

them for solicitation and management, the particulars of which cannot be named; and though it be true, that no act of Parliament has directly declared a special sum to be due as equivalent, yet it is sufficiently evident, that there was a fund arising in Scotland fully corresponding, in terms of the 15th article of the Union, to what has been applied by Parliament towards payment of the debts due on the equivalent, and to other public uses peculiar to Scotland.

THE LORDS found all the Creditors of the Equivalent who did not expressly dissent when the pursuer did negotiate the affairs of the Equivalent before the Parliament, were liable for the same quota of premium as those who signed his commission.

THE pursuer further insisted against severals who were not original creditors, but to whom debentures had been indorsed for onerous causes for payment of debts; for whom it was *contended*, That the obligation for the premium to the pursuer being but personal, even as to those who had agreed to and signed his commission, it could not affect their onerous indorsees; much less could the implied consent, inferred from silence, affect the debentures in the hands of indorsees.

It was *answered*, That the commission and agreement was a notour and public deed, which lay in the Equivalent Office, and nobody who received debentures from thence could be ignorant of it; and, therefore, it ought to affect indorsees as well as original creditors.

THE LORDS found indorsees not liable.

The pursuer insisted likewise against some Gentlemen, who, as executors-creditors to a creditor on the equivalent, had confirmed their debtor's effects, particularly the debt due to him out of the equivalent, and had recovered payment thereof.

THE LORDS found them not liable to repeat to the pursuer.

Reporter, *Lord Royston.* Act. *Dun. Forbes Advocatus, Pat. Campbell, Ro. Dundas,*
Ch. Erskine. Alt. *Ja. Graham sen. Ja. Fergusson sen.* Clerk, *Dalrymple.*
Edgar, p. 194.

1726. June 21.

SIR WILLIAM JOHNSTON of Westerhall *against* The MARQUIS of ANNANDALE.

SIR WILLIAM JOHNSTON, upon an order from the Marchioness of Annandale, to raise money for defraying the late Marquis's funerals, by which order she obliged herself to indemnify him for the same, having uplifted the sum of L. 482 of bygone rents from Henderson, one of the late Marquis's factors; this Marquis brought an action against him, to account for this and other intromissions; and Sir William brought a counter-action against the Marquis, for cognoscing

No 4.

The actions *negotiorum gestorum, in rem versum, and funeraria,* found not competent, where the

No 4.
pursuer acted
upon ano-
ther's man-
date, without
immediate in-
tention to
serve the de-
fender.

the charges of the funerals, and for declaring, that the money uplifted from Henderson being laid out that way, ought to be sustained as a sufficient article of discharge and exoneration.

It was *pleaded* for the Marquis, That Sir William having followed the faith of the Marchioness in raising the money by her order, the presumption is, that he acted solely in consequence of that order, with a view to serve the Marchioness alone; and there is no presumption, that he had an intention to oblige the heir; whence, as he could have no *actio negotiorum gestorum, in rem versum* or *funeraria*, against the heir, in his own right, but in name of the Marchioness, his employer; so now when he is pleading a discharge and exoneration against the heir, he cannot separate himself from the Marchioness; for that discharge being founded upon the application of the rents to the funerals, which, in the eye of the law, is the Marchioness's deed, according to this maxim, "Qui facit per alium, ipse facere videtur," if he plead upon her deed, he must sustain all the legal objections competent against her; and were she in the field, it would be competent for the Marquis to plead against her, that *intus habuit*, by her intromission with her deceased husband's executry in England; and that, therefore, she could not plead upon the application of the rents intromitted with in Scotland, to the defraying of the funerals, which she had no title to uplift.

It was *answered* for Sir William, That the *actio negotiorum gestorum, in rem versum* or *funeraria*, arises from the *fact* of applying money for another's behoof, whether the *intention* was to serve that other or not; thus Sir William having uplifted the defunct's rents, and applied them to his burial, it was *utiliter gestum*, and he must be exonerated at the hands of all concerned; and it matters not whether he acted by a mandate or not; for, what prejudice is it to the Marquis, that Sir William took a further pactional security from the Marchioness, for his own safety? So then, if any man lay out money profitably, for the behoof of another, suppose he take a third party bound to indemnify him, that is but an additional security; and the person that lays out the money, has it plainly in his choice, to pursue him for whose behoof the money is laid out, or to take himself to the additional security given by the third party, who becomes engaged to keep him skaitless. And when the action is directed against the person benefited, it is plainly in the pursuer's own right, as being founded upon his fact of application; and, therefore, he cannot be obliged to sustain any objection that might be competent against his mandant.

Replied, When a master gives orders to his servant to do any fact, the actions arising therefrom are competent to the master alone. Thus Sir William Johnston is only to be considered as the Marchioness's hand; as he laid out the money by her order, he has no action or exception, but as in her right: For, in general, it signifies not who acts, but in whose name, and by whose authority.

“ THE LORDS found Sir William could be in no better case than the Lady Marchioness.”—*See* RECOMPENCE. No 4

Fol. Dic. v. 2. p. 4. Rem. Dec. v. 1. No 84. p. 169.

*** Edgar's report of this case is No 3. p. 8486. *voce* MANDATE.

1772. June 19.

MESSRS GIBSON and BALFOUR, Merchants in Edinburgh, Trustees for MICHAEL BARSTOW of Dantzick, *against* JAMES HUTTON and Co.

THE ship Polly of Crail, belonging to Robert Cheyne, having been sold by authority of the Judge-Admiral, a competition ensued for the price, deposited with the clerk of court; Gibson and Balfour claiming a preference for behoof of their correspondent Barstow of Dantzick, founded upon an arrestment which they had caused to be made of said ship, upon the 16th January 1767, in virtue of an admiral-precept which they had taken out, and upon which Cheyne was cited the 12th January; and Hutton and Co. producing, as their interest, an arrestment of Cheyne's ship, dated 21st November 1767, and a decree recovered against them for payment of the debt due them.

Objected by the latter before the Admiral; That although Gibson and Balfour now appeared as trustees for Barstow; yet the diligence upon which they claimed a preference, proceeded entirely in their own name, no mention being made of Barstow, either in the arrestment, or in the execution of the precept upon which their decree proceeded; nor had they any authority from him to recover the money till after the date of the arrestment; and, it might give room to fraudulent and collusive practices, if a man, using diligence in his own name, might afterwards transfer it at pleasure to another. The arrestment, therefore, and all that followed thereon, must be disregarded, as totally null.

Answered; It was evident that Gibson and Balfour had acted all along avowedly as trustees for behoof of Barstow; and that, although this circumstance is not expressly taken notice of in the citation, or the execution of arrestment, yet, the libelled precept to which they refer, contains a particular narrative of the whole; and, although not filled up till some little time thereafter, according to the universal practice, must be drawn back to the date of the citation. And that, albeit Mr Barstow had given them no express orders, yet their connection with him was such as rendered it a duty incumbent upon them, as they were possessed of the documents of debt, to take this measure for his behoof, and that he afterwards ratified and approved of all that they had done.

No 5
Arrestment used by a *negotiorum gestor, proprio nomine*, upon a blank Admiral precept, found not available to the person in whose name it was afterwards libelled, in a competition with an intermediate ar-
rester.