No. 14. estates, and being infeft, brought a reduction and improbation of the rights granted by the Company to the Trustees. In this process he insisted, that none of the new bonds could be entitled to the security of the Trustees' infeftment, not being mentioned in the schedule; and that the destroying the old bonds was a cancelling of the security; besides, that in several of the new bonds the alteration of the lives made a total alteration of the annuity. The Court found, That the annuitants, whose names were not mentioned in the schedule annexed to the disposition to the Trustees, or who had delivered up the old bonds, and taken new bonds, posterior to the Trustee's infeftment, had no real right upon the lands,

Fol. Dic v. 4. *p.* 318. *Sel. Dec. Fac. Coll.*

*** This case is No. 7. p. 7062. *voce* INNOVATION.

1765. *November*

ALEXANDER ALISON, Deputy Receiver of Excise, *against* Messrs. FAIRHOLMS and MALCOLM, Bankers in Edinburgh.

No. 15.
A factor for an executor having lodged his constituent's money with a banker, in his own name, found, that after the factor's death, the money was not *in bonis* of him, but belonged to his constituent.

Mr. Alison, as executor of William Ruthven, granted a factory to John M'Laggan for disposing of the executry-effects, paying the creditors, &c. M'Laggan, being clerk to Messrs Fairholms and Malcolm, lodged the proceeds of the executry with them at 4 *per cent.* entering the payments in the books, and taking the receipts in his own name. He had a salary of £.50, from Fairholms and Malcolm, for which he kept a separate account. He likewise owed them a sum by bond, bearing 5 *per cent* interest.

M'Laggan died before fully settling with Mr. Alison, and, when there was £.287 9*s.* 6*d.* of the executry money still in the hands of the defenders; and, they having claimed compensation or retention, on account of the debt due to them by M'Laggan, Mr. Alison brought a process, concluding to have it found, that the sum, being the proceeds of the executry-effects, belonged to him, and therefore could not be applied towards payment of M'Laggan's debt.

The fact, that this money was the proceeds of the executry was very satisfyingly evinced. M'Laggan had no money of his own. He was not factor for any other person. His account with Fairholms and Malcolm, both in dates and in the sums, to very trifling fractions, corresponded with his transactions as factor. There was besides found in his cabinet at his death an holograph note, wherein, after stating some articles of charge and discharge respecting the executry, he drew out a balance against himself of £.289 18*s.* 7*d.* adding, "whereof due by Fairholms and Malcolm £.287 9*s.* 6*d.*"

Argued for the defenders: Though it were certain that this money was the proceeds of the executry, that would not be sufficient to infer the conclusion contended for by the pursuer. The law does not consider money as a *corpus*. It is the property of him into whose hands it hath lawfully come. If it be the value of another person's effects, that person may be creditor to the possessor of the money,

but he has no hypotheck over, or real and preferable right to, the money itself. If the possessor apply it to payment of his own debts, the debts will be extinguished, and the money become the creditor's; or, if he bestow it in the purchase of goods in his own name, these will belong to himself, not to the person from whom or on whose account he receives the money. So it was found, Boylston against Robertson and Fleming, No. 6 p. 15125 No. 15.

As M'Laggan was therefore proprietor of the money, so he lodged it with the defenders, not *factorio nomine*, but as his own. That being the case, an arrestment in their hands by M'Laggan's creditors, while he was alive, must have been effectual. For the same reason the money must still be considered as *in bonis* of M'Laggan, and cannot be taken up any other way than as executor-creditor to him. Had M'Laggan taken a bond for it in his own name, the defenders' plea must have been admitted without question. There appears no solid difference between that and the present case.

The pursuer's doctrine would lead to extraordinary consequences, and the application of it would in many cases be altogether impossible. Suppose one factor to twenty different persons dies insolvent, leaving a sum in his cabinet, or in the hands of a banker, how would it be possible to ascertain what part of this arose from the factor's intromissions with the respective estates of his constituents?

Answered for the pursuer: Whatever might have been the case, had the money been alienated either in payment of the debts or otherwise, no argument can thence be drawn to the present question. Here the money was not alienated. On the contrary, M'Laggan gave the strongest proof that he meant it should not be applied for his use, by keeping a separate account for his salary, and not bringing his bond to his debit in the executry-account, though that bore *5 per cent.* The money in question only 4. The executry-money was only *deposited* in the defenders' hands, that it might be ready when the exigencies of the factory should require. It must therefore be considered as still *in medio*, and being proved to be the proceeds of the executory-effects, must belong to the pursuer as the *surrogatum* of these. See Street, No. 4. p. 15122. Hay, No. 9. p. 15128. L. Strathnaver, No. 10. p. 15126. Robertson's creditors, 27th July, 1757, No. 43. p. 4941. *voce* FRAUD.

The case of Boylston does not apply. It is thought of importance to commerce, to secure the current transmission of property clear of any latent claims by third parties. In questions, with regard to personal rights and sums of money, commerce is not concerned, Stair, B. 1. Tit. 12. § 16.

Cases may perhaps be figured where the application of this doctrine would be difficult or impossible; but that ought not to influence the judgment in this question, where there is no difficulty; L. 162. De regulis juris.

Observed on the bench: That, if an executor take a security in his own name for the executry-money, it is held to be in trust for those interested in the exe-

No. 15. cutry; and, as M'Laggan was factor for an executor, the same rule ought to take place.

The Lords repelled the defence of compensation and retention pleaded for the defenders, and decerned against them for the sums in their hands."

Act. *Rolland et Rae.* Alt. *Lockhart.*

A. R. *Fol. Dic. v.* 4. *p.* 319. *Fac. Coll. No.* 29. *p.* 51.

See APPENDIX.