No 133.

THE COURT adhered to the Lord Ordinary's interlocutor, finding, 'That the sum *in medio* was in Silvercraig's hands merely in the character of one of the trustees of Danna; and that he had no right of retention or preference therein.'

Lord Ordinary, *Monboddo*. For Arrester, *G. Fergusson*. For Trustees, *Rolland*. Clerk, *Menzies*.

S. *Fac. Col. No 12. p. 24.*

1791. *January* 27.

The CREDITORS of HENRY HARPER *against* ANDREW FAULDS.

No 134.
Goods in the hands of an artisan to be manufactured cannot be retained by him for any other debt than that of the expense of his manufacture.

HARPER, a dealer in the linen trade, used to employ Faulds as a bleacher; and at the end of each season accounts were settled between them, for the cloths bleached in the course of it. On one of those occasions Harper granted a bill for L. 105.

In the following season he sent various parcels of linen to this bleachfield, but soon after became bankrupt, his estate being sequestrated, and a trustee chosen over it. The trustee demanded delivery of those goods on payment of the price of bleaching them. This being refused by Faulds, who claimed retention for security of the bill-debt, the trustee brought an action against him, when it was

Pleaded for the defender; One's right of retaining the goods of another, until he shall restore the property of the retainer in his possession, is founded on the first and clearest dictates of justice. It is, however, to be understood, that in the retainer's situation no circumstances have occurred inconsistent with his claim; that his possession is honest and lawful; that he has neither relinquished the claim by express paction; nor is excluded from it by implied compact, as in the cases of deposit and of commodate; nor debarred by any positive law: But if possession has been obtained *hinc inde* in the way of commerce, where, from the nature of the contract, each party is to be entitled to a certain patrimonial benefit, and to make the best advantage he can of his neighbour's property, justice requires that the performance be mutual, while nothing to the contrary is stipulated or implied. And it requires this more especially when, by the insolvency of the party, the denial of retention is the loss of a debt.

Such is the situation of an artist having the goods of other people in his possession for the purpose of manufacture; it being in effect the same, as if he had held that possession for his own benefit, by paying a premium to the owner. This is evident where different artisans have, in that way, mutually each others goods in their custody; in whose case it is clear, at the same time, that there is nothing peculiar.

The above is the doctrine of the Roman law. Without *bonæ fidei* possession, in the case of deposit—or in that of *commodatum*, there existed no right of

retention; *Voet. ad lib.* 16. *tit.* 2. § 16,; *ad tit. depos. vel. cont. p.* 741.; *l. pen. Cod. lib.* 4. *tit.* 34.; *Id. ad. tit. Com. vel. cont. p.* 684. But in all transactions affording mutual benefit, or *quid pro quo*, such as *locatio conductio*, the principle of retention had its full operation. Though the convenience of commerce may dictate the limitation of the right, to cases of the insolvency of owners, yet no such distinction was recognized by the Roman law, which allowed it always, even as a *facilius remedium.* No 134.

When, in § 32. *ad. tit. de loc. cond.* Voet. argues, that a conductor cannot retain, he means only as claiming the property against the locator; and if, under that title, he speaks solely of retention for sums expended on the subject, it is because this alone could there fall properly under his consideration. Even, in the case of *pignus*, the Romans admitted the right of retention in its fullest extent; allowing the pledge to be retained for extraneous debts, not excepting such as were contracted after delivery; *l. unic. Cod. Etiam ob. chirog. pec. pen. pig. ten. poss.*; *Perez. Prælect. in Cod. Justin.* Now does it derogate from this right, that the retention could not operate against the *secondus creditor*, or him who had the secondary right of pledge; *Voet. ad tit. Quib. mod. Pig. vel Hyp. solv.* § 15.

