The right of retention was found available to a creditor who had poinded after his debtor's death, being ignorant of it; Fountainhall, v. 2. p. 402. 10th December 1707, Lees againſt Dinwooddie, *voce* COMPENSATION, RETENTION. No 51.

Pleaded for the creditors, That *bona fides* is of no effect in a competition between creditors, and he who claims a preference on his diligence, muſt ſhow it to have been duly executed. The creditors apprehend retention could not have been pleaded againſt Glendinning; for there being no proteſt, the poinding was unwarrantable, and *ſpoliatus eſt ante omnia reſtituendus*; but ſuppoſing it competent againſt him, it will not follow, that it can be obtruded to his creditors; and appriſings and adjudications will often be wholly reduced in competitions, which would be ſuſtained as ſecurities againſt the debtor.

Suppoſing the proteſt actually taken, as it bears; the diligence was null, as it was neither perſonal, nor at the dwelling-houſe of the debtor, nor at the place of executing the contract, but at Peebles.

THE LORDS, 8th June, ſuſtained the defence that Magbyhill, as creditor to Glendinning, having *bona fide* proceeded in diligence, his poinding his debtor's ſheep, by virtue thereof, was not a ſpuilzie; and found, that the ſaid defender was not bound to reſtore the ſheep themſelves, or hold compt for the price, or value to the purſuers, until payment was made of the debt on which the diligence proceeded. And this day refuſed a bill and adhered. *See* COMPENSATION, RETENTION.

Reporter, *Lord Minto.* Act. *Hay.* Alt. *H. Hume.* Clerk, *Forbes.*
Fol. Dic. v. 3. p. 76. D. Falconer, v. 1. p. 99.

1765. *June* 27.

WILLIAM BUCHANAN *againſt* ANDREW DUNCAN, Baker in Glaſgow. No 52.
Action refuſed upon a bill ſubſcribed by notaries, without witneſſes.

JOHN BUCHANAN, ſome time before his death, conveyed his whole effects to certain truſtees, for the purpoſes mentioned in the truſt-diſpoſition. Janet Macklum, his widow, the fulfilment of the obligations to whom, made part of the truſt-deed, among other debts aſſigned to her by the truſtees, got a bill, accepted by Janet M'Farlane; the acceptance of which, as ſhe could not write, was, by her authority, ſigned by two notaries. Janet Macklum having executed a teſtament in favour of the purſuer, he brought an action againſt Andrew Duncan, the defender, as repreſenting Janet M'Farlane, in the character of a vitious intromitter.

Againſt this action, it was *contended*, on the part of the defender, That the bill was not good, being ſigned by notaries; and, even upon the ſuppoſition, that a bill was valid when ſigned by notaries; yet the preſent was void, as there were no witneſſes to the ſubſcription of theſe notaries. That, in this country, there are only two methods of conſtituting a valid obligation; either by a writing, holograph of the party; or by a deed wrote by another, bearing the name of the writer and witneſſes, with the ſubſcription of the laſt. When the deed is not ho-

No 52. lograph, the party either can write, or cannot write. If the laſt is the caſe, then the law allows him to ſubſcribe by two notaries, ſpecially authoriſed, in preſence of four witneſſes; whoſe names and deſignations, with that of the writer, muſt be inſerted in the deed. But the bill in queſtion, though it could have admitted of theſe ſolemnities, is deſtitute of them all; and, therefore, it would be repugnant to the law of this country, were ſuch a deed to be found valid, in direct oppoſition to the moſt poſitive ſtatutory enactments.

As to the arguments advanced by the purſuer, concerning the uſage of almoſt all countries, relating to bills of exchange; and the particular indulgence every where ſhown them, to facilitate the operations of commerce; the purſuer muſt be pardoned for being of opinion; that, if the indulgence, already given to bills of exchange, were to be enlarged; conſequences would follow, prejudicial to commerce itſelf, and hurtful to the ſecurity of private property; as new methods would then be furniſhed, by the interpoſition of notaries, and other perſons, to create obligations, to which the perſons bound never gave their concurrence.

