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. No 14.

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*

No 15.

incogitatus; but if such burdens had been then in being, it is impossible that heritors would have consented to make such ground-annuals absolutely free.—*Answered*, This ground-annual has been paid past memory, and never any such retention granted on account of cess, which evinces it has been designed for a free annuity; and they might as well plead, that an infeftment of annualrent might suffer deduction for cess, which was never pretended.—*Replied*, That prescription and immunity, though never so long, can never be obtruded against posterior supervenient acts of Parliament, imposing public burdens; and this ground-annual being relative to no sum on which it is made redeemable, it can be in no better case than an irredeemable right of property, which can plead no exemption from cess.——THE LORDS, in their reasoning, inclined to think, that such ground-annuals are not diminishable by cess, but did not decide at this time. They seem to be somewhat of the nature of a feu-duty, which payeth no part of the cess, but the property is only burdened with it; and they might as well plead, that ground-annuals should be liable to retention.

Fol. Dic. v. 1. *p.* 221. *Fountainhall, v.* 2. *p.* 465.

1712. *February* 12.

MARY SCOT, Spouse of PATRICK SCOT of Halkshaw, *against* ANN, DUTCHESS of BUCCLEUGH.

No 16.

One of two cautioners in a bond, having paid the debt on distress, and got a discharge thereof, action of relief was found competent to the distressed cautioner, against the other cautioner, notwithstanding a restriction in the assignation, which screened him only from the direction at the assignee's instance, but could not evacuate the implied obligation of relief among cautioners.

THE deceased Captain William Scot as principal, Walter Earl of Buccleugh, and John Scot of Sintoun as cautioners, having granted bond to Sir William Dick for L. 1000 Scots, with annualrent and penalty, which Sir William assigned to Sir John Scot of Scotstarbet, in so far as might be extended against the principal debtor and John Scot of Sintoun. This bond and assignation came by progress in the person of John Smith of Falla, who pursued Mary Scot, heir by progress to John Scot, one of the co-cautioners in the principal bond, for payment. She intimated the distress to the Dutchess of Buccleugh, who represented the Earl, the other co-cautioner, and being decerned to pay, and having paid upon distress the whole debt, and got a discharge thereof, pursued the Dutchess of Buccleugh as representing the Earl, the other co-cautioner, for relief of the one half.

Alleged for the defender; She can be liable in no relief to the pursuer, because, 1*mo*, The bond, which is the ground of the process, was assigned by the original creditor to Sir John Scot, only in so far as might be extended against the principal debtor, and not against the Earl of Buccleugh; whereby the Earl was free from any action that could follow upon the restricted assignation, as effectually as if the creditor had discharged him; 2*do*, The obligement of relief is prescribed *non utendo*, in so far as the bond was not only registred against John Scot of Sintoun in the year 1625, but a decreet thereon recovered against