

No 1.

1000 merks;—THE LORDS therefore liquidated the distress to 1000 merks, for which they found the pursuer might seek execution against the defender; and which sum, if he recovered, the LORDS found, that the said pursuer should make equally and alike profitable to the whole rest of the heritors of the land affected, to the effect that the whole tenement thereby might be relieved of the said burden, and that the annualrenter might receive payment of the principal sum thereby: And the LORDS found, that albeit the annualrenter might distress any part of the tenement affected for the whole annualrent; yet that the heritor of that part which should happen to be distressed, or which was distressed some time by-past, might well and lawfully seek his own relief off the rest of the land and tenement affected with the burden, and off the heritors of the same *pro rata*, and for their own parts proportionally, according to the worth and rent of their lands, to be equally divided amongst the saids whole heritors; and that every one of them ought to bear his own part of the burden, both for by-gones already paid, and also for all years to come, while the principal sum might be recovered for all their reliefs.

Act. *Nicolson & Heriot.*Alt. *Absent.*Clerk, *Gibson.**Fol. Dic. v. 1. p. 221. Durie, p. 769.*

No 2.

Where persons are bound conjunctly and severally, they are entitled to relief against one another.

1662. *June 19.* MR JOHN WALLACE *against* FORBES.

ROBERT and WILLIAM FORBES', and Hugh Wallace, being bound in a bond as co-principals, Hugh Wallace being distressed for all, consigned the sum to this charger's son. Forbes suspends, on this reason, that there is no clause of relief in the bond, and Wallace being debtor *in solidum*, and having gotten assignation *confusione tollitur obligatio*. The charger *answered*, That though there was no clause of relief, *hoc inest*, where many parties are bound conjunctly and severally, that each is obliged to relieve others.

THE LORDS repelled the reason of suspension for the suspender's part, and found them liable therefor, but not for the other co-principal parties.

*Fol. Dic. v. 1. p. 221. Stair, v. 1. p. III.*

\*.\* The like was decided in the cases of Monteith *against* Anderson, *voce* BANKRUPT, No 133. p. 1044.; and Ferguson *against* More, *voce* COMPENSATION.—RETENTION, No 119. p. 2652.

No 3.

An annualrent being payable out of two tene-

1662. *June 26.* ADAMSONS *against* LORD BALMERINO.

ADAMSONS being infeft in an old annualrent out of two tenements in Leith, and having thereupon obtained decret of poiding the ground in *anno* 1661.

and insisting for pointing one of the tenant's goods, now belonging to the Lord Balmerino, for the whole annualrent, Balmerino suspends, on these reasons, *imo*, The heritor, against whom the decret of pointing was obtained, and all his tenants, were dead; and therefore it can receive no summar execution against the present heritor and his tenants, but there must be a new decret against them. *2do*, Balmerino hath peaceably possessed this tenement 20 or 30 years, and thereby hath the benefit of a possessory judgment, by which his infestment cannot be questioned without reduction and declarator. *3tio*, The English possessed this tenement several years by the public calamity of war; and therefore there must be deduction of these years annualrents, as is frequently done in feu-duties. *4to*, The two tenements being now in the hands of different singular successors, Balmerino's tenement can only be pointed for a part of the annualrent. The pursuer *answered*, That pointing of the ground is *actio realis*, chiefly against the ground; and therefore, during the obtainer's life, it is valued, not only against the ground, while it belonged to these heritors and possessors, but against the same in whosoever hands it be, that the moveable goods therein, or the ground right thereof, may be appraised. To the *2d*, Annualrents are *debita fundi*, and a possessory judgment takes neither place for them, nor against them. To the *3d*, Though, in some cases, feu-duties cease by devastation, that was never extended to annualrents, due for the profit of a stock of money. To the *4th*, The annualrent being out of two tenements promiscuously, the annualrenter may distress any part for the whole, in whosoever hands the tenement may be.

THE LORDS repelled all these defences, but superseded execution for one-half of the annualrent for a time; and ordained the suspender to give commission to Balmerino to put the decret in execution against the other tenements for its proportion, for his relief, *medio tempore*.

*Fol. Dic. v. I. p. 221. Stair, v. I. p. 114.*

1666. July 10. Dame MARGARET HOME *against* DAVID CRAWFORD.

UMQUHILE John Earl of Loudon as principal, David Crawford of Kers, with eight others, as cautioners for him, being debtors to Dame Margaret Home, Lady Loudon, for payment making to her of the sum of 2700 merks yearly, during her lifetime, at the terms mentioned in the contract, passed amongst the parties, all the cautioners and principal being dead, except David Crawford, and he being charged, and having suspended, he only craved, that, in regard the contract bears no mutual clause of relief, and that he is the only person charged, the LORDS would be pleased, upon payment of the money by him, to ordain the charger to assign the foresaid contract to the suspender; that he may obtain his relief. And it being controverted, whether the charger was obliged

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ments, which came afterwards into the hands of two different singular successors, it was found, that the annual-renter might uplift the whole out of any one of the tenements, assigning against the other for relief.

No 4.

A cautioner, upon payment, craved assignation against his co-cautioner. The Lords found the creditor not obliged to assign, the cautioner being sufficiently secured in law by his action of relief.