

1743. February 26. MIDDLETON *against* The EARL of Strathmore.

It has been frequently found, that compensation might be pleaded by a person who had no right to the debt upon which the compensation was founded: Thus an heir, pursued for his predecessor's debt, has been allowed to plead compensation upon a debt due to his predecessor, though that debt was moveable, and belonged not to him the heir, but to the executor, *Hay contra Crawford*, No. 31. p. 2511.: And, upon the same principles, we see compensation every day sustained in a competition of creditors, upon a creditor's objecting to the interest of another creditor, that his debt is compensated by the like debt due by him to the common debtor.

The like question having now occurred in the case of an heir pleading compensation upon a moveable debt; THE LORDS gave the like judgement, and 'sustained the compensation.'

*N. B.* It is not quite clear that this practice is agreeable to the principles of law: For though compensation operates *ipso jure et retro*, yet that is only when it is applied, and it is not the operation of the law, but of the judge upon the application of the party; which it is much doubted that any should be allowed to make, but the person who has right to the debt upon which it is founded.

*Fol. Dic. v. 3. p. 143. Kilkerran, (COMPENSATION.) No 3. p. 134.*

1745. June 8.

CREDITORS of Glendinning *against* MONTGOMERY of Magbiehill.

MONTGOMERY of Magbiehill, factor for the Earl of March, took a bill from Robert Glendinning one of the tenants, for his arrears, being L. 1265 Scots. A few days before elapsing of the six months, Magbiehill sent this bill to a notary to be protested. A regular protest was returned, upon which a poinding ensued of Glendinning's stock of sheep. Glendinning becoming insolvent, his creditors arrested in Magbiehill's hands, pursued a furthcoming, and repeated a reduction of the poinding; upon this ground, that, notwithstanding the instrument of protest, there was no protest taken, but that the instrument was made up in the notary's dwelling-house, without taking any of those steps which are necessary in protesting a bill. And accordingly it came out, upon proof, by the depositions of the witnesses insert in the instrument of protest, that none of the solemnities were used that are mentioned in the instrument.

The question was, What should be the effect of this null protest? Magbiehill insisted, that as he was *in optima fide* to poind by virtue of a protest, which he had reason to believe unexceptionable, he was not bound to restore the goods to the common debtor, without getting payment of the debt; and as little to

No 33.

Compensation found pleadable by a person who had no right to the debt upon which it was founded.

No 34.

A man obtaining possession *bona fide* of his debtor's effects, though by an informal poinding, found entitled to retain them till he should obtain payment of his debt. Compensation may be proposed, even after a decree, by way of retention, where the party has no other means of obtaining payment.