No 13.

the lands by adjudication, or some other legal right.—*Replied*, It seems too grasping and malicious to refuse payment; and has our law no remedy to compel in such cases? For why should you accumulate unnecessary expenses on the debtor, or co-creditors, by adjudging, and then claim your penalties and accumulations?——THE LORDS found a personal creditor, offering to pay, could not force him to give him an assignation; but declared, in the competition of the creditors, they would take this offer to consideration, how far it may then cut off accumulations now heaped on the debtor and co-creditors, and would count them as strictly as law would permit. It seems each of these parties had a design to purchase the lands.

Fol. Dic. v. 1. p. 221. *Fountainhall, v. 2. p.* 146.

1708. *July* 23.

JAMES NICOLSON of Trabroun, and the Other CREDITORS of NICOLSON, *against* The EARL of BALCARRAS.

No 14.
A bond of corroboration, granted by one of two *correi debendi* in the bond corroborated, found to make the debtor liable for only half the sum, in respect the creditor did not produce the original bond, that he, who did corroborate, might operate his relief of the other half, against the co-principal therein bound.

IN a process at the instance of the Creditors of Nicolson, against the Earl of Balcarras, for payment of 4000 merks contained in an heritable bond of corroboration, granted in anno 1652, by Alexander Lord Balcarras, the defender's father, to Sir Thomas Nicolson, King's Advocate, to which bond the pursuers have right by progress;

Alleged for the defender, absolvitor; because the bond pursued on relates to a principal bond granted for the same sum in May 1648, by the deceast John Duke of Lauderdale, and the said Lord Alexander, conjunctly and severally, which is not produced, and craved to be reduced by the defender, that he may be assoilzied from the bond of corrboration, as a relative writ, depending upon the original bond corroborated, and falling with it; seeing *non creditur referenti, nisi constet de relato*.

Alleged for the pursuer; The bond of corroboration is a new bond obligatory *per se*, and nowise depending upon the narrative of the former; and it hath been often found, that a bond of corroboration is a sufficient title to pursue, though the principal bond be lost or missing; Beg *contra* Brown, *voce* TITLE TO PURSUE; 24th February 1676, Johnston *contra* Orchardtoun, *voce* TENOR; for the maxim *non creditur referenti, &c.* holds only where there is a simple reference to a writ, and not where the relative writ is also dispositive.

Answered for the defender; Whatever might be pretended, had the principal and corroborative bonds been granted by the same person, (which is the case of the cited decisions,) in this case, where the original bond, granted by two *correi debendi*, is simply corroborated by one of them; law presumes, 1*mo*, That the principal bond wanting, contained a clause of relief by the Duke of

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Lauderdale, in favours of the Lord Balcarras, of which he is deprived through the want of the said bond; *2do*, It is presumed, that the creditor got payment from the Duke, and retired his bond, seeing it cannot be produced; for the creditor was bound to keep up the original bond for the Earl's security and relief; and since the pursuers, by their own or their author's fault, are in no condition to relieve the Earl, or to afford him recourse against the Duke's representatives; he ought to be assoilzed from the bond pursued on, and both bonds should be reduced and declared extinct, with all that has followed or may follow thereon.

Duplied for the pursuer; It may rather be presumed that the Duke of Lauderdale was only cautioner in the original bond, from the conception of the bond of corroboration, and the real security granted by the Lord Balcarras, without the least insinuation or reservation of relief against Lauderdale; *2do*, A creditor lies under no tie to keep the bond corroborated, so as to be liable to the debtor, in case it be lost, *sine lata culpa;* for as the creditor thought himself secure by the new bond of corroboration, the debtor should have consulted his own security by a separate bond of relief, or a timeous pursuit for that effect.

THE LORDS sustained the defence, that the Lord Balcarras had relief against the Duke of Lauderdale for the one half of the sum in the bond of corroboration; in respect it bears that they were bound *in solidum* as co-principals by the bond corroborated; and the pursuers do not produce the said bond, that the defender might thereupon operate his relief of the other half against Lauderdale; but refused to assoilzie the defender totally, unless he prove that his father was bound only as cautioner.

