cautioners contained in the first bond liberated. To which it was *replied;* That these words import no innovation, except it had been expressly set down, that the first bond was innovated and discharged; which reply the LORDS found relevant, and the letters orderly proceeded. No 194.

Auchinleck, MS. p. 147.

1633. *July* 23. Mr JOHN LAWSON *against* SCOT of Whiteslead.

No 195.
In a process against a cautioner, he was assoilzied, because the principal had given to the creditor infeftment, "in full satisfaction" of that sum.

THE deceased Scot of Whiteslead, being cautioner for Scot of Thirlstane, for the sum of to his creditor, the rights whereof being come in the person of Mr John Lawson, who seeking transferring of the bond against Whiteslead, as heir to his father, he *alleged*, That the principal had given to the creditor infeftment of his land, in full satisfaction of that sum, whereby, in effect, that bond was satisfied, and the creditor could never have recourse to the prior bond, neither against the principal, nor any of his cautioners, but ought to be content with that infeftment, given in full satisfaction, as said is. 2*do*, He *alleged*, That the creditor had comprised the debtor's other lands and teinds, and, by virtue thereof, acquired possession of a part of the same, which possession, conform to the said comprising, ought to be found as payment, so that he could never return, neither personally against the debtor, nor his cautioner, nor no other ways, seeing the debt behoved to be counted as paid.—THE LORDS found the first allegeance relevant, notwithstanding that the pursuer *answered*, That that infeftment bearing, to be given in full satisfaction of the debt, could not be reputed as payment, but behoved to be reputed as a further security for payment, as it was indeed; and that adjection of the clause which bore, in full satisfaction, could mean nor import no more, but that when he might be paid by the infeftment, it should fully satisfy; but the making it of that tenor could not take away this prior security, except that prior right had been *specifice* discharged; for, *novatio non fit nisi expresse*, where the prior security was expressly discharged, which was never done by the pursuer, who, without he had so done, could never be prejudged of his debt, albeit he had received twenty securities for his sum; likeas, he renounced *omni habili modo* that infeftment; notwithstanding whereof, the allegeance was sustained; and by the receiving of the infeftment of the tenor foresaid, it was found, that the prior security was extinct; and, as to the second allegeance, the same was repelled; for the LORDS found, that a comprising, albeit the compriser was in possession *ex parte*, if he were not totally paid thereby, seeing the pursuer renounced the same, could not prejudge the compriser, to have recourse to his prior security; but whatsoever he had recovered by the comprising, it might

No 195. be admitted as partial payment *pro tanto;* but he might, nevertheless, seek the rest otherways, not being paid totally.

Act. *Stuart.* Alt. *Cunninghame.* 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 accepter, 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. *Fountainhall, 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-