

“tutary and curatory expires; First, By the marriage of a female tutor or curator. Thus, when a father names his wife as tutor to their common child, the nomination was adjudged to fall upon her second marriage, both from the impropriety of a woman having one under her power, who is herself subjected to the power of another, March 8th 1636, Stewart, *vide supra*, § 12.” Hence, her powers having expired on her marriage, her right was then reduced to a mere liferent, which did not entitle her to discharge and uplift the bond. The whole plan, by which the conveyance of the bond was devised, was undoubtedly intended as a fraud, for the purpose of disappointing and carrying off the children’s estate.

1775.

HEWIT
v.
ELLIOT, &c.

After hearing counsel, it was
Ordered and adjudged that the interlocutors complained of be affirmed.

For the Appellant, *Al. Wedderburn, Dav. Rae, Ar. Macdonald.*

For the Respondents, *Alex. Murray.*

Not reported in Court of Session.

EDWARD HEWIT, surviving Partner of HEWIT and BROCKHURST,	} <i>Appellant ;</i>
DAVID ELLIOT, GEORGE M’CRAE, SIMON BROWN, JOHN AULD, and JAMES BALLAN- TINE, Trustees for the Creditors of AN- DREW STEVENSON, Merchant Glasgow,	
	} <i>Respondents.</i>

House of Lords, *6th Dec.* 1775.

BANKRUPTCY—RETENTION—ADMISSIBILITY OF WITNESS—INTEREST—TUTORING.—Circumstances in which a party, having procured possession of bills in a legitimate manner, though sent for, and to be appropriated to a special purpose, was held entitled to retain these bills in payment *pro tanto* of his own account, against the creditors of the remitter of these bills: reversing the judgment of the Court of Session. Circumstances in which objection to examination of witness, on the ground of interest, not sustained. Also objection to witness, as having been tutored, and having perused the papers, &c., in the cause, repelled.

The appellant, and his deceased partner Brockhurst, car-

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ried on business in London as wholesale mercers, and merchants in London, under the firm of Hewit and Brockhurst. They had extensive dealings, as such, with Scotland, and, among others, with Andrew Stephenson, merchant there, who was at this time their debtor in account.

Stephenson, at the time alluded to, had been in the practice, in order to support his credit in business, of drawing and redrawing bills on London: and, for these purposes, Dove and Reynolds, merchants, London, were their correspondents. This system of credit having received a shock, gave general alarm to all who had bills in the circle; and Stephenson, having bills in the circle, became apprehensive lest they should be returned. On advising with Brown and Auld, two of his correspondents, and learning that two of these bills had been returned, he despatched Jamieson (who was connected with Stephenson in trade) to London, with a parcel of bills, drawn on London, amounting to £1119, for the purpose, that if he found Dove and Reynolds in good condition, and able to go on, these bills might be handed to them, that they might accept, and be able to pay the bills in the circle. Jamieson had letters of recommendation to Hewit and Brockhurst from John Auld, and from Brown of the Ayr bank in Glasgow, which were intended to aid and assist Jamieson's mission. He had special written instructions from Stephenson as to the application of the money bills for £1119 sent with him. He was only to hand them over to them if he found Dove and Reynolds all right. If not, he was to retain them for him; but Hewit and Brockhurst, to whom he was introduced, were to direct him in this.

Jamieson arrived in London on Friday evening, the 26th January. He called immediately at the appellant's house, and not finding him at home, left his two letters from Stephenson and Brown; but was informed that Dove and Reynolds had stopt payment, whereupon he wrote off that night to Stephenson, intimating the failure.

The next night after Jamieson left for London, Stephenson, who, in the meantime, had received bad intelligence of Dove and Reynolds' affairs, wrote to Jamieson on 23d June, stating, "All the service you can do me is to retain every thing in your hand that you took up." "I fear it is too late for all those things."—"Retain every thing you can, without mentioning what you was to bring up."

It was stated, that on the 24th June, Stephenson again

wrote to Jamieson, stating, "I fear every thing is too late." — "Keep what you have, and make speed home." I am, &c. And another on 25th June: "I wrote you last night, "and have only now to beg that you will come away the "moment you receive this, and bring back what you took "with you, what you took entire." — "It is too late to pro- "fit by your good offices now."

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These letters did not arrive until 29th June. In the meantime, Jamieson, on calling next morning (27th June) after his arrival, on Hewit and Brockhurst, at their counting house, shewed the bills he had brought with him, amounting to £1119, and informed them of his instructions to have paid them to Dove and Reynolds had they been in good condition to go on and meet Stephenson's bills. Jamieson proposed to give the bills to Hewit and Brockhurst on Stephenson's account. The bills were received by them, and entered in their books on 27th June, and an advance of £200 given upon them.

