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 obligement, 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. No 6.

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

Fol. Dic. v. 1. *p.* 221. *Stair, v.* 1. *p.* 738.

1675. *January* 27. MONTEITH *against* RODGER.

No 7.
Found in conformity with No 2. p. 3346.

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 7. the mutual desire or mandate each of other, *et tenetur ex mandato*, but co-cautioners do not engage upon the desire of either of them, but upon the desire of the principal debtor; and therefore *inter se nullum habent negotium;* upon which account by the civil law they have no relief, *nisi ex pacto.* It was *triplied*, that by the Roman law *correi debendi* had *exceptionis*, *divisionis*, *ordinis et actionum sedendarum;* by which they were not obliged to pay the creditor till he assigned his right, which doth not quadrate with our customs, whereby co-principals have oft times been found liable without an express clause of relief, and without assignation from the creditor; and there is the same reason amongst co-cautioners, when one by his act relieves all.

THE LORDS found that the co-cautioners were liable for mutual relief, without an express clause of relief.

Fol. Dic. v. 1. *p.* 221. *Stair, v.* 2. *p.* 312.

*** Dirleton reports the same case:

1675. *January* 5.

IT was debated this day among the Lords, whether a bond being granted by a principal and two cautioners bound conjunctly and severally; and the cautioners not bound to relieve one another; if one of the cautioners should take assignation to the bond and should pursue the other, the said other cautioner will have a defence upon that ground, That albeit they be not obliged to relieve one another *pro rata*, yet that the said obligement *inest*, in so far as they are bound conjunctly and severally; most of the Lords inclined to find, that the pursuer ought to relieve the co-cautioner *pro rata* and had not action but for his own part. But some of the Lords were of another opinion, that there being no obligement upon any of the co-cautioners to relieve one another; one of the cautioners paying entirely and getting an assignation, in effect *emit nomen:* And though both the cautioners be obliged conjunctly and severally in relation to the creditor, yet there is no transaction or obligement betwixt the cautioners themselves; every one having *actio mandati* as to the principal for their relief, which *inest*, though the principal were not bound to relieve them expressly; but ought to be considered as *quilibet*, and strangers to one another.

But because the Lords were divided, and it was alleged on either hand, the case was formerly decided; the decision was delayed this day.

January 27. 1675.—IN the case above mentioned, 5th January instant, concerning con-cautioners obliged conjunctly and severally for the principal, without a clause of mutual relief; THE LORDS found, That one of the cautioners having paid and taken assignation, the others had a good defence against him for his own part, notwithstanding of the reasons there above mentioned; and that it was urged, that the co-cautioner could not be forced to relieve the defender if he had paid the whole; seeing he had neither *actio mandati*, there

No 7.

being none given by either of the cautioners to others; nor was obliged to relieve the other cautioners by an express clause, which is ever insert, when mutual relief is intended; and that this is clear law, it appears from the title of the civil law *de Fidejussoribus ff. lib.* 46. *tit.* 1. *leg.* 39. *Et leg.* 36. *ibid. Et leg.* 11. *cod. eod. tit.*

THE LORDS decided, as said is, in respect of a practique produced betwixt in anno relating to a former practique in anno

Dirleton, No 212. 228. *p.* 90. 108.

1676. *November* 7.

THOMAS RIG *against* the CAUTIONERS for the LAIRD of BROOMHALL.

No 8.
A cautioner in a suspension being distressed upon a decree, may crave an assignation, not only against the principal, for whom he was cautioner, but against the whole cautioners in the original bond.

THERE being a suspension raised by the Laird of Broomhall of a charge upon a bond for borrowed money, against Mr Thomas Rig, who was assigned by Alexander Lockhart to the principal bond whereupon the suspension was raised, and Captain Crawford found cautioner in the suspension; which Cautioner being charged, he gave in a bill of suspension, upon the reason, That he being Cautioner, and being willing to pay the debt, he craved, that he might have an assignation for his relief, not only of the principal, but of the whole Cautioners contained in the principal bond; whereupon they being ordained to be heard before the Ordinary upon the bills, and he to make report;—it was *alleged* for the Cautioners, That no assignation would be granted against them to the Cautioner in a suspension, but only to militate against the principal for whom he was cautioner. It was *answered*, That albeit the principal, Broomhall, was only charged, yet it was not only suspended to his benefit, but to the benefit of the whole Cautioners, who were bound to the creditor; and that by payment he did free both principal and Cautioners, and therefore ought to be assigned to the whole obligements. THE LORDS did consider this as a general case, and found that the creditor, or his assignee, if they had discharged any of the Cautioners, they could not be of new distrest, and so were not obliged to assign the cautioner in the suspension, or the principal debtor, who were only charged; and so ordained that the creditor and his assignee should give their oath, if, by writ or promise, they were bound to any of the Cautioners in the bond, never to distress them; in which case, any of the Cautioners to whom they were bound were to be free, and no assignation to be granted against them; otherwise they found that the assignee should be obliged to assign the cautioner in the suspension, who was to make payment of the bond, that for his relief he might not only discuss the principal, but all those Cautioners, who were not secured by a discharge or promise not to be distrest.

Fol. Dic. v. 1. *p.* 221. *Gosford, MS. No* 898. *p.* 577.