

1699. December 8.

SIR JAMES DOUGLAS of Kelhead, *against* The CREDITORS of BUCHTRIG.

No 97.

An assignee, who, by a back-bond, stood bound to apply the contents of the assignation when recovered, in payment of certain debts, in which he was cautioner for the cedent, having there-  
after become creditor to the cedent in a pure debt, compensation was opposed to him upon the contents of the assignation now uplifted. Found, that this sum, destined for relieving the assignee of his cautionry, could not be applied by the cedent, so as to sopite a separate debt, by compensation.

IN the competition of the Creditors of Buchtrig, compearance is made for Kelhead, who craves preference, by virtue of an early inhibition upon two debts, one to Cameron, and another to Scot, in which Sir James being cautioner, he paid the debts, and obtained assignation for his relief.

It was *alleged* for the Creditors; These debts were extinct by compensation, in so far as Sir James being cautioner for Buchtrig in several sums, Buchtrig conveyed the right of two debts, one due by the Earl of Marshall, and another by Menzies of Enoch, in favours of Kelhead, and took Kelhead's back-bond, mentioning the conveyance of these rights, and several cautionries, wherein he stood engaged, and obliging him to apply what he had received to the payment of these debts, and to purchase discharges from the creditors *pro tanto*; whereupon it being *alleged*, That Kelhead being creditor to Buchtrig, as assignee to Cameron and Scot's debts, *eo momento* he got payment of Buchtrig's money from the Earl of Marshall, he was debtor to Buchtrig; and what he owed did compensate what was due to him as assignee foresaid;

It was *answered*; That he being engaged in many debts for Buchtrig, he obtained a conveyance to Marshall and Enoch's debts, for his better relief of these cautionries, and was still willing to apply the same, according to the design of his back-bond; but he had the election, and was not obliged to impute what he had received, in payment of what he had then paid out; because, albeit he was a liquid creditor in what he had paid out, and had a liquid sum in his hand, and stood only creditor in relief, as to other sums, yet he might apply the money in his hand for his relief, and not extinguish what he had then paid; because the conveyance was made to him *eo intuitu*, that he might have the more effectual relief; and consequently, the rational design was, that he should relieve himself of these debts, which otherwise would be least effectual.

'THE LORDS found, That the Earl Marshall and Enoch's money did not compensate Cameron and Scot's debt; and that Kelhead had the application thereof to the relief of any cautionry he pleased.'

*Fol. Dic. v. 1. p. 163. Dalrymple, No 22. p. 27.*

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The Title COMPENSATION—RETENTION is continued in Vol. VII.