

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-