

## DEBTOR AND CREDITOR.

### S E C T. I.

Relief among Co-debtors, and whether the Creditor, upon payment, is bound to assign in order to operate relief.

1635. June 26.

GREIVE *against* HEPBURN.

**A**LLEXANDER GREIVE, as heir to his father umquhile George Grieve, who had bought a dwelling-house in Edinburgh from Mr Alexander Hepburn, with ample warrandice ; and the whole tenement, whereof this dwelling-house was a part, being affected with a ground annual of 100 merks yearly, redeemable to the author of the annualrent, by payment of 1000 merks before the alienation made to George Grieve ; the said Mr Alexander's dwelling-house being distress for the whole annualrent by Lawrence Scot, advocate, who was heritor of another part of the tenement affected with the said burden, and which Lawrence had acquired the right of the said annualrent from the heritor thereof, whereby he laid the burden of the whole annualrent, and the total payment thereof, upon the pursuer's dwelling-house, and made his own part free ; the said pursuer pursues the said Mr Alexander Hepburn, his author, for warrandice from that annualrent, and for that effect to be decerned to pay all the bygones of the years paid by him, and also to hear and see the said annualrent, for time to come, to be liquidate to a certain particular sum, for which he might have execution by poinding, or comprising of the defender's goods, or lands, when he should find occasion to deprehend the same thereafter, according to such a quantity as the Lords should extend the said annualrent to for times subsequent ; which summons being called, and no party compearing, the Lords having considered the same, and the desire thereof, they sustained the same, and the conclusion thereof, (albeit it was not usual to decern the like, viz. to liquidate a distress which might ensue *in futuro*, to a particular principal sum, before the party should be decerned and distressed *pro tanto*, seeing it was *futurum quod potuit contingere vel non*, but in regard the cause was seen and perpetual, viz. a distress yearly of 100 merks, ay and while it were redeemed by payment of

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#### No 1.

Although an annualrenter may distress any part of a tenement affected, for the whole annualrent, yet the Lords found, that the heritor of that part might seek his relief from the rest of the lands affected, and from the heritors thereof *pro rata*, and this both for bygones already paid, and for time to come.

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. I. 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. I. p. 221. Stair, v. I. 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 pointing the ground in *anno* 1661.