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

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

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

No 84.
bond to pay or denude. He attempted to retain till paid a debt due to him by the cedent. Being a trust, or deposite, compensation found not competent or receiveable.

to himself, and likewise on bonds due to James Scot of Bowhill, and others, to whom he gave back-bonds declaring the trust, and obliging himself to hold compt, reckoning, and payment for what he should recover, or denude. Bowhill having assigned Sir Francis to Bristo's back-bond, and he craving him to denude; he *alleged*, upon compensation, that Bowhill was owing him as much by clear liquid bonds, and which he advanced him on the faith of the trust he had of Hartwood-myres' adjudication, and that he would retain till he were paid.—*Answered* for Sir Francis, 1*mo*, This is not liquid, neither being *inter eosdem*, nor a compensible sum, but only an obligement to denude, which is the prestation of a fact.—*Replied*, That it was an alternative obligation, either to pay or denude, in all which cases *electio est debitoris*; and if he elect to pay, then compensation is in construction of law equivalent thereto. Yet the LORDS considered this was a trust, and that *reddere depositum*, was *juris gentium*, and compensation was neither competent nor receiveable against a *depositum*; and Sir Francis being an assignee for an onerous cause, they repelled the compensation in so far as proponed on Bowhill's debts against him. Yet Bowhill's discharge would have precluded Sir Francis; and it has been oft found, that back-bonds qualify and affect not only personal rights, but even apprisings and other real rights, till either infeftment be taken upon them, or the legal be expired; and even against singular successors and third parties, whereof there is an eminent case, 5th February 1678, Mr Rory M'Kenzie against Watson. *See* PERSONAL and TRANSMISSIBLE.

Fol. Dic. v. 1. *p.* 164, *Fountainhall, v.* 1. *p.* 770.

1709. *July* 16.

No 85.
A legacy being left to two brothers, the share of one them who had died, was deposited in the hands of the other. Found, that he could not retain for a debt due to himself, in competition with other creditors of the defunct.

The EXECUTORS-CREDITORS of JOHN STUART, Merchant in Edinburgh, *against* MR ROBERT STUART, Professor of Philosophy in the College of Edinburgh.

JAMES STUART advocate, one of the town clerks of Edinburgh, having, before his decease in January 1704, disponed and made over all his means and effects in trust to Sir James Stuart of Goodtrees his uncle, and Sir Hugh Cunninghame of Craigend his father-in-law, for the ends mentioned in the disposition; with a clause ordaining what remained of his estate, after payment of his debts and legacies, to be made furthcoming to his two brothers, John and Robert Stuarts, equally betwixt them; and John Stuart chancing to die a little after James, before the trustees had executed his will; they, the trustees, the 25th March 1705, ordered L. 6029, the superplus balance of James's free gear, to be put in Mr Robert's hands, to be kept and made furthcoming by him, to such as should be found to have best right. John Stuart's creditors confirmed his share of the money as executors-creditors to him, and pursued Mr Robert for payment.