In *answer* to theſe arguments, the purſuer obſerved, That bills of exchange have always been privileged with an exemption from the ſtatutory ſolemnities, requiſite in other deeds. Some ſmall inconveniences, perhaps, may ariſe from this indulgence; but there, the national advantages derived to commerce, renders the other unworthy of obſervation. Holograph bonds do not prove their date, in queſtions with heirs or creditors; yet bills do: though it may be ſaid, that a perſon may antedate a bill, to avoid the effect of the act 1696, or to prevent the effects of an inhibition. This ſhows, that the arguments ariſing from the inconveniency, attending the privileges granted to bills, are inconcluſive; as that inconveniency is evidently diſregarded by the law itſelf.

Writing is now become almoſt univerſal; and few caſes can occur, when the aſſiſtance of others, on account of being otherwiſe, is neceſſary; and, it would be extremely hard, if, in a caſe ſuch as the preſent, a bill, ſigned by notaries, was to be rejected; when it is offered to be proven, that the two notaries were at the houſe of Janet M'Farlane, when the bill was accepted; that ſhe was heard frequently to acknowledge the juſtneſs of the debt; and her having authoriſed the notaries to ſign for her.

The ſtatute 1579 reſpects only deeds where witneſſes are required to the ſubſcription of the parties; but, in bills of exchange, this ſolemnity was never required. The ſubſcription of the notary comes in place of that of the party; and, if witneſſes are not required to the firſt, there appears no reaſon why they ſhould be neceſſary to the laſt.

The caſe of Dinwoodie, 28th of June 1737, No 21. p. 1419. is preciſely in point; where the Court found a bill to be valid, though ſubſcribed by notaries.

The Court ſeemed to be of opinion, that, if witneſſes had atteſted the ſubſcription of the notaries, the bill would have been good. And, as to the caſe Dinwoodie, it was obſerved, on the Bench, That there were two witneſſes to the ſubſcription of the notary; notwithſtanding of which, the Court firſt found the

bill void, and its being afterwards ſuſtained, was chiefly on this medium, that the debtor was alive, and did not diſown her having authoriſed the notaries to ſign for her. No 52.

'The Court ſuſtained the objections to the bill. *See* This caſe, *voce* WRIT.

Act. *James Dundas.* Alt. *John Dalrymple.*
Fac. Col. No 20. p. 33.

1795. *January* 27.
ARCHIBALD GRAHAME *againſt* WILLIAM GILLESPIE, and Company.

No 53.
The ſum in a bill was fraudulently encreaſed after the bill was accepted. The alteration was apparent *ex facie*. The bill was found not actionable even for the original amount.

Blanks were left in a bill, at the time of accepting. The drawer afterwards, was, by means of them, able to increaſe the ſum, without giving the bill a ſuſpicious appearance. The acceptor found liable to an onerous indorſee for the increaſed value.

ON the 24th October 1791, William Gilleſpie and Company, in conſequence of a conſignment of goods made in their hands, accepted a bill, holograph of William Robb, in the following terms:

L. 58: 10s. Sterling. *Glaſgow, 24th July* 1791.

Six months after date, pay to us or order, at the ſhop of Mr Andrew Bibbald, the ſum of Fifty-eight pounds ten ſhillings Sterling, value received from

(Signed) DAVID ROSS & Co.

To Meſſrs William Gilleſpie and Co.
linen-printers, Anderſton.

William Robb afterwards increaſed the ſum in the bill to L. 458: 10s. by inſerting the figure '4' between the 'L.' and the '5' at the top of the bill; drawing a ſcore through the word 'or,' at the end of the firſt line; adding the words '*or to our*' at the beginning of the ſecond; and the words '*Four hundred*' at the beginning of the third; all which he was enabled to do, in conſequence of the blank left betwixt the 'L.' and the '5,' and of there being no writing on the ſtamp. The fraud was ſo well executed, that it could ſcarcely have been diſcovered, unleſs by a perſon aware of it; who might, on a narrow inſpection, have perceived, that the words added were written a little differently from thoſe which followed them, and not quite in the ſame line.

On the 29th October 1791, William Gilleſpie and Company, in conſequence of a ſecond conſignment of goods, accepted another bill for L. 50 Sterling, dated 29th July 1791, payable ſix months after date. This bill was written, and its amount altered to L. 450, by Robb, in a ſimilar manner with the former. The fraud, however, was not ſo well executed; in particular, the word '*four*,' which in it was inſerted at the end of the ſecond line, had a very crowded appearance.

Both bills were written upon ſhilling ſtamps.

Theſe bills, thus altered, were diſcounted by William Robb with Archibald Grahame, caſhier for the Thiſtle Bank at Glaſgow; who, having threatened to