

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 infertment 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THE LORDS repelled all these defences, but superseded execution for one-half of the annualrent for a time; and ordained the suspender to give commission to Balmerino to put the decret in execution against the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

No 3.

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.

No 4.

in law to assign the suspender to the contract, that he might get his relief from the remanent cautioners;—THE LORDS found, that the charger was not obliged to assign against the rest of the cautioners; but that the suspender having paid, the law would supply the defect of the clause of the relief, which grants action to the cautioners for pursuing the remanent cautioners, according to the civil law;—in Novell. 4. c. 2.

Fol. Dic. v. 1. p. 221. Newbyth, MS. p. 71.

* * * This case is also reported by Stair, *voce* CAUTIONER, No 38. p. 2112.

1668. January 24.

MAGISTRATES OF DUNDEE *against* The EARL OF FINDLATER.

No 5.

A Magistrate, upon his negligence in suffering a debtor to escape from prison, being condemned to pay the debt, has no recourse against the cautioners, whether he obtain from the creditor a discharge only, or be assigned to the debt; because he is liable *ex delicto*, and comes in place of the principal debtor.

THERE was a bond granted by one Jackson principal, and a cautioner, which is also alleged to have been subscribed by umquhile Inchmartin as another cautioner; which bond being registrate at the creditor's instance, he did thereupon incarcerate the principal debtor, whom the Magistrates having suffered unwarrantably to escape, the creditor obtained decret against the Magistrates for payment of the debt. The Magistrate pays the debt, but takes assignation from the creditor; and now, as assignee, pursues the Earl of Findlater, as representing Inchmartin, one of the cautioners, for payment, who *alleged* absolvi-
tor, *imo*, Because the bond is null as to Inchmartin, wanting both date and witnesses; for it bears to have been subscribed by the principal, and the other cautioner, at such a place, such a day, before these witnesses, who are subjoined, and designed, and after the names of these witnesses says, 'and subscribed by Inchmartin at ———;' after which there nothing follows in the bond but the subscription of parties, none of which subscribe as witness to Inchmartin, yet his subscription is amongst the subscriptions of the other parties, but as to him, it hath neither place, day, nor witnesses. The pursuer offered to condescend, that the day and place of the subscription of the witnesses were the same to Inchmartin as to the principal and other cautioner, which they alleged to be sufficient to make up this nullity, as is ordinary where the writer and witnesses are not designed, for thereupon the defender may improve the bond by the witnesses insert. The defender *answered*, That albeit the Lords supply the want of designation of writer or witnesses, by condescending on their designation, that means of improbation may be afforded, which is not the question here; yet the Lords did never suffer parties to fill up witnesses, where no witnesses were insert, nor no date, either as to year or month.

THE LORDS would not sustain the bond upon this condescence, but *ex officio* ordained the witnesses (if they were alive) to be examined, whether they