

(DUE TO CAUTIONERS, &c.)

bond, having paid the sum; in the which bond, the principal is obliged to relieve the cautioner of all cost, skaith, and damage, to be incurred by him through his cautionry; the bond being of the nature of a moveable sum, and bearing no annual:—THE LORDS found, that the cautioner might seek his relief, and charge, for payment to him of the annualrent of the principal, for all terms since he made payment thereof to the creditor, albeit he had not sought his relief, and payment thereof many years, and albeit it was a great space after the payment of the principal sum, without any charges of horning, or pointing, or other distresses; seeing the LORDS found, that he being obliged, and the bond registrate, and thereafter payment made, that was a sufficient distress, without any more, to produce this action for relief of the annuals against the party obliged.

Act. Belsbes.

Alt. Nisbet.

Clerk, Hay.

Durie, p. 62.

No 55.
registration
of the bond,
sufficient dis-
tress to en-
title the cau-
tioner to
claim annual-
rent of the
sums paid out
by him for
the principal
debitor.

1627. January 16.

CRANSTON against CRICHTON.

CRANSTON of Moreston pursued the Laird of Frendraught for the principal sum of 500 merks, paid by him as cautioner for the defender's grandfather, 1611, and for the annualrents thereof ever since.—*Alleged*, He ought to be affolized from the annualrents, because the principal debtor was only bound to relieve the cautioner of the principal sum; and the bond bore not annualrent. And, for the Lords statute 1610, it is only in favours of such creditors as are compelled and forced to pay; but voluntary payment, made by a cautioner undistressed, will not be a good ground to crave annualrent by virtue of that statute; but so it is, that the pursuer paid uncompelled or distressed.—*Replied*, That the day of payment being past, and the bond registered, it was a sufficient distress for an honest man, and he needed not abide a charge of horning; *nam dies interpellat pro homine*.—THE LORDS repelled the allegiance, and found that annualrent was due after payment made by the cautioner.

Fol. Dic. v. 1. p. 43. Spottiswood (USURY), p. 353.

No 56.
The same
found.

1627. January 24.

L. WAUCHTON against L. INNERWEEK.

IN an action of the L. Wauchton's against the L. Innerweek younger, for repayment of some sums paid by the pursuer, as cautioner for the defender, with the ordinary annualrent therefor, since the time of his payment thereof, according to the act of Session, anno 1590:—THE LORDS sustained this action, for the annualrents acclaimed, albeit the pursuer was not compelled by charges of

No 57.
The same
found.

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No 57.

horning to pay, seeing the bond being registered, and the term of payment being past, it was distress enough to move any person to make payment; who was unwilling, upon respect to his own credit, to abide charges of horning; and which the LORDS found sufficient, to import this action for profit sincefyne, especially where the party obliged for his relief, and now called in this action, is not able to allege any reason, whereby the pursuer might be freed of payment thereof, at the creditors hands.

Act. *Hope & Belshes.*Alt. *Mowat.*Clerk, *Gibson.**Fol. Dic. v. 1. p. 43. Durie, p. 262.*

No 58.

The act of federunt 1590, allowing annualrent to cautioners, for sums paid out by them, extended to a debtor bound conjointly and severally, having a bond of relief from the other co-obligant.

1627. November 15. BLACK of Largo against DICK.

IN a suspension betwixt Patrick Black of Largo and William Dick, as assignee, constituted by Archibald Primrose, to certain sums addebted to him by the said Patrick Black; the LORDS found, That the act of Session, made *anno 1590*, which appoints annualrents to be paid to cautioners by the principal debtor, since the time of payment making by cautioners, albeit the bond bore no annualrent, where the bond bears, that the principal is obliged to relieve the cautioner of all cost, skaith, and expences, should militate in favours of any, who provides himself of the like relief of skaith, damage, and interest, by taking of any other person bound to him therein, albeit he, in whose favours that clause of relief is conceived, be not cautioner for the other, but that they be both bound to the creditor *æque principaliter*, and not as principal and cautioner; and because Mr Black desired compensation and allowance of a sum, wherein he and Archibald Primrose were addebted to a creditor, whereof the said Archibald was obliged in the bond to relieve the said Patrick Black, and which the said Patrick had paid, being straitened by charges, which all preceded long before the assignation made to William Dick; in respect of the which distress and payment, he *alleged* that he ought to have retention in his own hands of so many of the sums acclaimed from him by William Dick, and the annualrents thereof sincefyne effeiring thereto, seeing he was subject in annualrent to the said Archibald Primrose for his sums. — THE LORDS would not allow the compensation for the annualrents of these sums, against William Dick the assignee, seeing there was nothing extant in writ before William Dick's assignation, to verify that Mr Black paid that sum, whereof Archibald Primrose should have relieved him; for the payment was made by William Geichan, brother-in-law to the said Mr Black, which William Geichan, at his payment making, obtained an assignation to the bond in his own name from the creditor, and no record was extant in writ, that it was done to Mr Black's behoof, before the assignation made to William Dick, albeit that Geichan presently offered to make faith, that all was to Mr Black's behoof, which was cor-