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 compense 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.

No 60.
Found as above.

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 infeftment. Mr Patrick, as heir to his father, pursued a mails and duties of these lands of Rutherstane, wherein compearance was made for the town of Aberdeen, who claimed preference upon the L. 1,000 debt, to which they had right by progress.

Alleged for the pursuer: The town can found no preference on the L. 1,000 bond, because compensed 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 infeftment 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-

No 60.

dent, which came not under the precise terms of compensation. *Ex equitate*, the exception of retention may sometimes be competent against a liquid debt; as to a cautioner pursued by the principal debtor for a liquid debt due by him to the principal, though he cannot formally compense, he being debtor to pay a sum, and the other only obliged *ad factum præstandum*, viz. to relieve the cautioner; which debts are not comensurable *de liquido in liquidum*. But then this exception is only competent against the creditor himself, and not against an assignee for an onerous cause: Because, it is a simple personal exception, that doth not extinguish the debt, arising from the creditor's dole in seeking payment from his cautioner, before he relieve him of his engagement for the principal. 2*do*, *Esto* retention had been competent, it was past from by Andrew Skeen's granting the bond of corroboration in April 1674, long after the engagement of cautionry. 3*tio*, James Skeen was denuded of the bond before the term of payment of the tack-duty, and so before Andrew was or could be distressed as cautioner, or any debt liquidated against him upon that head; consequently the assignee cannot be concerned therewith.

Replied for the pursuer: Albeit the tack-duty had not been liquid, retention was competent to Andrew Skeen for security of his relief, and consequently is competent to his creditor Mr Patrick Strachan: But *ita est*, that by the heritable security granted to the town of Aberdeen in December 1672, Andrew Skeen was distressed, and the tack-duty therein liquidated to L. 53 Sterling monthly for one year, which liquid debt must be drawn back to the date of the tack of the excise. 2*do*, Prior to the bond of corroboration, Mr Strachan had both inhibited Andrew Skeen, and got infeftment in his lands, which *jus quæsitum* could not be prejudiced by Andrew's granting a posterior corroboration. 3*tio*, Though at the date of the assignation by James Skeen to Alexander King, the term of payment of a part of the tack-duty was not come, that could not hinder retention; because, 1*mo*, *dies cesserat*, *licet non venerat*, and a debt *in diem* is due from the date, though execution for payment be superseded to a day. True, a cautionry may be thought an obligement *in pendenti* for a time, when the existence of the principal obligement depends upon the elapsing of terms; as in the case of a cautioner for a liferent, where *non constat* if the liferenter will outlive subsequent terms, or a cautioner in a tack for more years than one, which commonly goes not to heirs and assignees, unless expresly conceived in their favours. But Andrew Skeen was cautioner for one year's tack-duty, which tack would have subsisted whether the tacksman had lived or not; and the obligement of cautionry was the same thing upon the matter, as if a liquid bond for a sum equivalent to the tack-duty payable at several terms had been granted; in which case, the cautioner would certainly have had retention till he were relieved of moieties due before, though payable after assignation of the cautioner's bond; because, in personal rights, all exceptions competent against the cedent, are competent against his assignee, except as to probation by the cedent's oath. And where a man has a right in his person to another's be-

hoof, whatever he expends or obligeth himself for that other, is a real burden upon the subject affecting singular successors, as presumed to be undertaken upon the faith thereof, Earl of Bedford against Lord Balmerinoch; *voce* MUTUAL CONTRACT; just as when one having another's money in his hand, becomes cautioner for that other in contemplation thereof. Besides, one of the reasons why our custom allows retention in a man's own hand, to have the same effect with arrestment of a subject in the hands of another, is, for that a person cannot affect, directly by arrestment or otherways, money in his own hand, and *pro facto habetur, per quem non stetit quo minus fieret.* The Lords have also frequently so decided, even in the case where there was no distress at the time of the principal's assigning his cautioner's bond. No 60.

Duplied for the defender: If one to whom compensation is competent, corroborate the bond in favours of the assignee, the benefit of objecting compensation against the assignee, is lost; seeing compensation not applied operates nothing: And it will not be pretended, that a right of retention is better than compensation. Inhibition may indeed stop the conveyance of heritage, but it was never heard to discharge an exception arising upon a personal deed, such as the obligation of relief: And though the infeftment in the lands, would be a ground to reduce posterior rights on these lands; what doth that signify to hinder the discharge of an extrinsic personal exception, when Andrew Skeen was of entire credit? 2*do*, It is true in the case betwixt the Lords Ballantyne and Sinclair, retention was allowed to my Lord Sinclair for relief of his cautionry for Sir James Cockburn: But then this was carried very narrowly, and the point was not fully heard in presence. Besides, there was a specialty in my Lord Sinclair's case; for Sir James Cockburn was broken and fled before the arrestment in the Lord Sinclair's hands, so that in effect the cautioner was under distress; whereas James Skeen was solvent and in good condition when he assigned the bond to Alexander King. *See* MUTUAL CONTRACT.

THE LORDS found that Andrew Skeen being engaged as cautioner for his brother James in the tack of the excise, before he assigned the L. 1,000 bond founded on to Alexander King, had thereby right of retention of the sums contained in the said bond due by him to James, till he were relieved of his cautionry. And found the said defence competent to Mr Patrick Strachan the pursuer in this competition, for the mails and duties of Andrew Skeen's lands, whereon the pursuer is a real creditor, and used inhibition against Andrew before he granted the bond of corroboration to the town of Aberdeen's cedent. And therefore preferred Mr Strachan's right, to the town's claim upon the said bond of L. 1,000, and diligence done thereon. *See* INHIBITION. *See* No 30. p. 2570. *Fol. Dic. v.* 1. *p.* 162. *Forbes, p.* 240.