

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

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

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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.

No 34.

the arresting creditors. The question being reported to the Court; Elchies observed, that if the execution be informal, as proceeding upon a bill not duly protested, or rather not at all protested, the pointing cannot have the effect to transfer the property; *ergo*, the sheep, as Glendinning's property, are regularly attached by the arrestment laid in Magbiehill's hands; which being followed by a decree of forthcoming, must transfer the property from the common debtor to the arresters; whereby there is no place for pleading compensation or retention. Arniston gave his opinion, that arrestment being only a prohibitory execution, and not making a *nexus realis*, Magbiehill may lawfully retain the goods, which had thus come innocently into his possession, till he get payment of the debt upon which the pointing proceeded; and that he has this equitable privilege of retention against arresting creditors, as well as against the common debtor. He observed that the difficulty would be greater, had the creditors attempted to point the sheep in Magbiehill's possession. Drummore said, that it is not unusual to give retention, even where the intromission proceeds upon the authority of an informal execution; witness an adjudication, which though often annulled in a competition with other creditors, yet has always been sustained to save from repetition of sums or subjects intromitted with in virtue of it; so much weight is laid upon the *bona fides* of the intromitter.

'THE LORDS sustained the defence, that Magbiehill, as creditor to Glendinning, having *bona fide* pointed his debtor's sheep, is not bound to restore the sheep, or to hold count for the price or value of them, till payment be made of the debts on which the execution proceeded.'

This judgment is solidly founded on the nature of an arrestment, which can have no other effect than to oblige the arrestee to pay or to deliver to the arrester, what he was bound to pay or deliver to the common debtor. Now Magbiehill having got into his possession the goods of the common debtor, though by an informal execution, even Elchies yielded, that in equity he was not bound to restore the same to the common debtor, without getting payment of his debt. If so, the arrestment could not bind him to restore these goods to the creditors, but in the same terms; as an arrestment can have no further effect than to transfer the obligation from the common debtor to the creditor; and by no means to afford a stronger claim to the arrester, than to the common debtor. And as compensation is good against an arrester, retention ought equally to be sustained where the common debtor is bankrupt; it being an established point in equity, that though compensation cannot be proponed after decree, it may be proponed by way of retention, where the party has no other chance of obtaining payment. See No 51. p. 1449.

*Fol. Dic. v. 3. p. 143. Rem. Dec. v. 2. No 66. p. 102.*