

No 195.

be admitted as partial payment *pro tanto*; but he might, nevertheless, seek the rest otherways, not being paid totally.

Act. *Stuart.*Alt. *Cunningham.*Clerk, *Gibson.*

*Fol. Dic. v. 2. p. 151. Durie, p. 689.*

1697. *July 6.*JOHN HAY *against* SIR JAMES HALL.

No 196.

A creditor took a bill from his debtor, upon a third party, whose estate was adjudged for the debt. Found, that the creditor might still, till payment, claim upon the original ground of debt.

NEWBYTH reported John Hay of Alderston against Sir James Hall of Dunglass. Mr Thomas Hay, father to the said John, being creditor to Sir William Ruthven of Dunglass, he apprised his lands for the debt; and now pursues a reduction and improbation of Sir James Hall's rights thereto. *Alleged*, I will not take a term to produce my writs to you, because your apprising is extinct, in so far as Sir William Ruthven gave your father a precept for 33,000 merks on Sir William Sharp, in full of his comprisings; and Sir William Sharp accepted the precept, and you have adjudged his estate for the same; and so the debt is innovated by delegation, and you have accepted of Sir William Sharp for your debtor, and taken yourself to his lands, seeing it is plain, that *delegatio est species novationis*, and as effectually extinguishes an obligation as payment by a discharge; L. 51. D. De peculio. And delegatio pro justa præstatione habetur; L. 81. § 3. D. Ad S. C. Vell. Solvit enim qui et reum delegat; L. 98. § 8. D. De solution. L. 2. C. De novat. So that *esto* the party should turn bankrupt, yet he who accepts the delegation has no recourse against the former delegant. *Answered*, This is a downright mistake of the nature of bills of exchange and precepts, which are never accepted in satisfaction, but only as *adpromissor*, and an accessory security; so that, till payment be made, there is no novation or extinction of the first debt, nor liberation of the first debtor; for the practice of the mercatorian law, and our act of Parliament 1681, clear this; seeing a bill, though accepted, if not paid, I can not only pursue the acceptor, and make him liable, but also recur against the drawer, who is never freed, but both subsist as securities, till payment be made.—THE LORDS found it so, and repelled the defence; and that there was no extinction in this case, till the precept be paid; which was not pretended here.

*Fol. Dic. v. 2. p. 150. Fountainball, v. 1. p. 782.*

No 197.

1703. *December 23.* ROW *against* BRUCE, (MONRO.)

AN heiress, to secure a tailzie in favour of her two sisters, having, by a clause therein, obliged herself not to contract debt without the consent of two interdictors therein named, and thereafter marrying, and, with consent of her hus-

band and the interdictors, making another bond of tailzie in the terms of the former, and only assuming her husband into the conjunct fee and liferent with herself, but without repeating the clause of interdiction, and thereafter contracting an heritable debt on the estate, the LORDS, in a poiding of the ground at the instance of the creditor, wherein compearance was made for the presumptive heir of tailzie, and also for the interdictors, who had not consented to the bond, sustained the interdiction as valid; and found, that the second tailzie was not a novation of the first; and, therefore, reduced the debt, as being contracted after the interdiction.

No 197.

*Fol. Dic. v. 2. p. 150. Fountainhall.*

\*\*\* This case is No 40. p. 7162. *voce* INTERDICTION.

1711. *February 7.*NICOLSON *against* MORISON.

No 198.

ANY right granted by a man to his creditor, though above the value of the debt, is presumed to be in further security, not in satisfaction.

*Fol. Dic. v. 2. p. 150. Fountainhall. Forbes.*

\*\*\* This case is No 130. p. 1552. *voce* BILL OF EXCHANGE.

1711. *June 26.*Captain JAMES OSWALD *against* Captain THOMAS GORDON.

No 199.  
Found in conformity to  
Hay *against*  
Hall, No 196.  
p. 11520.

CAPTAIN OSWALD having, in July 1706, got a ticket from Captain Gordon for L. 770 Scots, as the price of rigging furnished by the former to the latter for The Royal William, payable when the Martinmas cess, imposed for outrigging the said ship, is paid;—in November 1707, Captain Gordon drew a bill on John Gordon, writer in Edinburgh, ordering him to pay the said L. 770 to Captain Oswald, out of the first and readiest money due to the drawer out of the Equivalent, and to retire his note, which John Gordon accepted in the fore-said terms. Captain Oswald seeing little appearance of getting payment out of the Equivalent, pursued Thomas Gordon upon his first ticket.

*Alleged* for the defender; The ticket was innovated by taking the bill for the same sum; at least was explained, and the fund of payment determined and agreed to, so as Captain Gordon could not be liable till that were got in and uplifted.

*Replied* for the pursuer; Innovation is not to be presumed or inferred from conjectures, but a posterior obligation is understood to be in corroboration of a former, unless innovation was expressed; § 3. *Instit. Quibus modis toll. oblig.* L. ult. C. De Novat. Stair, *Instit. B. 1. T. 18. § 8.* And the case, 27th July 1666, Newburgh *against* Stuart, observed by Dirleton, No 124. p. 1543.—