the bond corroborated, upon any intrinsic nullities, as the want of witnesses, or the writer's designation, or the like; yet it is ever competent to the granter of a corroboration, to except, that the debt in the original bond is not due; especially where the exception is founded upon the creditor's own fact and deed, as that the original bond was discharged by him: and upon the matter, the back-bond founded on by the pursuer imports a discharge.

The Lords found the reason of reduction relevant, and assigned to the pursuer a term to recover the back-bond.

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1710. *June* 27. The MAGISTRATES and PROCURATOR-FISCAL of NEW-GALLOWAY *against* JOHN CANON of Barley.

AT discussing a suspension of a decreet of the Bailies of New Galloway, fining John Canon in 300 merks for swearing thirty oaths, that is, in ten merks for each oath, conform to the *Act* 19. *Par.* 1. *Sess.* 1. *Act* 22. *Par.* 2. *Sess.* 3. *Ch.* 2. upon this ground, that the act of Parliament, imposing ten merks for swearing *toties quoties*, is to be understood of ten merks, not for every oath, but for every conviction; as the words *toties quoties* are taken in the *Act* 38. *Par.* 1. *Sess.* 1. *Act* 21. *Par.* 2. *Sess.* 3. *Ch.* 2. and therefore, in church judicatures, a person is never censured as guilty of relapse, till after conviction. The Lords found, that *toties quoties* in the act of Parliament is to be understood of every oath, and not of every conviction only. But they modified and restricted the fine to L.100; in respect it was alleged for the suspender, that the oaths were emitted by him in passion, when provoked by abuses he met with from the Magistrate and his coy-duke, who tempted him to swear, that they might catch him in a fine: and preceding provocation extenuates the punishment of crimes *in foro soli*, though not *in foro poli*; and it may be said of oaths vented in passion, (which is *brevis furor,)* that *lingua juravi, mente juravi nihil.*

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1710. *July* 4. JOHN WHITE, late Bailie of Kirkcaldie, *against* JAMES HENDERSON and other Tenants in Birkhill.

JAMES HENDERSON, Alexander Donaldson, William Paterson, and John Morris, tenants in Birkhill, taken with caption for a civil debt, at the instance of Bailie White; having, to obtain their liberty, obliged themselves conjunctly and severally, by a bond of presentation, to pay the debt in the caption to the Bailie, against the 20th of June, 1709, or else to present themselves prisoners to the messenger that day, betwixt eleven and twelve hours, within the dwell-

ing-house of Thomas Lawson in Bamblea, without past bill or suspension, under the pain of 1000 merks by and attour performance:—The Lords found that James Henderson's compearing and offering himself prisoner for himself, and in name of the other co-obligants, who had no lawful excuse for not appearing, was not sufficient to free them from the penalty in the bond of presentation; albeit payment by one of severals bound jointly and severally, would liberate the rest: and Henderson behoved either to pay the penalty, or go to prison.

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1710. *July* 15. JOHN BARCLAY *against* Mr. DAVID BARCLAY of Touch.

IN the action at the instance of John Barclay, third son of the second marriage to Mr. David Barclay of Touch, against Mr. David Barclay, now of Touch, as representing Mr. David his grandfather, for payment of one thousand two hundred merks, as the remainder of four thousand two hundred merks, contained in the grandfather's bond of provision, in favours of the children procreated, or to be procreated, betwixt him and Anna Hamilton his second wife; the grandfather having granted an heritable bond for one thousand pounds to each of Robert and James Barclays, two of his three children of that marriage; and afterwards granted bond for, and paid other five hundred merks to Robert:—The Lords found, That albeit *debitor non præsumitur donare*, yet the five hundred merks was not to be imputed in payment of any part of the one thousand two hundred merks; and the brocard took no place in this case.—Because, 1. The bond for the five hundred merks bore,—In respect of the one thousand pounds formerly provided to Robert, was liferented, and the granter was willing to provide him to a sum for his education; he obliged himself, by and attour the said one thousand pounds, to give, content, and pay to the said Robert the sum of five hundred merks;—which narrative imported the said sum to be a mere gratuity. 2. Old Mr. David Barclay not being debtor to Robert at the granting of the five hundred merk bond, there can be no place for the brocard, *debitor non præsumitur*, &c. And it is clear he was not debtor, being under no obligation to give him more than the one thousand pounds already provided, which was more than his share: and, perhaps it may be said, he was under no obligation to give Robert any thing, having the privilege to divide the sum among the bairns at his pleasure.—Albeit it was alleged for the defender, That *utcunque* his grandfather shewed more kindness to Robert than to his other children of the second marriage, by giving him the additional provision of five hundred merks; it was never intended as a free donation, not to be imputed in payment of the capital sum, wherein he stood bound to the children of the marriage.

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