

party from such malversation, is actionable in the ordinary courts of law. A court-martial cannot execute its own sentence *quoad civilem effectum*; the civil magistrate is not bound, and indeed dares not interpose his authority to the execution of such sentence. It follows, that redress can only be obtained by a legal action before the ordinary courts of law. It may be doubted, and it has been doubted, whether a court-martial can grant even military redress against an officer after his regiment is disbanded, and himself put upon half-pay. If he should refuse to acknowledge such jurisdiction, the only consequence will be, the striking him out of the half-pay list; but this would afford no satisfaction to the complainer. The effects mentioned in sec. 17 of the mutiny Act, are military effects and no other. The sec. 11, of the mutiny Act, is conclusive in favour of the pursuers, "That nothing in this Act contained shall extend, or be construed to exempt any officer or soldier whatsoever, from being proceeded against by the ordinary course of law." Hence also, in sec. 49, a fine of £100 imposed, is made payable, upon a suit, "in any court of record." And, in sec. 38, a penalty of £5, for the use of the poor, is appointed to be levied by distress, in consequence of "a warrant under the hand and seal of a justice of peace." The sec. 12 of the Articles of War is a salutary regulation for obtaining justice, in so far as it can be awarded by a court-martial. But, supposing that the pursuers had sought for and obtained a court-martial against Major Maclean, and the sentence of that court had cashiered him, all this would not have forced him to refund the money in question. With respect to the ambiguity in the orders which, it is contended, ought to be explained by the King, or his secretary at war, like ambiguities daily occur in Acts of Parliament; and yet the courts of law determine thereon, instead of leaving them to be explained by the legislature.

30th July 1765, The Lord Stonefield, Ordinary, "sustained the defence founded on the incompetency."

21st November 1765, Upon advising a representation with answers, "he advised hered."

8th March 1766, "The Lords, upon advising a petition and answers, remitted to the Ordinary to find the action competent."

Act. A. Lockhart. Alt. Hlay Campbell.

1766. *March 8.* CHRISTIANA CHALMERS *against* INNES and HOPE, Merchants in London.

[*Faculty Collection, v. IV, p. 58, Dictionary 3489.*]

MANDATE.

Mandatory is directly liable to the mandant, and is not entitled to place a sum recovered for him to his own credit in account with a third party, at whose desire he accepted the mandate.

CHRISTIANA CHALMERS had right to L.24 sterling of prize money and wages due to her deceased son, a sailor. In consequence of the advice and recommend-

ation of Young, a merchant in Stromness, she granted a letter of attorney to his correspondents, Innes and Hope, merchants in London, empowering them to receive the money. She delivered this letter to Young, and he transmitted it to Innes and Hope. Innes and Hope notified to Chalmers that they had received the money, and had placed it to the credit of Young. Chalmers brought an action against Young, concluding for payment.—His defences were, that he was not employed by Chalmers to receive the money, nor did he receive it: That, although he recommended, it was Chalmers who employed Innes and Hope as her attorneys: That consequently he himself could not be liable in payment of money which he had never received, nor for the intrusions of those he had never employed.

Process against Young was sisted until Innes and Hope should be called. Chalmers brought an action against them concluding for payment.

ARGUMENT FOR THE DEFENDERS,—He who undertakes to execute powers of attorney, does it from the confidence which he reposes in the person transmitting such powers; is understood to contract with him, and, according to the custom of merchants, is answerable to him. Were the case otherwise, no man would undertake to execute such commissions, and thereby become answerable to persons utterly strangers. Had the letter of attorney been transmitted directly by Chalmers to Innes and Hope, they would not have accepted of the trust, for they knew nothing of her, nor had they any security from her for their indemnification; but, as the letter of attorney was transmitted to them by Young, their correspondent, they accepted of the trust. Young was in effect employed by Chalmers. Innes and Hope might have paid the money to him, and they did what was equivalent, by crediting him with the money which they received; and if Young omitted to account with Chalmers, he omitted to do his duty.

ARGUMENT FOR THE PURSUER,—The pursuer might have given the letter of attorney to Young, and authorised him to delegate. In such a case, Young would have been directly accountable to her; but, in fact, she gave him no powers: he was nothing more than a hand to transmit the letter of attorney from her, the mandator, to Innes and Hope, the mandataries; nor could they run any hazard in executing the trust and receiving the money, for they could always indemnify themselves by retention, and were bound to account for no more than the balance. If they could pay her by passing the sum to Young's credit, then a mandatory, instead of accounting with his constituent, may account with the person by whose recommendation the mandate was given, and will thus pay himself, not his constituent. “The Lord Gardenston, Ordinary, having considered that the pursuer's power of attorney was a direct commission to Innes and Hope to levy her son's wages, which commission they accepted of upon the recommendation of Young, therefore FOUND that the defenders are accountable to the pursuer; without prejudice to the defenders to claim a full indemnification from Young, in case they shall make it appear, on accounting with him, that he was in cash to pay the demand.”

Upon advising a reclaiming petition and answers, “The Lords adhered, and found expenses due.”

Act. W. Oliver. *Alt.* Arch. Cockburn.

OPINIONS.

COALSTOUN. The money might have been paid by the defenders to Young : they did the same thing by giving credit for it.

GARDENSTON. No powers were given to Young.

KAIMES. Young comes in here only in consequence of his gratuitous offer to transmit the power of attorney. Young is no party.

AUCHINLECK. A letter of attorney may be given to one who may delegate.

PRESIDENT. The defender's plea is dangerous ; for, according to it, a London merchant, or any other merchant at a distance, would, in consequence of a simple recommendation, always pay himself first for any debt due by the person recommending.

1766. *March 11.* JOHN PATULLO, Writer in Edinburgh, Trustee for the Creditors of Allan Livingstone, *against* CHARLES and ELIZABETH LIVINGSTONE.

PROVISION TO HEIRS AND CHILDREN.

The Bar-keeper of the Faculty of Advocates, whose office is held during pleasure, having resigned, upon an arrangement that his successor should pay him an annuity during his life, and a sum of money to his children upon his death,—Found, that this last mentioned sum could not be attached by his creditors after his death, but belonged to the children.

ALLAN Livingstone enjoyed the office of bar-keeper to the Faculty of Advocates. His commission was during pleasure. On the 4th February 1764, he resigned his office on account of his infirmities ; but, at the same time, he prayed that he might be allowed to retire in such a manner as not to be left destitute in his old age. This resignation being made, John Hay, late merchant in Edinburgh, was suggested in Faculty as a proper successor to Livingstone. The Dean and his council were named as a committee to settle such terms of agreement between Livingstone and Hay as should appear equal and reasonable. On the 24th February 1764, Hay became bound to pay to Livingstone an annuity for life of L.70 sterling, and to his children the sum of L.200 sterling, at the first term after his death. Next day, the Dean reported to the Faculty that the committee had settled an agreement between Livingstone and Hay in such a manner as appeared equal and reasonable ; and Hay was elected bar-keeper during pleasure. Livingstone enjoyed the annuity of L.70 during his life. Upon his death, his children received the L.200. In an action before the Commissaries of Edinburgh, Patullo, trustee for the creditors of Livingstone, insisted against his children as representing him. The Commissaries "Found, that, as the bond expressly bears to have been granted in consideration of the deceased Allan Livingstone resigning his office of bar-keeper to the Faculty of Advocates ; that the said Allan Livingstone could not take the sum of L.200 sterling, therein contained, payable to the defenders, his children, to the prejudice of his own lawful creditors ; and, therefore, found the defenders liable to the