

sidered as the creditors's factor, but as trustee to the common debtor, who having intromitted promiscuously himself, can put the defender to answer only for his actual intromissions.

Replied for the pursuer; Mungo Cochran being empowered by the Lords to uplift the pursuer's rents exclusive of all others, he was obliged to do exact diligence, and to count for the same. His voluntary suffering the pursuer to intromit, could not invert or alter the nature of his factory and trust, but operate only a personal defence against the intromitter, That he cannot seek twice payment; and in so far as the pursuer did not intromit, the defender stands accountable for exact diligence; because only the defender had a title to intromit, or do diligence for payment; the heritor of a sequestered estate being quite divested, and his right not to be reintegrated by the factor's tolerance.

THE LORDS found the defender liable to count at a rental, and not for his actual intromissions only.

Fol. Dic. v. 1. p. 242. Forbes, p. 423.

1724. *January 30.*

THOMAS GARDEN Merchant in Dundee, and JOHN DONALDSON Writer there, his Assignee, *against* JOHN PILMORE Writer in St Andrews and JOHN LINDSAY Merchant there.

ROBERT BALFOUR skipper in St Andrews was debtor to Thomas Garden in L. 40 Sterling per bill; for security of which he gave to Garden a bill of bottomry, and also a vendition of five eighth-parts of his ship.

Balfour's ship having come into the harbour of St Andrews, Garden left the bill of bottomry and vendition in Mr Pilmore's hands, to be given up to Balfour, upon his payment of the L. 40, or finding security; and Garden being to go abroad, committed the inspection of that affair to David Brisbane writer in Dundee.

Brisbane wrote two pressing letters to Pilmore, to take out an admiral precept, and arrest the ship till good security should be got for the L. 40, and Pilmore in return to these letters wrote to Brisbane, that he had got a bill drawn upon and excepted by John Lindsay merchant in St Andrews for L. 40, and that thereupon he had sent back the precept unexecuted.

Garden and his assignee brought an action against Pilmore upon his said letter, either to deliver up Lindsay's bill, or pay the L. 40. Pilmore pretended, that the bill was in John Stark writer in St Andrews his hand; and having got a diligence for recovering it, Stark at exhibiting deponed, that it was deposited by Lindsay in his hands as his doer, not to be delivered up to Garden, until he should make over to Lindsay the security he had from Balfour, both with regard to his person and the ship, for his relief of the sum in the bill.

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tho' the proprietor had a promiscuous intromission.

No 59.

A person gave a mandate to his agent to arrest a ship. He having got a bill for the debt, neglected to use the arrestment. The Lords found him liable in the debt.

No 59.

Compearance was made for Lindsay, who *pleaded*, that the bill could not be given up, nor any sentence passed thereon against him, because it was never a delivered evident, but had been deposited in his own doer's hands upon the above mentioned condition, which was now become imprestible, by reason that the ship had since perished.

It was *pleaded* for Pilmore, that the bill being out of Lindsay's hand, he behoved to prove that it was a depositate deed otherwise than by Stark's oath, and that being once proven, Stark's oath would indeed prove the terms of the deposition. *2do*, Even taking it on the footing of Stark's oath, it was evident that Lindsay had bought Garden's right, and therefore he ought to pay the bill, upon Garden's conveying the same; nor could Lindsay be liberate from the bargain, upon pretence that the ship was now perished, because *periculum rei venditæ, etiam ante traditionem, pertinet ad emptorem*. In the *next* place, Whether Lindsay be liable or not, he Pilmore had done his duty sufficiently; for he could do no more than take such a security as he did, because he had no power from Garden instantly to convey his right, nor could it be expected that Lindsay would give a simple bill till he got such a conveyance for his relief: And further, that Garden had approved of his management, in so far as he took up his papers from him, and gave him a gratification for his service.

It was *pleaded* for the pursuers, that they were not to enter into the question, whether Lindsay was liable upon a bill so clogged, at least in the management of it, for which Pilmore was to blame: But surely if Lindsay was not liable, Pilmore was; because he had not duly executed the mandate given him by Brisbane, who was Garden's trustee in his absence, namely, to arrest the ship, or, to get good security for the sum; for by good security must be understood not only what is taken from a responsal person, but also what affords *parata executio*. And it is but an affected excuse, that Lindsay would not give his bill in other terms; for if he would not engage purely and absolutely, Pilmore's instructions were plain, to arrest the ship: Garden was under no obligation to Balfour, further than to cancel and deliver up his bill of bottomry and vendition of the ship, which Pilmore could have done (since he had them in his hands) upon getting payment or security for the L. 40. It was Balfour's business to find out the security, and if he could not prevail with Lindsay to engage simply, then the ship was to be detained by arrestment. In the *next* place, though Garden was obliged to take up his papers from Pilmore, in order to commence this process, and did pay his account, because he would not otherwise part with them; yet he at the time objected to the article for his pains, and was so far from approving his management, that he protested at the very time against him for cost, skaith, &c. because of his not duly executing the commission to arrest the ship, as appeared from an instrument in Process.

