

S E C T. VI.

No 58.

A man being first debtor, and thereafter becoming cautioner for his creditor in a bond for the like sum, bearing a clause of relief, and the creditor having, after the cautionry, assigned the bond, and it being intimated, the Lords sustained compensation and retention, in respect that the compenser was creditor by the clause of relief, prior to intimation of the assignation.

Retention, its effect relative to Onerous Assignees.

1683. *January.*SIBBALD *against* TURNBULL.

ONE being pursued on his bond, at the instance of an assignee, proponed compensation or rather retention, in so far as he stood engaged as cautioner for the cedent before the assignation.

Answered for the pursuer: Relief of cautionry becomes not a stated debt, which might be the ground of compensation till distress; and there was no distress here before the assignation; and the distress thereafter is not relevant, the cedent being then denuded; and compensation should be *inter eosdem*.

Replied: The Lords are still in use to sustain retention for cautionry without distress; and here the defender being debtor to the cedent, was thereafter induced, upon that account, to be cautioner for him; and the assignation was made by a father to his own son.

THE LORDS sustained the defence of retention.

Fol. Dic. v. I. p. 162. Harcarse, (COMPENSATION.) No 256. p. 61.

1684. *December.* SCRIMZEOUR *against* The LAIRD of GADGIRTH.

No 59.
Found as above.

THE Laird of Gadgirth being debtor to Alexander Blair in the sum of 1,000 lb. by bond; and, Alexander Blair having the occasion to borrow money from another, Gadgirth becomes cautioner for him in the equivalent sum; and thereafter, Blair having assigned Gadgirth's bond to Mr David Scrimzeour, who having charged Gadgirth, he suspends upon this reason, That he being cautioner for Blair, the cedent, in the equivalent sum for which now he was distressed, Blair, by the clause of relief in the bond, was debtor to him, and so he ought to have compensation and retention of the money in his own hand, for payment and relief of that sum wherein he was engaged as cautioner for Blair; and the charger, who was the assignee, could be in no better case than the cedent; and albeit, the distress was after the charger's assignation and intimation, yet the bond, which did bear the clause of relief, being prior, the distress must be drawn back to the date of the bond, and the compensation ought to be sustained against the assignee. *Answered*, That the clause of relief in the bond, not being to take effect before distress, and the sum due by Gadgirth to Blair being assigned, and the assignation intimate before the suspender was distressed, the clause of relief cannot be sustained as a ground of compensation or retention

against the charger, who is an assignee for an onerous cause; nor can the distress be drawn back to the date of the bond wherein the suspender was cautioner, so as to compensate or extinguish the bond granted by Gadgirth to Blair the charger's cedent, seeing the assignation and intimation, which is prior to the distress, is *medium impedimentum*. THE LORDS sustained the compensation and retention, in respect the suspender was creditor, by the clause of relief, prior to the intimation of the charger's assignation.

No 59.

Fol. Dic. v. 1. p. 162. Sir P. Home, v. 2. No 632.

1708. February 14.

MR PATRICK STRACHAN Servant to Sir Francis Grant Advocate *against* The
MAGISTRATES of Aberdeen.

ANDREW SKEEN of Rutherstane granted to James Skeen his brother, a bond for L. 1000, dated July 1st 1671; and the 11th of November thereafter became cautioner for him to the town of Aberdeen for a year's tack-duty of the excise, at L. 53 Sterling monthly; for security whereof, upon distress in December 1672, he granted a disposition of his lands to the town. In May 1672, James Skeen assigned the L. 1,000 bond to his brother-in-law Alexander King, who in June 1673, transferred it to Janet Lumsden, James Skeen's relict, who, in April 1674, got from Andrew Skeen an heritable bond of corroboration, and her right is conveyed to the town of Aberdeen. But prior to the said bond of corroboration, Mr Patrick Strachan's father being creditor to Andrew Skeen, did both inhibit him in August 1673, and get an heritable security for L. 2784 out of his lands in March 1674, made public by infetment. Mr Patrick, as heir to his father, pursued a mails and duties of these lands of Rutherstane, wherein comparance was made for the town of Aberdeen, who claimed preference upon the L. 1,000 debt, to which they had right by progress.

No 60.
Found as above.

Alleged for the pursuer: The town can found no preference on the L. 1,000 bond, because compensated while it stood in the person of James Skeen; in so far as, Andrew Skeen being engaged as his brother's cautioner for the tack-duty, and distressed by granting an infetment in his lands for the same to the town, who are paid by their intromissions with the rents, the pursuer, as creditor to Andrew Skeen by a real right in these lands, doth justly found upon compensation, or retention of the L. 1,000, as the common debtor might have done against the town's authors for relief of the said tack-duty.

Answered for the defenders: By the common law, *jus retentionis* was indeed competent even against singular successors, of species and things in the custody of others than the proprietor, for what had been necessarily expended upon the account thereof: But retention was never allowed to a debtor in a liquid sum, against an assignee upon the account of some other deed performable by the ce-