

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