Those principles are not less firmly founded in the common law of Scotland, as appears by the best writers; *Stair, b.* 1. *tit.* 18. § 7.; *Bankton, b.* 1. *tit.* 24. § 34.; *Ersk. b.* 3. *tit.* 4. § 20. The act of Parliament of 1592, instead of introducing, modified and limited the pre-existing right of compensation; in the same manner as the immediately subsequent act, relative to expenses of plea, did with regard to that claim. Nor is it any opinion of the authors above cited, that they refer to particular instances of retention, these not being stated as limits, but as examples of the right.

The decisions of the Court still more explicitly announce the same doctrine. In the case of Menzies *contra* Irvine, retention of a sum due by bill was admitted, on account of a cautionary engagement by the debtor for the creditor; in which case the caution was surely not incurred in contemplation of the bill-debt, as the bill would be indorsed away, and retention would not have been pleadable against the indorsee; Fountainhall, v. 2. p. 657. 10th July 1710, Menzies *contra* Irvine, No 147. p. 2686.

In like manner a mandatary, after the death of the mandant, was found entitled to retention of money, for relief of a cautionary obligation for the debts of the latter; 19th June 1744, Creditors of Murray *contra* Chalmer, No 82. p. 2626.

These are palpable instances of the general right of retention, and peculiarly apposite to the case in question. For it is surely not less to be presumed as understood, between a creditor and his debtor who is also cautioner for him, that the debt shall be paid without any claim of retention as cautioner, than that an artist having his employer's goods in his hands to be manufactured, should have agreed to renounce his right of retention for debts, due to him by the employer.

No 134. The decisions in the cases of Lees *contra* Dinwiddie, No 4. p. 2546. and of Glendinning *contra* Montgomery, No 34. p. 2573., though perhaps erroneous in sustaining an unlawful possession, are nevertheless strong authorities for the right of retention; as was also the judgment of the House of Lords in the case of Hewit and Brockhurst, 6th December 1775*. Nor when the *ratio decidendi*, in that of Leslie *contra* Hunter, the very case of a bleacher retaining cloth bleached by him, is attended to, can it be otherwise considered than as a precedent of a similar kind; No 130. p. 2660.

On the same principle alone, rests the acknowledged right of factors to retain the goods of their constituents, in security of all debts whatever due to them by the latter, *see* MUTUAL CONTRACT; Erskine, b. 3. tit, 4. § 21. For on any other ground than that of the general right of retention, a factor's claim could extend no farther, than to retain for payment of factor's fee and of debursements on the subjects. Even the right of retention, called a writer's hypothec, is another proof of this principle.

Nor, in the present case, are the creditors of the bankrupt owner placed in a better situation than he himself would have been. They are evidently in one less favourable; for any idea of an anxiety to exclude the right of retention, can hardly be applied to a party who is bankrupt, and without any personal interest in the matter. The bankrupt statutes surely affect not the right of retention more than that of compensation. If the goods by carelesness had been destroyed, the bankrupt would have been creditor for the price, and compensation must have been sustained. But as they are preserved safe, is the claimant's condition on that account to be rendered worse? And although a fraudulent use might on some occasions be made of retention, this imperfection is nothing but what is common to all commercial transactions; the remedy of which the law will supply when it becomes necessary, as in all cases where devices are employed *fraudem facere legi;* Blackie *contra* Robertson, No 12. p. 887.; Sym *contra* Thomson, No 201. p. 1137. Indeed as a person can neither arrest nor poind goods in his own hands; to deny the right of retention, would make the situation of one possessing the bankrupt's goods, more unfortunate than that of any other creditor.

Though the law of England is of no proper authority in Scotland, it may be noticed that it supports the doctrine of retention; of which Lord Kames gives an instance in Princ. of Equity, b. 11. cap. 3. as occurring in the Court of Chancery. And that the same rules prevail there in the other courts appears from Lord Hardwick's opinion in the case of Deeze; Atkin's Rep. vol. 1. p. 229. Nor is Lord Mansfield's judgment, in the case of Green *versus* Farmer, different in principle, as is evinced by the reasoning on which it is founded.

