

1756. July 10.

GEORGE MILLER, *against* JOHN MELDRUM and Others, Tenants of Balbedie.

No 71.

Tenants who had paid to their landlord, and were decerned to repay to a creditor arrester, having continued to possess for subsequent years; and these subsequent rents being also arrested, the tenants were not found entitled to plead retention against the last arresters, on account of the debt which became due to the tenants by the landlord, in consequence of the double payment which they had made. Here the second arrestment was prior to the second payment of the former rents.

SARAH and Margaret Schaws being creditors of Malcolm of Balbedie, in January 1750 arrested his rents in the hands of his tenants, and obtained decret of furthcoming. The tenants afterwards paid these arrested rents to their master; and in 1754 were obliged to repay them to the arresters.

Miller, another creditor, arrested the rents 1751 and 1752, and insisted in an action of furthcoming.

Pleaded for the tenants, By the payment of the rents arrested to their master, they became creditors to him, as they were obliged to pay the same rents again to the Schaws; therefore they had a right of retention of any subsequent rents affected by arrestments posterior to these payments to their master. That supposing they could not pay to their master arrested rents, yet by paying to him a sum of money, they became creditors to him. Had it been any indifferent sum, they had a right of retention; for a tenant creditor has right to retain against all arresters; it will make no difference that the sum consisted in rents due.

Answered for the arresters, The payment to the master after arrestment was illegal, and cannot found the tenants in a claim of retention: A master cannot discharge future rents in defraud of all posterior arrestments; yet such would be the case here, if the tenants plea were sustained.

Further, the tenants did not become creditors to their master till they were obliged to pay to the Schaws, which was in the 1754, and posterior to the arrestments used by the pursuers.

THE LORDS found, That the tenants cannot have allowance of the payments made to their masters.'

Act. *Scrymgeour.*Alt. *D. Græme.*Clerk, *Pringle.**W. S.**Fol. Dic. v. 3. p. 148. Fac. Col. No 208. p. 305.*

1760. December 10. Competition of APPIN'S CREDITORS.

No 72.

A depositary was not permitted to retain goods, for a debt due to himself, in opposition to an arrestment.

A DEBTOR perceiving his affairs to be in disorder, put the keys of his house in Edinburgh, with an inventory of his furniture and plate, into the hands of a friend, who at the same time was creditor to him in L. 131 Sterling; and to escape from diligence left the country. The depositary put the goods into another man's house, in whose hands one of the creditors immediately laid an arrestment. Another having arrested in the hands of the depositary, he raised a multiplepoinding, *pleading*, That the goods were pledged in his hands, in security of a debt owing to himself, or at least that he had a right of retention, until

he should operate his own payment. In proof of this, he produced a letter from the debtor, acknowledging that the goods were left in his hands in security of a debt he owed him.—*Answered*, The letter was obtained *ex post facto*, after no-tour bankruptcy; and there is no evidence of an actual impignoration of the goods.—THE LORDS preferred the arrester. See The particulars, No 79. p. 749. *Fol. Dic. v. 3. p. 148.*

No 72.

S E C T. IX.

Effect relative to Donatars of Escheat.

1622. July 26.

DAVIDSON against L. BUCKIE.

IN an action of declarator pursued by — Davidson, donatar to the escheat of L. Essilmont, against L. Buckie, for special declarator of a bond of some money, which Buckie was obliged to pay to Essilmont; and which bond bore not that the party was resting owing the sum therein contained, but that he obliged him to pay the same, and had no cause therein expressed, for the which it was granted; the LORDS found, That the cause of the granting thereof might be proven by the witnesses insert in the bond; for albeit the bond was pure and simple in itself, yet seeing Buckie alleged that it was given for a special cause condescended on by him, and which should have been fulfilled to him by Essilmont to whom he was bound, and which was not fulfilled, no reason was he should pay the sum, being obliged *ex causa data, et non sequuta*, and which he offered him to prove, by the witnesses insert, as said is; which allegiance THE LORDS found relevant to be so proven, albeit the bond was in itself pure and simple, seeing the pursuer could not condescend upon any other cause, for the which it was given; but this allegiance THE LORDS would not admit against the fisk and donatar, but only against the party's self, to whom the bond was granted.—In this same process, THE LORDS found an allegiance of compensation, founded upon the like debt owing by the rebel to Buckie, relevant to compensate the debt acclaimed from him by the rebel's donatar, which is sustained against the donatar, to meet the donatar's action; likeas if it had been sought by the rebel's self. See ESCHEAT.

No 73.

In a special declarator, at a donatar's instance, against a debtor of the rebel; found, that compensation was proponable against the donatar, so as to meet this action, as if it had been objected against the rebel himself.

Act. *Nicolson et Lermonth.*Alt. *Hope et Lawtie.*Clerk, *Hay.**Fol. Dic. v. 1. p. 163. Durie, p. 33.*