Fol. Dic. v. 1. *p.* 222. *Forbes, p.* 272.

*** Fountainhall reports the same case:

THE Earl of Lauderdale and the Lord Balcarras, in 1648, grant bond to Sir Thomas Nicolson, for 4000 merks. In 1652, Sir Thomas craving further security, he obtains an heritable bond of corroboration from Balcarras, narrating the former moveable bond, and obliging himself to infeft Sir Thomas in an annualrent effeiring to that principal sum, out of the Mains of Balcarras, whereupon he was actually infeft, and obtained a decreet for poinding of the ground. This right being adjudged by Trabroun from Sir Thomas's heirs, he pursues this Earl of Balcarras on the passive titles for payment.—*Alleged*, No process against me on the bond of corroboration, because the principal original bond corroborate is not produced; which if it were, it would evidently instruct that I was only cautioner for Lauderdale in the debt; and by your abstracting and withholding it I am deprived of my recourse and relief; and if you expect payment from me, you behoved to assign me to that bond, and deliver it to me, that I might thereby operate my relief; and I have raised reduction of it, and crave certification against it, and that I may be declared free of the debt ay till it be

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produced; and it must be presumed to have been paid by my Lord Lauderdale, seeing it does not now appear extant, but has been delivered up to him; and the narrating of it can never supply its non existence, seeing *non creditur referenti nisi constat de relato.*—*Answered*, The Lords are come to a fixed custom upon this point, of sustaining process on bonds of corroboration, without producing the first bond corroborate, unless the party offer to prove the first bond satisfied, paid and retired, as is remarked by President Gilmour, July 1663, Beg *contra* Brown *voce* TITLE TO PURSUE; and by Dirleton, 24th February 1676, Johnston *contra* Maxwell, *voce* TENOR.

And this being tenaciously debated of new in 1707, the LORDS adhered, and found the brocard *non creditur referenti*, took place only where a writ made a bare and naked relation to another, but not where it proceeds to a new positive obligement, as this bond of corroboration does; and so is not merely relative, but dispositive; and *non constat* by the bond who was principal, and who was cautioner; or if they were both *correi debendi* and co-principals liable *in solidum*, without any clause of mutual relief, except what results *ex natura rei.*——THE LORDS having read the tenor of the bond, they found they were conjunct principals, as it is there narrated; and therefore, seeing by your negligence and deed in losing the first bond, I am wholly precluded and cut off from my relief against the Duke of Lauderdale's heirs *quoad* the half of the bond; therefore they assoilzied Balcarras from the half of the debt, and decerned him in the other half, unless he would burden himself to prove that the debt was properly and wholly Lauderdale's, and he only cautioner; in which case they would assoilzie him from the whole of the debt, because, by their default in losing the bond, he had also lost his relief.

Fountainhall, v. 2. p. 457.

1708. *November* 25. ADAMSON *against* BALMERINO.

No 15.
Found in conformity with No 3. p. 3346.

JANET ADAMSON standing infeft in a ground-annual of L. 80 Scots yearly, to be uplifted out of some tenements lying in Leith, pursued my Lord Balmerino as heritor, and obtained a decreet against him in 1667. He now suspends on these reasons, *first*, That this annuity at its first constitution was out of two several tenements, at that time belonging to one man; so then it was no odds which of the tenements paid it; but now the same are come into different hands, and therefore the L. 80 should divide according to the value and proportion of the tenements, and my Lord is willing to pay his share.——THE LORDS found it affected each of them *in solidum*, but ordained the charger Adamson to assign my Lord to her action for obtaining his proportional relief from the heritor of the other lands. The *second* reason was, That her ground-annual ought to bear a part of the cess he pays for the said tenement; for though, in the original constitution, which is more than 100 years ago, there was no such provision, that was because there was no cess then imposed, and so was *casus*