

* * Dirleton reports the same case :

No 5.

A CREDITOR having obtained a decret *in subsidium*, for payment of his debts, against the Magistrates of Dundee ; and having assigned the bond whereupon the debt was due, to the Magistrates, they pursued the cautioners in the bond ; who *alleged*, that the debt and bond being satisfied by the principal or Town of Dundee, who was liable *loco rei ex delicto*, the cautioners were liberate.

THE LORDS did demur and delay to give answer.

1668. *January 24.*—THE TOWN of Dundee being pursued *in subsidium* for payment of a debt due by a rebel, whom they suffered to escape out of prison ; after decret satisfied the creditor, and took assignation to the debt and bond, whereupon they pursued the Earl of Findlater one of the cautioners. It was *alleged*, That the town *ex delicto* had come in the place of the principal debtor, and payment made by them did liberate the cautioners, as if payment had been made by the principal. It was *replied*, That the Town was only liable to the creditor, who might pass from his decret against the Town ; and as he might have assigned the debt to any other person, the Town as *quilibet* might have a right from him.

THE LORDS found, that the Town is not in the case of cautioners, or *expromisores ex pacto*, but of *correi*, being liable in law *ex delicto* for, and in place of the principal.

Dirleton, Nos 91. & 147. p. 37. & 59.

1671. *June 22.* LORD BALMERINO *against* HAMILTON of Little Preston.

No 6.

Found in conformity with
No 1. p. 3345.

— WISHART in Leith did grant infeftment of an annualrent of L. 40 yearly, out of two tenements in Leith, in any part of them ; which annualrent by progress belonged to Mr John Adamson, and after the constitution of the annualrent, the two tenements were transmitted to different proprietors, and now the one belongs to the Lord Balmerino, and the other to Hamilton of Little Preston ; the annualrenter did only insist against Balmerino's tenement, and upon an old decret of poinding of the ground of that tenement, hath continued in possession, and distressed Balmerino ; who having suspended on this ground, that the annualrent being out of two tenements, whereof he had but the one, he could be only liable but for the one half.

THE LORDS found that the annualrenter might distress any of the tenements for the whole, but reserved to Balmerino his relief as accords.

Whereupon Balmerino now pursues Little Preston to repay him the half of the annualrent, for which he was distressed, because he having paid, did libe-

rate Little Preston of the annualrent which affected both tenements, they being now in different heritors' hands, behoved to infer a proportional relief, as is ordinary in all annualrents, constitute upon any barony or tenement which thereafter comes to be divided. The defender *alleged* absolvitor, because he had bruiked his tenement much more than 40 years before this pursuit, free of any such annualrent; and therefore had prescribed the freedom thereof. The pursuer *answered*, that prescription was hindered by the annualrenter's possession, in getting his annualrent, which though it had been but by a personal obligation, it would have preserved his right entire to all effects in the same manner, as payment by a principal debtor hinders the cautioner's bond to prescribe, though he were free thereof for 40 years. It was *answered*, that albeit there might be ground for the reply, where the annualrent is constitute out of one barony or tenement, whereon infeftment may reach the whole, yet it cannot hold in this case, where the annualrent is constitute upon two distinct tenements; and where there behoved sasine to be taken upon both of them, and if omitted upon one, that would be free.

THE LORDS found that payment of the annualrent out of any of the tenements, saved prescription as to both. *See* PRESCRIPTION.

Fol. Dic. v. I. p. 221. Stair, v. I. p. 738.

1675. January 27.

MONTEITH *against* RODGER.

MONTEITH and John Rodger being conjunct cautioners, there is a pursuit against Monteith, at the instance of an assignee to the bond, for payment of the debt; in which pursuit it was *alleged*, that the samin being to the behoof of John Rodger, who was conjunct cautioner, Monteith the other conjunct cautioner, could only be liable for a half, because if Rodger himself were pursuing for the whole, Monteith might relevantly allege, that his co-cautioner could not distress him for the whole, but behoved to allow his own half. It was *answered*, That in this bond there is no clause of relief amongst the co-cautioners; so that one of them getting assignation from the creditor, as being in the creditor's place, may distress the other for the whole. It was *replied*, that *correi debendi* are liable for mutual relief, though there be no express clause of relief, which though it uses to be adhibit, *ad majorem evidentiam*, yet it is implied *ex natura rei*, in respect that both parties being liable *in solidum* to the debtor, any one paying, doth not only liberate himself, but all the rest, which being *utiliter gestum*, obliges all for relief of their shares, as hath been decided by the Lords oft times in the case of co-principals; and the reason is the same amongst co-cautioners, and was so decided amongst co-cautioners, January 14. 1673, Scot *contra* Douglas, (*See* APPENDIX.) It was *duplied*, That co-principals have a ground of mutual relief, because as to the one half they are co-principals, but as to the other half they are mutually cautioners, and so they do engage upon.

No 6.

No 7.

Found in conformity with
No 2. p. 3346.