DIVISION IV.

Novatio non præsumitur.

1626. *March* 29. KING *against* TAYLOR.

No 193.
A new bond for a debt, contained in a prior bond, granted by other obligants, found not to be an extinction of the former bond, but only an additional security.

IN a suspension of James King against Taylor, the LORDS found, That the acceptation of a new bond by a creditor, made by other persons, for payment of the same debt to him, wherein others, his debtors, were obliged, by their other former bond of before, the said posterior bond bearing none of those who were first obliged to be of new again bound in that last accepted bond, but altogether different in the persons obliged, and that the receiving of a part of payment of the debt from the last debtor, conform to the said last bond, did not take away the prior bond, nor liberate the persons bound therein; but that the creditor might have recourse as he pleased to the prior bond, seeing the creditor had not expressly discharged the first bond, when he received the last, without the which, that is, that the first had been *specifice* discharged, the same was not prejudged by the said acceptation of the new security, and receiving of partial payment conform thereto, from the last debtor.—Idem, l. ult. C. De Novat. et § pen. Inst. Quibus mod. toll. obligatio.

Act. *Nicolson.* Alt. *Stuart & Primrose.* Clerk, *Scot.*

Fol. Dic. v. 2. *p.* 150. *Durie, p.* 201.

1631. *November* 16. HORN *against* STEWART & ROLLOCK.

No 194.

JOHN HORN, executor confirmed to umquhile Lawrence Horn, pursues Henry Stewart and John Rollock, for payment of 800 merks, for which they were bound to the defunct, as cautioners for Patrick Stewart of Baith, conform to their bond. It was *alleged* by the defenders; That they ought to be assoilzied; because the pursuer had accepted another bond from the principal, and Robert Stewart, his cautioner, containing the sum of , whereby they were obliged to pay the said sum in full and complete satisfaction of the foresaid sums, and so, by this posterior bond, the prior was innovated, and the

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