

No 12.

Found in
conformity
with No 4.
P. 3347.

1697. December 31. WAIT and RAE against PANTON.

WAIT's children, and Bailie Rae in the Canongate, who was lately their tutor, charge William Panton writer, for 1000 merks contained in his bond. He suspends, that the bairns not having chosen their curators, there was none authorised to give him a valid discharge.—*Answered, imo*, The money is payable to me for their behoof, and though my office of tutory be expired, yet I will give you sufficient warrandice; likeas, the Lords may name their advocate to be curator *ad banc litem*; 2do, A minor wanting curators may do all that a minor having curators can do.—*Replied, Plenissima securitas* to the debtors of minors is, either where they pay to curators, or on the sentence of a judge; and here a curator *ad lites* will not serve to concur with the minors in a discharge, but it must be a curator *ad negotia*, who cannot be chosen by the Lords, but only by the minor himself; and this is clear *per l. 7. § 2. D. de minor, si minor conveniat debitorem, adhibere debet curatores ut iis solvatur pecunia, alias non compellitur solvere.*—THE LORDS found the money being payable to Bailie Rae, the interposition of their authority was sufficient warrant to William Panton, the debtor, to pay. And he craving an assignation against William Gordon of Pencaitland, the principal debtor, the LORDS found, though the creditor was rigid in refusing an assignation, yet that they could not compel him; but the cautioner behoved to pursue, as accords, on his clause of relief. The 2d § *Institut. Tit. Quib. licet alienare vel non*, is in the case of pupils and tutors, but not of minors and their curators paying their creditors, or receiving sums due to them by their debtors, where the minor consumes or dilapidates the same; for *minori habenti curatorem solutio sine illius auctoritate facta non exonerat debitorem*, and the minor is restored *contra istam solutionem, nisi pecunia extet, vel in rem minoris versa sit.*

Fol. Dic. v. I. p. 221. Fountainball. v. I. p. 808.

No 13.

A personal creditor adjudging, tho' he is bound to accept of payment from another personal creditor, cannot be forced to grant an assignation, but a discharge only.

1702. February 14. HAY against TWEEDIE.

WILLIAM HAY of Drummelzier being a creditor to French of Kingledores, and adjudging his lands, compearance is made for Robert Tweedie, another creditor, who *contends*, You cannot adjudge, because I am willing immediately to pay your principal and annualrent, and true disbursed expences, *et nihil tibi deest*, you giving me an assignation to your right.—*Answered*, I am content, but I will give you nothing but a discharge, no law obliging me to assign; and you can be in no better case than the debtor who may redeem and pay, but can crave no more but a discharge and extinction of the debt; and at this rate there might be a circle, for another personal creditor may redeem from you, as you offer to do from me; and so you have no interest, unless you had affected

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. Fountainball, v. 2. p. 146.

No 13.

1708. July 23.

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

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 corroboration, 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, *imo*, That the principal bond wanting, contained a clause of relief by the Duke of

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.