

No. 4. creates a presumption of property on which the purchaser is under the necessity of acting, and the fraud of the consignee creates no *vitium reale* in the subject sold; Stair, B. 1. Tit. 12. § 16. Ersk. B. 3. Tit. 3. § 34. 24th January 1672, Boylston, No. 6. p. 15125.

Answered: Compensation does not operate *ipso jure*; it must be pleaded, and it cannot now be pleaded by the defenders against the pursuer, who is not their debtor, November 1765, Alison, No. 15. p. 15132. Although a factor or mandatary should take a bond in his own name for his constituent's money, this will not give his creditors a right to the sum for which it is granted; 21st January 1781, Morison against the creditors of Stewart, (not reported) and *a fortiori*, if a factor sell his constituent's goods as his own, he will not thereby become the owner of the price.

The Lord Ordinary assoilzied the defenders; and on advising a reclaiming petition, with answers, the Court, with the exception of one Judge, and on the grounds stated for the defender, adhered to the judgment of the Lord Ordinary.

Lord Ordinary, *Craig*.
Clerk, *Mennis*.

Act. *Craigie, Hagart*.

Alt. *H. Erskine, Baird*.

R. D.

Fac. Coll. No. 208. p. 477.

1808. June 7.

WILLIAM BALLENY, Trustee on the Estate of GEORGE ROBB, against HENRY RAEBURN and COMPANY.

No. 5.

Creditors who had received from their debtor a vendition *ex facie* absolute, but had at the same time granted a separate missive, obliging themselves to re-convey on payment of a certain debt, were found entitled to retain the right, in security of another debt afterward contracted.

RAEBURN and Company advanced to Robb £1300, by accepting two bills on London: In security for re-payment of this sum, Robb gave them a vendition of the ship Turton which belonged to him. The vendition was *ex facie* absolute; but Raeburn and Company granted the following missive to Robb, (18th March 1806.) "We have this day, at your desire, accepted two bills of this date, payable in London, at four and six months, *pro* £650 each, drawn by you on us, and intended to be applied in payment of part of the price of the ship Leviathan, purchased by you at London; and you having of this date conveyed to us two third-parts of your ship Turton, in consideration of the obligation so come under by us on your account, we hereby oblige ourselves, on the foresaid two bills being duly retired by you when due, and produced to us discharged, to reconvey the said two third-parts of the said ship Turton to you, your heirs, or assignees; the expense of the conveyances to be equally divided betwixt you and us."

Robb retired both the bills; but in the mean time he had contracted other debts to Raeburn and Company to a much greater amount. He became bankrupt; and Balleny, the trustee upon his estate, brought an action in the Court of Admiralty against Raeburn and Company, for re-conveyance of the two-

thirds of the ship Turton. They pleaded a right to retain this property for their whole credit against Robb. The Judge Admiral found, (17th April 1807 :) “ That as the defenders are not possessors only, but fully vested in the property of the two-thirds of the ship Turton, they are entitled to refuse re- conveying the said right of property to the pursuer, till the debts due to them by George Robb shall be paid.

The pursuer presented a bill of advocation; and the Lord Ordinary on the bills reported the case on memorials.

Argument for the pursuer.

It is a general rule of law, that there can be no constitution of hypothec or pledge, without express consent of the debtor. Mere possession of a subject by a creditor is not sufficient to constitute this right. But consent to impignorate for one debt, is no consent to impignorate for any other debt. A pledge, therefore, is liable only to that debt for which it is pledged, not for all debts due by the pledger to the pledgee.

Even in the few exceptions to the general rule that are admitted by our law, there is no general hypothec, but a hypothec only for a certain debt or kind of debt, as in the case of a writer’s hypothec on papers, Orme against Barclay, 13th November 1778, No. 56. p. 6251. in that of a manufacturer’s hypothec on goods, Harper against Faulds, 27th January 1791, No. 134. p. 2666.

In this case, though the vendition, being accompanied, *simul et semel*, with an obligation to reconvey on payment of a particular debt, was no more than an impignoration. In a question between the parties themselves, it can make no difference, that the different parts of this contract were contained in separate writings, still it was one contract of impignoration.

As the debt for which the hypothec was constituted has been extinguished, the hypothec must therefore be extinguished also; and the defender has nothing but bare possession, which gives him no right to retain.

Argument for defenders.

A disposition, *ex facie* absolute, gives a good security for future advances by the disponee to the disponent; Riddle against Creditors of Niblie, 16th February 1782, No. 211. p. 1154.

But here there is a vendition, which is a disposition of a ship *ex facie* absolute. In the cases of a pledge or hypothec quoted by the pursuer, the creditor had only the possession, not the property of the subject, but here he has the property; and it must remain in him till he executes a conveyance.

But this he is not bound to do while the debts due to him are unpaid. The case of Dougal against Gordon, 17th November 1795, No. 53. p. 851. is exactly similar to the present, only substituting assignation of a bond for vendition of a ship.

It was also pleaded for the defenders, that they had given credit to Robb on a full mutual understanding, that they were to be secured by the vendition; and they further pleaded, that £300. of the debt due to them by him was in

No. 5. truth a part of the original debt, as it had been advanced in order to retire one of the bills for £650. Both these assertions were denied; and the Court, in giving their opinions, did not think it necessary to take them into consideration. Upon the reasons contained in the first part of the defender's argument, with the exception of one Judge, their Lordships, (7th June 1808,) "refused the "bill."

Lord Ordinary, *Newton.*

Act. *David Cathcart.*

Alt. *Daniel Verz.*

H. Fotheringham, and Jo. Ross, Agents.

B. Clerk.

M.

Fac. Coll. No. 49. p. 182.