

S E C T. IV.

Who entitled to Propone Compensation and Retention.

1670. February 5.

The EARL of Northesk *against* The TUTORS of GAIRNS, and DUNGLAS and REIDCASTLE, his Cautioners.

NORTHESK, as heir to his father, pursuing upon a bond granted by the Tutor of Gairns as principal, and Dunglass and Reidcastle as cautioners, for the sum of 10,000 merks; it was *alleged* for the defenders, That the bond, which was the ground of the pursuit, was given in place of another bond of 12,000 merks, granted to his father the Earl of Ethie, and which was satisfied by the sale of the lands of Bygayes, it being accounted as part of the price, as might appear by a discharge of all debts due by the old Laird of Gairns, of the date of the new bond granted to the pursuer; and by the disposition of the lands of Bygayes, bearing, L. 6,000 to be retained in Northesk's hands, which he declared he would allow in the first end of the old bond. As, likewise, it being *alleged*, that the defenders ought to have compensation of the said sum of L. 6,000, retained as a part of the price, notwithstanding whereof, this new bond pursued upon was granted; it was *answered*, That compensation was not liquid, as not being *inter easdem personas*; seeing the Laird of Gairns could not pursue for repetition in case he had made twice payment, both by giving bond and allowing so much in the first end of the price of the lands; seeing this bond was not granted by the Laird of Gairns, but by the Tutor and his cautioners *propriis nominibus*: Likeas, the pursuer did declare, that he did insist against the cautioners only and not the principal, who was Tutor of Gairns; and albeit he should insist against the Tutor, yet that he could not compensate for a debt due to his pupil. THE LORDS were clear to find, that the cautioners of the Tutor might compensate upon any ground in law that was competent to the principal; and that a tutor, having power to uplift his pupil's moneys, might thereupon compensate. But because the grounds of the compensation, and the trial of the transaction, required a further consideration, and that witnesses *ex officio* behoved to be examined; therefore to this effect that Northesk might come in, *pari passu*, with several comprisers who had comprised near a year since, they did decern for payment, but ordained suspension to be granted without caution or consignment, wherein the allegiance of compensation upon the grounds foresaid might be further cleared.

No 28.

A tutor and his cautioner being charged for payment of a bond granted by them, with relation to the pupil's affairs, were allowed to compensate upon a debt due to the pupil by the charger.

Fol. Dic. v. I. p. 161. Gosford, MS. No 247. p. 102.