

No 4.

Found, that the taking a bond of corroboration does not cut off preceding annualrents, of the debt corroborated.

1696. *January 24.* KINCAID'S CHILDREN *against* MR. JAMES DEAS.

HALCRAIG reported the Children of Thomas Kincaid chirurgion, against Mr. James Deas of Coldingknows Advocate.—The question was, if the accepting a bond of corroboration, bearing only annualrent from the date of the next term, presumed that all preceding annualrents were either discounted or paid. By the common practice, men of ordinary caution do either state an account of all then resting, and accumulate them in the new bond and security; or if they be not included then, they are either paid, or a new ticket given for them, and they are discharged. But the plurality of the LORDS found *in rigore juris* the taking a bond of corroboration did not cut off preceding annualrents, because one may renounce his bonds of corroboration and pass from them, and take himself to the first bonds corroborated, and charge on them, except they be expressly innovated.

Fol. Dic. v. 1. p. 477. Fountainball, v. 1. p. 704.

1715. *February 11.*

Brigadier ALEXANDER GRANT *against* LODOVICK DONALDSON Writer in
Edinburgh.

No 5.

A bond of corroboration being granted and delivered by a third party to a creditor, and he some days afterwards returning it, as not being pleased with it, the Lords found that he might use it, or repudiate it at his pleasure.

THE LAIRD of Grant elder being debtor by bond to Lodovick Donaldson, Brigadier Grant signs a bond of corroboration in the following terms, viz:
‘ That seeing Lodovick did, at the Brigadier’s request, and upon granting the said bond, agree to supersede diligence by caption, &c. against Grant elder, therefore, and but prejudice of the principal bond or diligence thereon, but in corroboration thereof the Brigadier obliged him, &c. as cautioner for Grant elder his father, to pay the said sum against Martinmas then next, &c. providing always, that Lodovick proceed in a process of forthcoming, raised upon an arrestment laid on by him in the hands of the tenants of Dundass. And provided, *2do*, That Lodovick do not assign the original bond to any person; and in case he recovered payment from the Brigadier, he was to assign the original bond and diligence to him, for operating his relief.’ This bond was delivered by John Stewart the Brigadier’s agent, to Lodovick; who some days thereafter offered back the same, (not being pleased with it) to John Stuart, who refusing to receive it, he at last offered it to him under form of instrument; and thereafter transacted the matter with old Grant. The Brigadier upon this intents process against Lodovick Donaldson, concluding, that upon payment of the sum he should be obliged to assign to the Brigadier the original bond against his father, with the diligences, &c.

Answered for the defender, That it was still entire to him to give up the bond to the pursuer, since by the conception thereof, there was no obligation upon.

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. *2do*, 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. *3tio*, He having transacted with old Grant, before intending 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 assigning.

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