

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

were witnesses to Inchmartin's subscription that same day and place with the rest, reserving to themselves what their testimonies should operate. *See* WITNESS.

The defender further *alleged* absolvitor, because he offers him to prove, that there was a decret against the Magistrates now pursuing, at the instance of the creditor, for payment of the debt, because they suffered the principal creditor incarcerated to escape, so that the debt being paid by the Magistrates, coming in the place of the principal debtor *ex delicto*, it is in the same case as if the principal debtor himself had paid, which necessarily liberates his cautioners. It was *answered*, That the Magistrates are only liable to the user of the diligence *pro damno et interesse*, and to no other; for the creditor (user of the diligence) might have consented to the escape of the rebel, or might have discharged the subsidiary obligation, or action competent against the Magistrates for suffering him to escape, whether the cautioners would or not, and therefore the Magistrates might as well take an assignation from the creditor for payment of the debt, which implies the creditor's passing from them as bound *ex delicto*; in which case he would only have given them a discharge; but here the Magistrates contract with the creditor, and acquire the assignation, *ut quilibet* upon an equivalent cause. It was *answered* for the defender, That this assignation is evidently simulate in place of a discharge, there having preceded a decret against the Magistrates, *ita est*, that assignations granted to persons obliged for a debt, do operate always as to the matter only as a discharge, though more summarily; as when cautioners pay, and are assigned, they must allow their own part; but much more these who are liable *ex delicto*, having paid upon a decret, cannot seek relief, whether they have assignation or discharge, especially against cautioners; and if this were sustained, all rebels who had cautioners might be suffered to escape, where there are any cautioners, for messengers might be deforced, taking assignation to the debt, and proceeding against the cautioners, and albeit the user of the diligence might consent to the liberation, yet he could not pass from the obligation *ex delicto*, which accresceth to all parties having interest; and if the cautioners had been distrest by the creditor, they might pursue the Magistrates, suffering the principal to escape *ex delicto et damno*, for if he had not been suffered to escape, they would have been paid.

THE LORDS found this defence relevant, that the Magistrates pursuers, having suffered the rebel to escape, and decret against them, and having satisfied the debt to the creditor, that they could not have recourse against the cautioners, either by virtue of a discharge or assignation. Here it was not debated, whether or not they might have recourse against the principal debtor escaping, who was *principaliter in delicto*, and the Magistrates but accessory.

Fol. Dic. v. 1. p. 222. Stair, v. 1. p. 513.

* * 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 *expromissores 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-