

(DUE TO CAUTIONERS, &c.)

No 57.

horning to pay, seeing the bond being registered, and the term of payment being past, it was distress enough to move any person to make payment; who was unwilling, upon respect to his own credit, to abide charges of horning; and which the LORDS found sufficient, to import this action for profit sincefyne, especially where the party obliged for his relief, and now called in this action, is not able to allege any reason, whereby the pursuer might be freed of payment thereof, at the creditors hands.

Act. *Hope & Belshes.*Alt. *Mowat.*Clerk, *Gibson.**Fol. Dic. v. 1. p. 43. Durie, p. 262.*

No 58.

The act of federunt 1590, allowing annualrent to cautioners, for sums paid out by them, extended to a debtor bound conjointly and severally, having a bond of relief from the other co-obligant.

1627. November 15. BLACK of Largo against DICK.

IN a suspension betwixt Patrick Black of Largo and William Dick, as assignee, constituted by Archibald Primrose, to certain sums addebted to him by the said Patrick Black; the LORDS found, That the act of Session, made *anno 1590*, which appoints annualrents to be paid to cautioners by the principal debtor, since the time of payment making by cautioners, albeit the bond bore no annualrent, where the bond bears, that the principal is obliged to relieve the cautioner of all cost, skaith, and expences, should militate in favours of any, who provides himself of the like relief of skaith, damage, and interest, by taking of any other person bound to him therein, albeit he, in whose favours that clause of relief is conceived, be not cautioner for the other, but that they be both bound to the creditor *æque principaliter*, and not as principal and cautioner; and because Mr Black desired compensation and allowance of a sum, wherein he and Archibald Primrose were addebted to a creditor, whereof the said Archibald was obliged in the bond to relieve the said Patrick Black, and which the said Patrick had paid, being straitened by charges, which all preceded long before the assignation made to William Dick; in respect of the which distress and payment, he *alleged* that he ought to have retention in his own hands of so many of the sums acclaimed from him by William Dick, and the annualrents thereof sincefyne effeiring thereto, seeing he was subject in annualrent to the said Archibald Primrose for his sums. — THE LORDS would not allow the compensation for the annualrents of these sums, against William Dick the assignee, seeing there was nothing extant in writ before William Dick's assignation, to verify that Mr Black paid that sum, whereof Archibald Primrose should have relieved him; for the payment was made by William Geichan, brother-in-law to the said Mr Black, which William Geichan, at his payment making, obtained an assignation to the bond in his own name from the creditor, and no record was extant in writ, that it was done to Mr Black's behoof, before the assignation made to William Dick, albeit that Geichan presently offered to make faith, that all was to Mr Black's behoof, which was cor-

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ceived in his name, and offered to assign the same; whose declaration the LORDS found could not prejudice the assignee, being made after his assignation; and because Mr Black took the assignation under trust to another than to himself, albeit he was the only true payer of the sum, the same yet standing in the person of Geichan, who was not denuded before the assignation made to Dick.—THE LORDS refused to allow the annualrents against William Dick, without prejudice to seek the same against Archibald Primrose, *prout de jure*. (See COMPENSATION, RETENTION.)

Act. *Hope & Nicolson.*Alt. *Stewart & Lawrie.*Clerk, *Scot.**Fol. Dic. v. 1. p. 43. Durie, p. 312.*

No 58.

1627. November 15.

DICK against BLACK.

WILLIAM DICK, is assignee by Archibald Primrose, to a decret of 27,000 merks, obtained by him against Patrick Black, charger.—Patrick *suspends*: He must have compensation of 2000 merks principal, wherein Archibald and Patrick were bound as principals, cautioners, and sureties, to Gilbert Scot, and whereof Archibald was obliged to relieve Patrick in that same bond, and of all damage and interest; which bond is registered against Patrick; and must have compensation of the annualrent thereof, since the translation made of the bond by John Wood, assignee thereto, in the person of William Geichan, who declares he took the translation in his own name, to the behoof of Patrick, having paid the sum for Patrick, whom Archibald was obliged to relieve; and by the statute of Session, a cautioner paying sick as Patrick's, was in effect in his right to the several annuals frae the principal, since the distress.

Answered: No compensation against William Dick, as assignee of the annuals nor principal: Not of the annuals; because the bond bears none; and Patrick was not a cautioner, but he and Archibald both principals; and the statute must be strictly interpreted. Farther: Neither of annuals nor principals; because Patrick has not made payment, but be the contrary. The translation produced bears William Geichan to have paid; and so non-liquet that Patrick paid.

Answered: Geichan declares he paid for Patrick, and took the translation to his behoof.

Answered: No declaration made be a third party, after the assignation made to William Dick, can make up a distress in the person of the cedent's debtor, to import compensation against the assignee of annuals, not contained in the bond.—Finds compensation for the principal sum, but not of the annuals.

Fol. Dic. v. 1. p. 43. Nicolson, (ANNUALRENT.) MS. p. 9.

No 59.
Before the act of federunt 1590, no annualrent was allowed to a cautioner for sums paid out by him upon the principal debtor's account, where the bond carried none.