

APPENDIX.

PART I.

COMPENSATION—RETENTION.

1770. January 31.

THOMAS BELCHES, and Others, Trustees for the Creditors of Forest and Blair, Merchants in Edinburgh, *against* ARCHIBALD JOHNSTONE.

JOHNSTONE was creditor to Andrew Duncan, merchant in Dysart, for £33. 12s. In May 1763, he purchased from him a cask of indigo, which had been forwarded to Duncan to sell for behoof of Messrs. Forest and Blair, at a price amounting to the neat sum of the above debt. Johnstone being pursued for payment by Belches, the trustee for Forest and Blair's creditors pleaded compensation; and the Lord Ordinary pronounced an interlocutor in these terms: "In respect the defender owns he bought the quantity of indigo libelled from Andrew Duncan; that it appears the indigo was the property of Forest and Blair, not of Andrew Duncan, and that he was employed by them to sell it—adheres to the former interlocutors," finding Johnstone liable in payment.

In a reclaiming petition, Johnstone pleaded:

When a person sold, as his own, the goods of another by mandate, if he did so *factorio nomine*, an action was no doubt competent to the constituent for the price; and as the purchaser, in that case, bought on the faith of the constituent, not of the factor, the *contraria actio empti* would be competent to him against the constituent; but where, as in the present instance, a consignee, or factor, sold as his own the goods of the constituent, the mutual actions were only competent directly to those who dealt; and of course, upon the same principle, the price was *compensable* by the debt of the consignee. It would be unjust, and against the faith of commerce, to hold the contrary; as the reason of making the purchase, which was the case here, might be to get payment of a debt.

No. 1.

Compensation not pleadable upon the price of goods sold by a factor for his constituent, against the factor's proper debt, though the factor sells them in his own name.

No. 1. The Trustees answered : When a person sold goods as factor or mandatary for a third party, the price, though taken payable to the factor himself, was yet truly and substantially *in bonis* of the constituent ; and was accordingly affectable for payment of the constituent's debts, not for those of the factor ; 9th June 1669, Street *contra* Home, No. 4. p. 15122 ; 15th March 1707, Hay *contra* Hay, No. 9. p. 15128 ; Dec. 1731, Lord Strathnaver *contra* Macbeath, No. 10. p. 15129. If Johnstone was insisting against Duncan for payment of this supposed separate debt, Duncan would not be allowed to plead compensation upon the price of the indigo, which was only due to him *factorio nomine* ; so neither, on the other hand, could he be allowed to defend himself against the real creditors, by pleading compensation upon a debt due by Duncan.

In giving judgment, the Lords laid some stress upon the circumstance of *the price being still in medio* ; and with that, as in additional *ratio*, adhered to the interlocutor of the Lord Ordinary.

Lord Ordinary, Stonefield.
Clerk, Ross.

For Johnstone, J. Swinton, jun.
For the Trustees, R. Blair.

R. H.

Fac. Coll. No. 16. p. 35.

1770. February 16.

ANDREW STEWART, Writer to the Signet, *against* JAMES BISSET, Merchant in Perth.

No. 2.

A creditor to whom a sum of money was sent by his debtor, and received, in order to be applied to a particular purpose, not allowed, upon the bankruptcy of that debtor, to plead retention of the money, or to apply it in compensation of his own debt.

JOHN MACDONALD, merchant in Inverness, was debtor to Stewart by a bill for £18. 10s. which he had accepted. When the bill became due, and a demand was made by Stewart's correspondent at Inverness, he was told by Macdonald that he had sent the contents to Bisset at Perth to be paid to the holder of the bill. This appeared to have been the fact, Bisset having acknowledged that the money was sent him for that purpose ; but that having called at the house of Coutts & Co. at Edinburgh, he was told the bill had been sent to the North ; and as he did not chuse to keep the money idle, he had given credit for it in his books to Macdonald, with whom he had transactions, and who at that time was in his debt.

Macdonald became bankrupt ; and Stewart having made a demand upon Bisset for the money impressed into his hands to take up the bill, Bisset maintained his right to apply the same to his own debt, and that he had done so accordingly. The pursuer having brought an action against Bisset, the Lord Ordinary assolizied the defender ; when in a reclaiming petition, it was

Pleaded for the pursuer :

1^{mo}, Where one person delivered money to another to be paid to a third party, and the money was received on these terms, the receiver became bound