.

RAEBURN and Company advanced to Robb £1300, by accepting two bills on London: In security for re-payment of this sum, Robb gave them a vendition of the ship Turton which belonged to him. The vendition was *ex facie* absolute; but Raeburn and Company granted the following missive to Robb, (18th March 1806.) "We have this day, at your desire, accepted two bills of "this date, payable in London, at four and six months, *pro* £650 each, drawn "by you on us, and intended to be applied in payment of part of the price of "the ship Leviathan, purchased by you at London; and you having of this "date conveyed to us two third-parts of your ship Turton, in consideration of "the obligation so come under by us on your account, we hereby oblige our-"selves, on the foresaid two bills being duly retired by you when due, and "produced to us discharged, to reconvey the said two third-parts of the said "ship Turton to you, your heirs, or assignees; the expense of the conveyances "to be equally divided betwixt you and us."

Robb retired both the bills; but in the mean time he had contracted other debts to Raeburn and Company to a much greater amount. He became bankrupt; and Balleny, the trustee upon his estate, brought an action in the Court of Admiralty against Raeburn and Company, for re-conveyance of the two-