Answered: The inexpediency of the defender's doctrine, both to the public in general, and to the individual employer, is obvious; to the public, whom by a latent and unknown security it excludes from access to a debtor's property, and to the employer, who may thus be deprived of the most advantageous use of

* *See* APPENDIX.

goods, which will often depend on having them at command at a particular time. No 134.

The privilege of compensation or of retention was not original in the law of any country; its subsequent introduction, and always under various limitations, having been owing to considerations of equity.

In Rome, so far from being a part of the common law, compensation was only at first admitted *ex æquitate* by the Prætor, in *judiciis bonæ fidei;* nor was it extended so as to become admissible *in judiciis stricti juris*, prior to the rescript of the Emperor Marcus; Vinn. ad Instit. p. 811. And in England, it was but in the reign of Geo. II. that compensation of mutual debts, unconnected with each other, was authorised by statute.

That in Scotland, before the statute of 1592, c. 143. compensation was not permitted by way of exception, appears from Balf. Pract. p. 349.; Stair, b. 1. tit. 18. § 6. This statute speaks of compensation alone, being silent as to retention of *ipsa corpora;* which owes its introduction to the authority of the Court. But the retention thus authorised is always founded on a mutual contract, and consists in withholding performance on one side, until that on the other be ready to ensue; *See voce* MUTUAL CONTRACT.

In the case of an artist employed to manufacture goods, the contract that takes place consists in an obligation on the one hand to perform the work and restore the subject, and on the other to pay the hire; the civil possession remaining all the while with the employer; Voet. lib. 4. tit. 2. § 1. *l.* 18. *pr. de adquir. vel amitt. possess.*; Blackstone, vol. 2. p. 452.; although the artist may avail himself of his actual custody, till the counter part of the contract be fulfilled. But farther than this, which is a right arising immediately from the contract, the artist has no privilege of retention. For the defender's idea of the right extending as a security for extraneous debts, has no foundation in law.

If there were any ground for so unlimited a claim, it would not be confined to moveables, but would comprehend equally immoveable property. A tenant of a farm, for example, would, in an action of removing, be entitled to defend himself by the same plea, on account of a debt due to him by the landlord. But the law does not recognise any such doctrine; for even an heritable right to the lands in the person of the tenant would not be sustained as a defence. The maxim of law on this head is, *Nemo potest mutare causam possessionis suæ;* Voet. lib. 19. tit. 2. § 32.; *See* MUTUAL CONTRACT; Vinn. Select. Quæst. lib. 1. cap. 51.

Again, if such a comprehensive right existed in our law, it would certainly be announced by the writers, and recognised by the decisions. But the reverse is the case, as appears from the various authorities; where indeed the doctrine of retention is not treated with much accuracy; Stair, b. 1. tit. 18. § 7.; Bankton, b. 1. tit. 17. § 15. tit. 24. § 34.; Erskine, b. 3. tit. 4. § 21. *See* also *voce* MUTUAL CONTRACT.

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The case of factors entitled to retention of their constituents' funds, and of the hypothec of writers, mentioned by the defender, do not support his plea. For factors are clearly understood to advance their money in the faith of this security, by which circumstance a virtual contract is formed; and the writer's hypothec has been always confined to claims arising out of his employment, so that it stands in the same predicament. Creditors of Lidderdale *contra* Naesmith, 5th July 1749, *voce* HYPOTHEC; Macvicar *contra* Campbell, 1735, IBIDEM; Orme *contra* Barclay, 18th November 1778, IBIDEM.

As to the case of cautioners, this affords not a proper instance of retention; for it is the plea of compensation that really belongs to a cautioner, when his creditor lies under the obligation of relief to him.

In the question, Murray *contra* Chalmer, No 82. p. 2626. if the mandate had not fallen by the mandant's death, it was admitted, that the mandatary would have had no right to retain; but on the mandant's death, the money in the mandatary's hands became a debt due to the representatives of the former, against which the latter was entitled to plead compensation.