When Jamieson received Stephenson's letters on the 29th June, he called immediately on Hewit and Brockhurst to obtain, in terms of his instructions, delivery of these bills; but they refused to give delivery, and claimed retention of them in payment *pro tanto* of their account.

On Stephenson's failure, action was raised by his trustee, after using arrestments, *jurisdictionis fundandæ causa* against Hewit, the only surviving partner of Hewit and Brockhurst, for repetition and payment, on the ground that the bills were sent for a special purpose, and that Jamieson had no power to use them in any other way. That by the bankruptcy of Dove and Reynolds, possession was at an end; and all he had to do was just to return with these bills, and therefore the defender had no right to retain them in compensation of his debt against Stephenson, but only a right to rank on the estate.

A proof was allowed and led of the circumstances attending the whole transaction. When it was offered to examine Jamieson as a witness, his admissibility was objected to by the appellant, on the ground of interest, because, if he had disobeyed his instructions, he was answerable for the consequences; and that he had given evidence by an *ex parte* affidavit on oath, which he would not gainsay without the pains of perjury; besides, he had volunteered in writing to a witness in London, endeavouring to bring him to join in his version of the story, which made his evidence exceptionable. The Court, however, of this date, "repelled the

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“ objections to the examination of Jamieson as a witness in
“ the cause, and remitted to the Lord Ordinary, on the Oaths
“ and witnesses to take his examination.” When he was exa-
mined, two objections emerged, 1. That he had been tutored
by the respondents, he (Jamieson) having acknowledged that
he had received from them the papers, evidence, and argu-
ments in the cause to peruse, which was *per se* sufficient to
reject him ; and, 2. That he had been accommodated by the
trustee, in the debt and engagement he was under to the
estate of Stephenson, on account of his partnership with
him, by taking his bond for the money he owed. The proof
being reported with the objections : After debate,

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The Court thereafter pronounced this interlocutor:—
“ The Lords having resumed consideration of this cause, with
“ the papers and proceedings therein, the testimony of the
“ witnesses adduced, writs produced, and memorials *hinc*
“ *inde*, and heard parties’ procurators thereon, and advised
“ the whole, they repel the defences, and find that the de-
“ fenders, Messrs. Hewit and Brockhurst, are not entitled
“ to retain the balance of the bills in question ; but are
“ bound to pay the same to the pursuer’s trustees for Ste-
“ phenson’s creditors, and that they have right only to a
“ part thereof, in proportion with the said creditors, and
“ remit to the Lord Auchinleck, the Ordinary who pro-
“ nounced the act, to proceed further in the cause, and to
“ do as he shall see just.”

Against these two interlocutors the present appeal was
brought to the House of Lords.

Pleaded for the Appellant.—1st, Weighing the whole evi-
dence in the cause,—the correspondence of parties,—the uni-
form account given of the transaction with Jamieson by the
appellant,—his answers to the original interrogatories, sup-
ported by the written and parole evidence, it is clearly es-
tablished that the bills were fairly and *bona fide* placed with
Hewit and Brockhurst, not for the special purpose of accept-
ance, but lodged with and paid to them on account of Stephen-
son. This was demonstrated by the immediate advance of
£200 upon them, and after giving Stephenson credit for the
full amount of these bills, he owed them a balance on account
of £147. They were delivered to the appellant, blank
indorsed by Jamieson, and passed into the possession of
Hewit and Brockhurst, like so many bank notes, duly and
fairly obtained. Having therefore been fairly obtained on
27th June, without any third party having any *jus quæsitum*
in them, he was entitled to apply the balance of the bills on

Stephenson's supervening bankruptcy in extinction *pro tanto* of his account. No doubt the original intention of placing the bills in their hands was, that he might receive payment, and be accountable to Stephenson for the contents, but on bankruptcy this did not prevent them from retaining them in extinction of his own debt. Nor does it at all affect the question of the transfer of these bills, or the appellant's right to retain, that Jamieson had no authority to transfer them to the appellant, and in so doing, was guilty of a breach of trust, and had exceeded his commission; because the transfer of bills cannot be affected by any thing not appearing *ex facie* of the bills themselves. Nor does it affect the question in like manner, that Jamieson had private instructions to be cautious; or that he had written Jamieson afterwards countermanding his instructions as to these bills, and ordering him to bring them back with him; because, in Stephenson's letter of instructions which accompanied Jamieson, there was this proviso in case of Dove and Reynolds being found to be bad, "to try if friend *Hewit* could *discount them for him*;" and also because the other letters, countermanding these instructions, arrived too late,—not until after the transaction was completed. Nay the letters themselves seem to anticipate that they will be too late: The maxim, therefore, of the civil law should hold *frustra petis quod mox es restiturus*; such rule of retention has been adopted by almost every trading nation, and it is consistent with justice, that where parties are mutually debtors, the one should not be allowed to withdraw his funds out of the hands of the other, without satisfying his debt. Which rule ought to receive a more ample latitude, when it is pleaded where the debtor, as in this case, was *vergens ad inopiam*.

