the defender; for the pursuer having only thereby become cautioner for his father, the defender, as creditor, may freely renounce such a security when he pleases. 2*do*, There was no *synallagma* in this case; but a naked stipulation by the pursuer under certain conditions, till the event of which there was no obligation on him, and consequently, no action competent. And the conditions in the bond being merely *potestative*, and left optional to the defender by the conception of the bond, the pursuer is in the same state, as if no such bond had been granted, until the defender had asked payment of him; for then, and not till then, could the pursuer crave of the defender to assign. 3*tio*, He having transacted with old Grant, before intenting of this process, it is scarcely conceivable that a cautioner though simply and not conditionally bound, can hinder the creditor from taking payment from the principal debtor. Nay, the bond itself bearing expressly to be without prejudice of the former, (that is, that he might pass from the second, and recover payment by virtue of the first bond if he pleased) there appears nothing could keep him from asssigning.

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Replied for the pursuer, That by this way of reasoning, the defender was to be free, and the pursuer bound, which were absurd and unequal; and therefore the very keeping of the bond, as it proved a delivered evident, so it made this a *bonæ fidei* contract, and obligatory upon the defender to assign; for since it appears from the nature of the *res gesta*, that the meaning of the parties was, that these provisions should be obligatory upon the defender, that must be the rule; for every thing that is conceived in a writ as a condition, is not there to be interpreted as such, so as either to suspend the obligation, or upon not performance to extinguish it. And Viscount Stair's Institutions, Lib. 1. Tit. 3. § 8. says, 'That among voluntary conditions, those are not to be numbered 'which consist in the mutual obligation of the creditor, which he is positively 'obliged to perform; and so are not looked on by the contractors, as an uncertain event in his choice.' And therefore though such are often conceived as conditions, and so may stop execution, till the creditors part be performed, yet that is rather as the failzie or delay of the mutual cause of the obligation, than as the non-existence of the condition.

The Lords found, the creditor may make use of the bond of corroboration, or repudiate the same at his pleasure.

Act. *Pat. Grant.* Alt. *Col. Mackenzie.* Clerk, *Sir Ja. Justice.*
Fol. Dic. v. 1. *p.* 477. *Bruce. v.* 1. *No* 66. *p.* 79.

1733. *June* 20. Davidsons *against* Ranken.

No 6.

Blyd and Ranken in company gave commission to Rankens merchants in Rotterdam to load a certain cargo, the amount of which they promised to pay; and the cargo being safely arrived, Blyd soon thereafter advises Davidson of the same, and among other things has these words, 'You may transfer the account

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'of the Company's goods to my particular account.' By return to this letter, Davidsons tell Blyd, 'That at his desire they shall place the amount of the 'cargo to his particular account.' Upon the sight of this letter, Ranken, the other partner paid to Blyd his proportion of the price of the cargo; and Blyd soon thereafter becoming insolvent, an action was raised against Ranken for the whole price. His defence was, that Davidsons the pursuers had betaken themselves entirely to the faith of Blyd the other partner, by transferring the account of the Company to his particular account, whereby there was a novation of the debt that released him the defender; especially having upon the faith of the pursuer's letter paid his proportion to Blyd. THE LORDS sustained the defence, this weighing with them, that the transaction could have no other sensible meaning than to liberate Ranken, which was obtained by Blyd, in this view, to afford him credit against his partner.

Fol. Dic. v. 1. p. 479.

1752. *February* 14.

DUKE of NORFOLK and Partners *against* TRUSTEES for the Annuitants of the YORK BUILDINGS COMPANY.

No 7.

An infeftment was taken upon bonds for annuities, which infeftment referred to a list that contained the names of the creditors, and the amount of their annuities, but the endurance of each annuity was only qualified by the bonds. After this infeftment, the original bonds were cancelled, and new personal bonds granted for the same sums. Found that the infeftment could not compete with a posterior adjudication.

THE York buildings Company being authorised to contract debt by way of annuities for life, and having granted liferent annuities to the extent of L. 10,000 yearly, they disponed their estates in Scotland to certain trustees for behoof of the annuitants, and for their security and payment, upon which the trustees were regularly infeft. As these annuities were a subject for commerce, many of them past from hand to hand; and in several instances matters were so slovenly transacted, that in place of reserving the real security, the original bonds secured by infeftment were given up to the Company, and new personal bonds taken from the Company to the same extent.

The Duke of Norfolk and Partners being creditors to the Company in a great sum, proceeded to adjudication. This title was made the foundation of a reduction and improbation, in whibh the trustees for the annuitants were called, and the above fact being discovered by production of the annuity-bonds in the process, it was *objected* for the pursuer, That the old bonds being retired by the Company were extinguished; and suppose the new bonds to be *surrogatum*, that being personal bonds only, they cannot compete with the pursuer's infeftment. It was the opinion of the plurality of the LORDS when this matter came before the COURT, that the case was hard, persons purchasing annuities upon the faith that they had a real security, and losing their money by an error in the form of transaction, excusable in strangers who are not supposed to be acquainted with our law; and that it would be against the rules of equity for the Duke to take advantage of this blunder, whose debt was contracted before any of the original annuity-bonds were retired, and who therefore did not trust his