

1744. Feb. 24. & 28. M'ILHOSE against REID.

M'ILHOSE having charged Reid for payment of a sum contained in a decret-arbitral, Reid suspended on this ground, That having sold a tenement, which was his whole estate, his whole creditors, and among the rest, the charger, had concerted with him to accept the price in full payment of their respective debts, and that accordingly all the creditors, the charger excepted, had taken their proportion and discharged their debts; and this concert having been admitted by the Ordinary to a proof before answer, a proof of it was accordingly brought by the testimonies of two of the creditors, and of one other person.

On advising of this proof, it was *objected, imo*, That although verbal concerts among creditors to follow out common measures, and that for preventing a subject's being exhausted by diligence, they should accept of their several proportions corresponding to their respective debts, were probable by witnesses, and to which effect the charger acknowledged that he had concerted with the other creditors; yet a concert to accept of such proportion in full of his debt could not be proved by witnesses, as being of the nature of a gratuitous promise. *2do*, The charger objected to the creditors as inhabile witnesses, in respect it was acknowledged they had subscribed a deed obliging themselves to defend Reid, and to defray the expense of the process for him.

Upon the 24th February, the Lords, without expressing the *ratio decidendi*, "Found there was no sufficient evidence of the alleged agreement." But, in a petition for the suspender, another indifferent person being condescended on, whom he offered to adduce, it carried by the narrowest majority, "To grant diligence," Feb. 28. 1744.

As witnesses cannot be admitted to prove payment of L. 5 of a greater debt, it was by those who opposed granting the diligence thought inconsistent, that they should be admitted to prove that a creditor had accepted of a part in full of the whole.

Fol. Dic. v. 4. p. 159. Kilkerran, (PROOF.) No 6. p. 442.

* * * C. Home reports this case:

THE said James Reid having sold certain tenements belonging to him in Glasgow, his creditors arrested the price in the hands of the purchaser, and, in order to avoid expenses, they agreed to pass from their arrestments, and to divide the price equally amongst them, in proportion to each man's debt. The proportion of the price which fell to be drawn by William M'Ilhose, one of the creditors, did not near pay his claim; whereupon he did diligence against Reid for the balance; who suspended on this single ground, that it was a branch of the concert, that the whole creditors should take themselves to the above price, in place of full payment, and should accordingly give him a full

No 196.
Whether competent to be proved by witnesses, that a creditor had agreed to accept of a certain proportion in full of his debt?

No 196. discharge of their whole debts. Millhose having denied the fact, a proof was allowed.

Objected for the charger, That the proof by witnesses was not competent in this case; *imo*, Because, though a concert amongst creditors to accept of a proportion of the price, toward payment of their debt, would be competent, yet a concert to accept of the debtor's effects in full payment of their debts was not competent, the same being gratuitous, which cannot be proved by witnesses; in the next place, taking it as set furth in the suspension, that each of the creditors agreed to sign a formal discharge, there could be no doubt, but that there was *locus pœnitentiæ* before writ intervened. *2do*, The charger objected against two of the three witnesses adduced, that though their being creditors did not disable them, yet he had discovered they had subscribed a deed, obliging themselves to be at the expense of defending this process, which made them parties in this cause, consequently disabled them from being witnesses.

Answered for the suspender; The concert could not be divided, but behaved to be taken as it stands; and that a concert amongst creditors to accept of a proportion of their debt, in full satisfaction, was noways similar to a gratuitous promise. That when a debtor surrendered all his effects to his creditors, it was a transaction to avoid the exhausting the subject by expense of diligence, which was most favourable, and indeed rather to be presumed, than that the creditors keep up the remainder of their debt to harass the debtor, and deprive him of bread.

And with respect to the objection to two of the witnesses, it was *answered*, That the creditors had been allowed to be witnesses by the Lord Ordinary's interlocutor, awarding the proof; that they were necessary from the nature of the thing, as none other were possibly present but the creditors and debtor. If then the creditors were liable, it could be no objection that they were to be at the expense of defending this process. It was their common interests to support the concert, and no body could be supposed to lay out expenses in doing it but them, especially as the debtor had nothing of his own. The creditors indeed are in effect parties, yet they are good witnesses in this case, being necessary, as none others are presumed to be present; and it was a chance there was another present, who, as he concurs with the two creditors who have been adduced, confirms their testimony beyond the power of suspicion.

THE LORDS found no sufficient evidence of the alleged agreement; and found the letters orderly proceeded.