

1680. *January 7.* M'BRIDE *against* MELVIL.

No 29.

COMPENSATION, like payment, may be founded on *a quocunque*. See the particulars, No 15. p. 256I.

1709. *July 1.* TOWN of Aberdeen *against* MR PATRICK STRACHAN.

No 30.
A debtor who was cautioner for his creditor, found entitled to retain; and this found pleadable by the cautioner's creditor.

MR PATRICK STRACHAN being infeft in the lands of Ruthrieston, and pursuing for mails and duties, compearance is made, and preference craved for the Town of Aberdeen, and master of their mortifications, who had also right to the same lands, wherein these points came to be decided. The *first* was, a debtor being cautioner for the creditor in another sum, if his creditor crave payment, law gives him retention *quoad concurrentem quantitatem*, aye, till he be relieved, because, on the faith of that debt I became cautioner, otherwise I would not have bound for you; but the strait here was, that the retention was craved by a creditor of that cautioner, who had not affected the relief *speciatim*, and directly. But the LORDS found it was transmissible and competent to the cautioner's creditor, as well as to himself; though the Town *alleged*, retention was a weaker and more personal right than compensation, because the last *ipso jure* extinguishes; whereas the first is only *exceptio doli, quæ soli personæ cohaeret et non rei*; which the LORDS repelled, seeing law says, *etiam ob chirographariam pecuniam pignus retineri posse*. The *second* point was, Whether retention, on the head of my being cautioner, may be proponed against the creditor himself, but likewise against his singular successor for an onerous cause; which the LORDS also sustained, seeing personal exceptions against the cedent, when proven by writ, are also competent against the assignee, as was found, 18th February 1662, Lord Balmerino *contra* Earl of Bedford, *voce* MUTUAL CONTRACT. The *third* question was, Whether the cautioner's creditor, who has right to the retention and relief, may not, by inhibition, hinder his debtor to renounce his relief of that debt, or to grant a new corroborative security to a singular successor? And it was urged for the Town, that however backbonds, arrestments, and other personal diligences can affect personal rights; yet the Town being infeft, none of these can affect their real right; and for this they cited 25th March 1629, Earl of Buccleugh, and Young, (No 55. p. 2204. *et infra, h. t.*) But the LORDS also repelled this, and after some reclaiming bills, having adhered, the Town of Aberdeen, who are a wealthy flourishing corporation, gave in an appeal and protestation for remeid of law to the Parliament. See APPENDIX.

Fol. Dic. v. 1. p. 161. Fountainball, v. 2. p. 509.