

THE LORDS 'authorised the said Richard Hotchkis, as interim factor on the sequestrated estate of Bertram, Gardner, and Company, and of John Gardner, Adam Keir, and Robert Forrester, individual partners of the said Company, and the trustee acting for the time upon the said estate, to make payment to the said David Thomson out of the funds in his hands, of the amount of his accounts, as soon as the same are finally liquidated and adjusted; and in the mean time ordained the said David Thomson instantly to deliver to the said Richard Hotchkis, the whole writings, vouchers, documents, books, and papers of every kind, both of the creditors and of the bankrupts, or connected with their affairs.'

No 61.

Lord Ordinary, *Ankerville*.Clerk, *Pringle*.

D. D.

*Fol. Dic. v. 3. p. 296. Fac. Col. No 91. p. 203.*

1802. July 9.

SMYTH *against* GEMMILL and HERBERTSON

IN the action which was maintained by William Robertson against Andrew Gemmill and Arthur Herbertson, in which he was successful, his agent, James Smyth, writer to the signet, obtained the decree for the expenses of process to be extracted in his name. This was objected to on their part, principally because a claim of compensation against Robertson would thus be cut off, if a third party were entitled to sue for them.

The Lord Ordinary appointed the parties to state the claim and objections in minutes, to be reported to the Court.

James Smyth

*Pleaded*; The Court have, by very long practice, allowed a decree for expenses to go out in name of the agent in the cause, for this just and solid reason, that the agent who has disbursed the expenses is in fact the real and proper creditor; and wherever these are found due, though they are nominally given to the contesting party, yet they are just the recompense of the labour of the agent, and the reimbursement of his own money. In a question between the agent and his client, there can be no doubt but the claim of the agent, by whose money the client's subject was preserved, or his right made effectual, would be preferred; as the subject belongs to the client only after deducting the sum expended in recovering it. Nor can the creditors of the client be in a better situation than he is. For though this sum be usually paid first to the client, who reimburses his agent, yet it may be paid at once to the agent, whose it substantially is; and the creditors of the client can have no claim upon what neither really, nor even in point of form, is in the hands of their debtor. Compensation cannot operate, there being no *concursum debiti et crediti*, except on the sum recovered, after the expense of recovering it is deducted. This right of the agent was found effectual in Wright's Trustee against

No 62.

The claim of the agent to the expenses of process from the unsuccessful party, preferred to a claim of compensation made by that unsuccessful party against the party in whose favour they were awarded.

No 62. Mill, June 1799, as well as in Campbell against Montgomerie; so that, as the agent is substantially the proper creditor in the expenses disbursed by him, any claim of compensation must be limited to the sum in which the client is the proper debtor. To that amount there is a *mutua concursus*, and there the rule of law operates.

*Answered*; It is unnecessary to inquire into the practice of the Court, where no opposition has been made to the claim of the agent to have the decree go out in his name; and the cases referred to are so far inapplicable. In the present case, the action was raised at the instance of Robertson; it was carried on in his name; the decret is obtained in his name, and in his favour; the decree for expenses is also obtained by the pursuer, to whom, and to no other party, the defenders have been found liable in expenses. If his agent has a claim against him, that can be made effectual by a personal action; it does not follow, that because the agent is a creditor of the party, he can thereby be transformed into the party, and not only take out a decree as if he were the party, but can likewise carry that decree into execution, as if he were not the party; for it is argued that the agent, as if he were the party, is entitled to have the decree which the party has obtained go out in his own name; and that he is entitled to maintain a plea which the party could not maintain; for he would be bound to allow compensation, while the agent claims the whole sum free from any such deduction: He claims in right of his client, but he claims it without the exceptions or objections pleadable against him. The claim of compensation, when proponed, operates *retro* to the date of the concurrence *ipso jure*, extinguishing the claim. Whenever a sum is found due, from that moment compensation operates in the person of the party. Here the sum must be answerable for the claim against Robertson.

Upon the principle that the sum recovered was not properly the client's till the agent's expenses in making that effectual were defrayed, and that if compensation could be pleaded, so as to exclude the writer's hypothec, there would be an end of this right, which also is admitted in the English law, though but lately introduced; Douglas's Rep. p. 100.—137.; the LORDS allowed the decret for expenses to go out in the name of Smyth.

Lord Ordinary, *Craig*.  
Alt. *A. Campbell*.

For Smyth, *Fletcher*.  
Agent, *J. Tinning*, W. S.

Agent, *Party*.  
Clerk, *Sinclair*.

F.

*Fac. Col. No 55. p. 114.*

\* \* \* A similar case, Gordon against Wylie, reported by Lord Woodhouselee from the Bill Chamber, was decided in the same way, as the above decision was understood to settle the point.

\* \* \* The cases, Wright's Trustees against Mill, and Campbell against Montgomerie, mentioned in this case, are not reported.

Mill had conducted a process for Wright against Yoole. Yoole was found liable in expenses; arrestments to their amount were used in the hands of two of his debtors, who severally granted to him a promissory note, which he indorsed to Wright, who indorsed them again to Mill; the arrestments were then discharged. Wright became bankrupt, and the trustee on his sequestrated estate brought a reduction of the indorsation of these notes to Mill, as being granted within sixty days of bankruptcy. Mill in defence pleaded, That the arrestments, though in Wright's name, were for his behoof, intended to recover payment of the expenses debursed by him; and as he might have got the decree for expenses in his own name, he was entitled to a preference upon the promissory notes to their amount; and Lord Armadale (11th March 1799, found so accordingly. A reclaiming petition to the Court was refused (June 1799).

F.

The circumstances of the case of Campbell of Skerrington against Montgomerie were these: Skerrington's mother had advanced the expense of process, and when expenses were awarded against Montgomerie, though the Court found no precedent to entitle her to have this decree in her own name, it went out in name of the agent, and he, in a competition with Skerrington's creditors, who had used arrestments in the hands of Montgomerie, was preferred, though they pleaded, that their arrestments covered the expenses as well as principal sums found due; but the decree in his favour, the Court found, could not be defeated by a posterior arrestment.

F.

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S E C T. VIII.

Hypothec upon a Ship for Furnishings and Repairs.—Hypothec for Seamen's Wages.—Upon the Cargo for Freight.

1682. *March.*SEAMEN of the GOLDEN STAR *against* PROVOST MILN and LUDQUHARN..

FOUND, that though mariners and seamen had not a hypothecation upon the ship for their wages of their last voyage, yet they had *jus insistendi* and *retinendi*, while in possession of the ship, even against a person who had bought her after the voyage.

*Fol. Dic. v. 1. p. 419. Harcarse (HYPOTHECATION.) No 521. p. 145.*