2d, The Court of Session ought to have sustained the objections to the admissibility of Jamieson, who, by his own confession, when examined, was objectionable on the ground of being tutored by receiving the papers, evidence and arguments in the cause to read. 3d, That he had been accommodated by the trustees in the debt due by him to Stephenson's estate. 4th, That he was materially interested in the cause, from his connection in partnership with Stephenson, and that he had already deponed to the transaction in an affidavit taken on oath *ex parte*.

Pleaded for the Respondents.—Hewit knew well the object and purpose of Jamieson's mission to London. He knew that he came as a special messenger from Stephenson, with bills in his pocket for the purpose of supporting his credit

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in the circulation business, which was endangered by some heavy failures. Knowing therefore that these bills were destined for a specific purpose, Hewit must have been aware, when he obtained possession of them, that Jamieson had no authority to dispose of them to him, and thereby to divert them from that special object. When they were put into the appellant's hands, they were placed there without authority or consent of the owner, and the property in them therefore remains untransferred. Hewit and Brockhurst could not be viewed as indorsees for a valuable consideration, but as having got them into their hands for a special purpose, without Stephenson's consent, and thereafter converting them to a different purpose. What the appellant says is, that they were handed to him in payment *pro tanto* of his account. Jamieson had no authority to make such payment, nor did he mean to make payment at all. He left the bills merely for a temporary purpose, for acceptance on Saturday, and was surprised, when he asked them back on Monday following, to hear Hewit and Brockhurst say, that they would retain them in compensation of their claim. Nothing had intervened to change the ownership of the bills. On Saturday they were placed in the hands of the appellants as the property of Stephenson. The custody was parted with, but not the property. Nothing intervened to change that character; and bankruptcy, when operating as a transfer of the property of bills, operates always in favour of the trustees of the bankrupt. Besides, if Jamieson had any instructions at all to deal with Hewit and Brockhurst, and transfer to them the bills on discount, these instructions were timeously countermanded by letter from Stephenson to Jamieson, which he received on Monday the 29th, and which induced him to ask them back. They were put into their hands on Saturday, next day was Sunday, and they were asked back on Monday. Such being the nature of the transaction, the appellant had no right of retention over them, but must take his share of the common fund for his debt. 2d, As to the objection to the admissibility of Jamieson as a witness, he was in no manner interested in the event of this cause. He is neither Stephenson's partner nor creditor, so that, whether the appellants have a right of retention or not, or the respondents a right to recover, is, in point of interest, matter of perfect indifference to Jamieson. As to the interest he has in defending his own conduct in the transaction, it is sufficient, that he is not made a party in this or

June 29.

any other suit for that misconduct; and so he cannot be rejected on the score of interest on that ground. If any questions put to him had tended to criminate him he might have refused to answer, but this rule is an indulgence to the witness, and not an objection to him. And as to the objections founded on the affidavit, it is evident that the witness cannot be rejected on this account, which is not of the nature of a judicial act; and which, therefore, cannot render him inadmissible.

1776.

M'DOWALL, & C.
v.
ANNAND, & C.

After hearing counsel,

LORD MANSFIELD said:—

“ That the point in question was merely, whether the appellant had a right to set off certain bills, remitted for another purpose, towards a debt due to himself, before the person remitting the same became a bankrupt, or had committed any act of bankruptcy; or whether, receiving the bills as a part of the general fund, he was now bound to throw them into the common stock, and be accountable to the assignees of the bankrupt, and come in of course as a common creditor. In my opinion, as no act of bankruptcy had been proved before the remitting of the bills, the appellant was entitled to set them off against the debt due to himself, and I therefore move that the interlocutor complained of be reversed.”

It was ordered and adjudged that the interlocutor of 2d March 1774 be affirmed, and the interlocutor of 17th February 1775 be *reversed*; and that the appellant's defence be sustained.

For Appellant, *Henry Dundas, Ja. Wallace.*

For Respondents, *Al. Wedderburn, Gilb. Elliot.*

Unreported in Court of Session.

JOHN M'DOWAL, Merchant in Glasgow, and } *Appellants* ;
 ALEXANDER GRAY, W.S. Edinburgh, }
 ANNAND and COLHOUN'S ASSIGNEES, Merchants, *Respondents.*

House of Lords, 26th February 1776.

GUARANTEE—RELIEF—ARRESTMENT—TRUST—PROOF—OATH OF BANKRUPT.—Two parties became guarantee for a company, on the latter depositing bills due to them in their hands as a security. This was done, and a list of the bills drawn out and handed over, and a receipt granted by the guarantees. They were immediately delivered to one of the partners of the company, who discounted and used some of them for company purposes. Held, on failure of the company, that the guarantees, though they had thus parted with