The case of Hewit and Brockhurst has been misconceived. It did not depend on the supposition of any general right of retention, but altogether on the nature of the special powers conferred on a person concerned.

With regard to the supposed effect of bankruptcy, it is reasonable, that the loss resulting from it should be equally distributed among all the creditors; nor does the circumstance of one of them holding a part of the debtor's property by accident, and without any right of pledge, create a just preference. He is only a custodier for the creditors at large. To say that he would be in a worse condition thus than the rest of the creditors, is a mistake; because in the name of a trustee he could arrest, and in his own he could execute a poinding.

Nor is there any solidity in the distinction between the case of gratuitous loans, and the like, in which the defender admits that retention is excluded, and that of contracts of a commercial nature; for if retention is not founded in the contract, it must be equally against right, whether that be onerous or gratuitous. The distinction receives no countenance from the Roman law, to which he appeals, as is evident from the passages above referred to; *Vid. etiam Voet. lib.* 16. *tit.* 2. § 20.; *lib.* 20. *tit.* 2. § 28. As to the *lex unica Codicis*, it gave not the right of retention against another creditor, but merely against the debtor himself; *Perezius*, *lib.* 8. *tit.* 27. § 3.

It is last of all to be observed, that the doctrine now maintained by the pursuer is in the law of England perfectly established, as is evident from the case of Green *versus* Farmer, reported by Burrow, vol. 4. p. 2214.; and by Blackstone, vol. 1. p. 651.

The Lord Ordinary reported the cause on informations, when the Court ordered a hearing in presence.

Afterwards, on advising the cause,

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The majority of the Court seemed to be of opinion, That although an artist's right of retaining, for security of his hire, the goods on which his labour has been bestowed, be understood as *pars contractus;* yet his possession or custody being only *ad hunc effectum*, it becomes unlawful when stretched beyond these limits; that the proper possession therefore still remains with the owner; of which, it was observed, the competency of poinding goods in that situation for his debts is a farther evidence; and consequently that there is not any room in such a case for the claim of retention.

Some of the Judges observed, That as in this case there had been a continuation from year to year of the same work performed to the owner, so the whole money due might be considered as an individual price for manufacturing one quantity of goods, and therefore that of the former any part might be retained, for whatever was due on account of the latter. And it was said, that the same principle of justice on which as to money compensation was founded, comprehended equally retention in respect of goods, which last would not, from its latency, give any peculiar occasion to fraud; for if this were intended, it could be as easily accomplished by a private agreement; nor would the bankrupt-statutes be less effectual against retention than other modes of security, when unduly attempted.

One Judge, who concurred with the majority as to the possession remaining with the owner, maintained at the same time, that in consequence of the owner's bankruptcy, effect ought to be given to the plea of retention; for that, by this event, the nature of all the contracts subsisting between him and his creditors was changed, and the whole converted into one general count and reckoning, insomuch that any special claim for delivery under a particular contract must have ceased. The same Judge too noticed, that it was because the right of retention was always viewed as an attribute of the various contracts out of which it rose, that it had not been more specifically treated of by writers on law.

THE LORDS 'repelled the plea of retention.'

To this judgment, a reclaiming petition having been preferred and followed with answers, the Court, by a very narrow majority, adhered.

Reporter, *Lord Justice-Clerk.* Act. *Wight, Cullen.*
Alt. *Dean of Faculty, Cathcart.* Clerk, *Sinclair.*

S. *Fol. Dic. v.* 3. *p.* 150. *Fac. Col. No* 163. *p.* 328.

1796. *January* 15.

JOHN DUNLOP, Trustee on the Sequestrated Estate of JAMES DUNLOP, *against* The DUNBARTON GLASSWORK COMPANY, and their CREDITORS.

No 135.
The creditors of a solvent company can rank on the

THE affairs of James Dunlop having gone into disorder, his estate was sequestrated in 1793.