

1744. June 19.

CREDITORS OF MR HUGH MURRAY *against* ANDREW CHALMER.

No 82.

When money is put into the hands of a mandatary, to be applied for a certain purpose, the death of the mandant, before the application, entitles the mandatary to retain the money in compensation of debt due to him by the mandant.

HUGH MURRAY advocate, executor nominate by Sir James Rothead's will, confirmed the moveables and executed the testament. In March 1741, being about to leave the town of Edinburgh, and apprehending a demand from Sir James Rothead's next of kin of the balance in his hand, for which they had obtained a decree against him as Sir James's executor, he lodged in the hand of Andrew Chalmer, his clerk and ordinary doer, a sum to answer the said demand, and took from him a declaration in the following terms: ' I Andrew Chalmer, writer in Edinburgh, grant that Mr Hugh Murray advocate, has given me in cash L. 135 Sterling, with which I am to pay the sum he is discerned to pay to the nearest of kin of Sir James Rothead, and to report him their discharge.' The next of kin not having made a demand, the money remained with Chalmer till Mr Murray died insolvent, when his creditors attached the same by a confirmation as executors-creditors. Chalmer brought a multiplepinding, and claimed retention of this sum for relief of certain debts wherein he was cautioner for Mr Murray. The creditors opposed this demand, *insisting*, in terms of the statute, That compensation is confined to actions of debt, and does not take place in an *actio mandati*; that a person employed as a hand, is limited to act like a hand, by delivering the subject as directed; and that Chalmer can no more with-hold Mr Murray's cash from his creditors, than he could from Mr Murray himself. Chalmer on the other hand admitted, That being employed only as a hand, it became his duty to pay the sum to Sir James Rothead's executors, or to redeliver the same to Mr Murray himself, if demanded; and that in either of these cases he had no ground of compensation or retention. But he *insisted*, That the case was altered by Mr Murray's death, which put an end to the mandate; after which he, Chalmer, could not lawfully pay the money to Sir James's next of kin, which therefore remained in his hand as a proper debt due to Mr Murray's representatives, subjected to compensation and retention.

The creditors acknowledged the madate to be so far at an end by Mr Murray's death, that Chalmer could not lawfully thereafter pay the money to Sir James's next of kin; but *insisted*, That one branch of the mandate remained entire, which is, to redeliver the money to Mr Murray's representatives. They put the case, that Mr Murray, finding use for the money, had changed his mind, and recalled the commission; Chalmer must instantly have restored the money, and would not have been allowed to retain the same upon any ground whatever; and yet, by alteration of will, the mandate was as much at an end as it could be by Mr Murray's death.'

Chalmer *answered*, That there is a wide difference betwixt the putting an end to the mandate by Mr Murray's death and by his alteration of will; that, during Mr Murray's life, there were no *termini habiles* for compensation or reten-

tion, in respect that Chalmer, if he did not restore the money to his constituent, stood bound to pay it to Sir James Rothead's next of kin; but that Mr Murray's death having put an end to the latter branch of the obligation, nothing remained but a simple claim of restitution, which may be subjected to compensation or retention; and he added, that the same exception would have been competent against Mr Murray himself, had Sir James's executor's been *aliunde* satisfied of their claim against Mr Murray.

' Found, That the contract betwixt Mr Hugh Murray and Andrew Chalmer, was a mandate which expired and became ineffectual by Mr Murray's death; and that thereby Andrew Chalmer was in the common case of one having his debtor's money in his hand, for which he was obliged to account; and that therefore retention is competent to him until he be relieved of his cautionary engagements.'

Fol. Dic. v. 3. p. 149. Rem. Dec. v. 2. No 54. p. 82.

No 82.

1783. July 4. LESLIE and THOMSON *against* DAVID LINN.

LESLIE and THOMSON, insurance-brokers in Edinburgh, were employed by M'Lean, a merchant in Leith, to get insurance on a ship done for him at Glasgow. The brokers, in effecting this insurance, had the policy taken out in their own names. Accordingly, a loss having happened, one of the underwriters granted his bill for his share, in favour of Leslie and Thomson. This bill, however, was by him transmitted to M'Lean, who had previously got the policy into his custody; upon which M'Lean indorsed and delivered it to Linn.

Leslie and Thomson insisted for delivery of the bill to them, on this ground, That M'Lean having been previously indebted to them, they, with a view to avail themselves of the possession of the policy, for operating their payment in the event of a loss, had accepted the commission from M'Lean; and, for their further security, had the policy made out in the above manner. In a process of multiplepounding, appearance having been made for Linn, they, in support of this claim,

Pleaded; The bill in question being payable to them, and not to M'Lean, the indorsation in favour of Linn by the latter, cannot confer the special privileges competent to indorsees of bills of exchange. Linn, therefore, in this competition, stands on the same footing as M'Lean himself would have done; and the question is, which of the parties has right to the contents of the bill, as the insured value, in part, payable by the underwriters.

An insurance-broker is to be considered as a factor acting on commission; and as it is established, that a factor is entitled to retention of the subject of his factory, for satisfaction of debts due to himself by his constituent, so it is lawful for an insurance-broker to retain possession of the policy for security or pay-

No 83.

An insurance-broker found entitled to retain a sum received for a loss, in payment of a debt due by the assured to the broker.