1723. July 16.— Upon report of the Lord Polton, the LORDS found it proven, That Lindsay's bill to Garden the pursuer was depositate in the hands of Stark till the pursuer should make over to Lindsay the debt due by Balfour the

skipper, and corroborative security of bottomry : And found, That Pilmore did accept of a commission to arrest and secure Balfour's ship at St Andrews, or to procure to Garden the pursuer a sufficient security of the debt ; and that not having secured the ship, nor intimate to the pursuer or his doer that the bill taken in the pursuer's name was depositate, he has not duly execute his commission, and thereby is become liable for the pursuer's debt ; the pursuer always making over to him the debt against Balfour, and any claim of right he might have to Lindsay's bill, that he might operate his relief either against the original debtor or against Lindsay, as accords.'

Pilmore reclaimed, and *insisted*, That Lindsay should be found liable on his bill for the L. 40 upon the topics formerly mentioned ; and because he had, by granting the said bill, obtained his main end, viz. liberty for the ship to sail, which was of great value to him, because he was chiefly concerned in the freighting of her, so that Lindsay bought two things, *first* the ship's freedom to sail, and *next* Garden's right affecting her, and the price of these was his bill. The liberty of sailing he got ; nor was he any loser by not getting a transmission of Garden's right, for that would not have hindered the ship to perish ; nor could he pretend that ever Garden refused, or was *in mora* to grant it, or that he Lindsay had a mind to sell that right to any other person ; and therefore he was equally liable as if he had got it.

It was *answered* for Lindsay, That the bill was properly never delivered, being still in his own doer's hand ; and the quality in Mr Stark's oath could not be separated from the exhibition, because it was by Mr Stark's oath only that it appeared the bill was ever out of the grantee's hand ; and, therefore, if Pilmore founded on the oath for that purpose, he could not both approbate and reprobate it, especially *in iis quæ sunt partes ejusdem negotii*. 2do, The maxim, that *Periculum rei venditæ et non traditæ pertinet ad emptorem* was disputed even among the civilians ; it was contrary to Cujacius's opinion, *ad l. 33. ff. locati* ; and it did not hold in our law, as appears from the Lord Stair, p. 128 (134) of his Institutions. But further, in the present case, there was no *venditio*, but only an offer, not obligatory till Garden should accept ; and supposing it was a sort of sale, it was at least pendent, upon the condition of Garden's being willing to convey his right ; and in such a case, *pendente conditione rei interitus venditori nocet*. Voet *ad tit. de peric. et commer. &c.* Further, the present case falls more properly under the head of a debt to have been innovated by delegation, which is a species of *novatio* ; and Voet determines the precise point in § 7. of his Commentary on the title *de novationibus*. 3tio, It was a fallacious argument, that because Lindsay purchased liberty for the ship to sail, therefore he should run the risk of her perishing, because he purchased that liberty, by entering into a bargain pendent upon a condition, before the existence of which the ship sailed upon the risk of its proper owner, or those who had right in her.

THE LORDS adhered to their former interlocutor, with the following alterations ; found Pilmore liable, upon the pursuer's making over to him the debt

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against Balfour, that he may operate his relief against the common debtor ; but found Lindsay not liable, and that the pursuer is not to assign against him.

For Garden and Donaldson, *Arch. Murray.*

For Lindsay, *Alex. Garden.*

And for Pilmore, *J. Ogilvie.*

Fol. Dic. v. 3. p. 181. Edgar, p. II.

1724. July 30.

MR JAMES GILLON Advocate, *against WILLIAM DRUMMOND of Grange,*
Writer to the Signet.

No 60.

A bill was put into the hands of a writer to the signet to recover payment. Twenty years afterwards, an action was brought against him for payment. The Lords assoilzied him, on his making oath that the bill had been lost, and that he had not received payment of it.

WILLIAM GLADSTONES, an officer in one of the Scots Dutch regiments, in the year 1700, drew a bill for 500 Florins from Paris, payable to Alexander Stevenson factor there, for value, upon John Lillie, agent for the regiment at the Hague ; Lillie having refused to accept the bill, it was returned to Stevenson by Vanderhyden and Drummond merchants in Amsterdam, to whom it had been indorsed. Gladstones having died shortly after without paying the bill, Stevenson sent it to Arthur Brown merchant in Edinburgh, his correspondent, in order to affect any remains of estate or effects he could find in Scotland belonging to Gladstones. Stevenson's affairs having also failed anno 1702, arrestments of his effects were used by several of his creditors in the hands of Brown at Edinburgh ; and amongst others, by Vanderhyden and Drummond, and by Mr Gideon Murray. Upon a settlement of Stevenson's Creditors with Mr Brown, the above bill was lodged in the defender's hands, as factor for the three arresters above named, anno 1703, upon his granting a receipt thereof, obliging himself to be accountable to Gideon Murray for the half of the money to be recovered upon it ; to this obligation the pursuer having right by assignation, insisted for production of the bill, or payment of the half of the money.

The defender *pleaded*, That he had kept the bill carefully for many years after the date of the receipt libelled on, and until, after a diligent enquiry, he found that Mr Gladstones had left no estate or effects, out of which payment of the bill could be recovered, and that no demand for the bill having been made on him for near 20 years, he had lost or mislaid it ; so that after the exactest search it could not be found, and that upon this he was willing to make oath, and that he had never received payment of the whole or any part of it ; that therefore he ought to be assoilzied, unless the pursuer could condescend on some estate or effects of Mr Gladstones, out of which payment might have been recovered.

Answered for the pursuer, That the defender being an agent practised in business, and having undertaken a trust, was liable *qua mandatarius in culpa levissima*, and therefore ought to be decerned against, though the pursuer should