

really bills; and, so the indorsation in question, had it not even related to a bill, would be good as a virtual bill, and an implied assignation.

Replied to the first: Obligations to repay, whether implied or expressed in the body of a bill, are only of the nature of a common ground of debt; which, though vouched by the bill and receipt upon it, has, in no country, been considered, as having the nature or privileges of a bill-debt: Accordingly, when the statute 1681, is looked into, it will be found; that nothing there is indulged with the privileges, but the obligation upon the acceptor and drawer, to the possessor; by no means the obligation that might arise to the acceptor, for repetition against the drawer; that was not understood to arise from the bill, as the privileged vehicle of commerce; but to arise from the common law *ex mandato*; and, therefore, was left to the disposition of common law.—*Replied to the second:* The form of bills is strictly to be adhered to; of which form, indorsations are not. Assignations are of as great consequence as bonds; and, if a simple indorsation, written by no body knows who, without witnesses, or any one solemnity required in law, should be found good to convey bonds and other writs, as well as bills; it would be the same, as if the Lords did find, that assignations, translations, and other such writs, were to be excepted out of the 5th Act, Parl. 1681, anent the solemnity of writs.

THE LORDS repelled also this exception, in respect the obligation to repay, was engrossed in the bill, and that the indorsation implied an assignation.

Fol. Dic. v. 1. p. 96. Rem. Dec. v. 1. No 96. & 97. p. 189.

1745. June 14. CREDITORS OF GLENDINNING against MONTGOMERY.

AFTER Magbyhill had poinded a parcel of sheep from Glendinning, a tenant, upon his protested bill; the other creditors of Glendinning arrested in his hand and pursued a furthcoming. In which it was *objected* to his poinding, That it had proceeded upon a bill not duly protested, in so far as, notwithstanding the protest was *ex facie* formal; yet in reality, neither the procurator for Magbyhill, whom the instrument bore to have protested the bill, nor Glendinning the acceptor, against whom the bill (which bore no place of payment) was protested at Peebles, which was not the place of his residence, were at the time present.

Whereof the Ordinary having allowed a proof, the fact came out by the depositions of the instrumentary witnesses to be, that Magbyhill had sent the bill to John M'Ewan clerk of Peebles, to whom one of the witnesses was apprentice, and the other a servant, with orders to protest it: That M'Ewan delivered the bill to the witnesses, desiring them to write out a protest thereon, and to insert therein the name of John Hunter indweller in Peebles, as procurator for Magbyhill; which accordingly they did, and subscribed, along with the notary as witnesses; though neither the said John Hunter nor Glendinning the acceptor was present.

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A protest on a bill, which bore to be payable at no certain place, was sustained, taken at the head burgh of the shire, where the debtor had his residence.

No 51.

And the arresters having argued, that the pointing on such null protest was a spuilzie, at least that it could afford no defence against their furthcoming; the LORDS, upon the Lord Ordinary's report of the case, 'Sustained the defence, that Magbyhill, as creditor to Glendinning, having *bona fide* proceeded to diligence, his pointing his debtor's sheep, by virtue thereof, was not a spuilzie;' and, by a plurality of voices, found, 'That he was not bound to restore the sheep themselves, nor to account for the value of them to the pursuers, till payment were made of the debt, on which the diligence proceeded; and remitted to the Ordinary to proceed accordingly.'

So far as concerned the spuilzie, the Court was unanimous; as *bona fides* must always save from pains and penalties. But as to the point of right, the case was not so clear. Had the question been only with the debtor, the pointer's *bona fides* might have entitled him to retention, till he obtained payment of his debt. Thus a creditor having proceeded to point *bona fide*, not knowing of his debtor's death; in a process of repetition at the executor's instance, retention was sustained to the pointer, upon the debt for which the pointing had proceeded, December 10. 1767, Lees *contra* Dinwoodie, Fountainhall, v. 2. p. 402. *voce* COMPENSATION, RETENTION; but as *bona fides* has no influence in a competition, the doubt was, how it could bar the furthcoming?

And the footing the Court took it on was, That an arrester is subject to every exception competent against his debtor; wherefore, as retention would have been competent against the debtor, so it also is against his creditor-arrester. A consideration of equity also concurred; that here there was no more than a catch by the arresters, who at the time of their arrestments knew as little of the defect of the protest as the pointer did. See December 7. 1748, Christie and Company *contra* Fairholms, *voce* FRAUD.—See p. 1167.—See COMPENSATION, RETENTION.

Kilkerran, (ARRESTMENT.) No 16. p. 44.

* * * The same case is reported by D. Falconer :

MONTGOMERY of Magbyhill, factor for the Earl of March, obtained a bill from Robert Glendinning, one of the tenants, for his arrears; and thereupon pointed a parcel of sheep belonging to him; upon which his other creditors arrested in Magbyhill's hands, and pursued a furthcoming.

In this process it came out, that the bill had never been protested, but the notary had returned a false execution; and thereupon the arresters *pleaded*, that the goods were in Magbyhill's hands, not habilely affected; and so were still the goods of their debtor, and behoved to be made furthcoming to them.

Pleaded for Magbyhill, That he had the goods in his hands *optima fide*, and could retain them till he got payment of his debt; this would be good against the owner, and must be good against his creditors who plead in his right; since an arrestment does not transfer the property, and it is *tritissimi juris* that compensation may be pleaded against an arrester.

The right of retention was found available to a creditor who had poided after his debtor's death, being ignorant of it; Fountainhall, v. 2. p. 402. 10th December 1707, Lees against Dinwooddie, *vide* 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 poiding 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 appraisings 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 poiding 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.

A&. 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.

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 McFarlane; 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 McFarlane, in the character of a vitious intruder.

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.
Action refused upon a bill subscribed by notaries, without witnesses.