1779. *February* 19.

No 48.
A new company granted bill for a sum due by a former company, of which some of the new company were partners. An obligant in the former debt found no longer liable.

THOMAS BUCHANAN and Co. *against* JAMES SOMERVILLE.

MESSRS Bogle, Somerville, and Co. stood indebted to Thomas Buchanan and Co. in the sum of L. 97, for different articles by open accompt.

In July 1776, Somerville sold his share in the company to Jamieson, one of the partners.—The co-partnery contract expired 1st May 1777; on which day the dissolution of it was advertised in the news-papers, and the creditors of the company desired to apply to Messrs Bogle and Jamieson for payment.—From that time a new company took place, under the firm of Bogle, Jamieson, and Co. consisting of the former partners, with this variation, that Somerville was entirely out, and one new partner assumed.

Buchanan and Company soon after applied for payment of their account to Jamieson, who proposed, that, as immediate payment was not convenient, they should take a bill payable at six months date for the amount of the account.—The creditors agreed; but, understanding that the bill was to be accepted by the old company, drew it upon Bogle, Somerville, and Co. They likewise made out the account in their name, and subjoined a receipt to it in the following terms: 'Received their acceptance for the above L. 108: 17: 0, payable six 'months after date, which when paid is in full.'

In place of the above draught, the Creditors afterwards agreed to take a bill accepted by Bogle, Jamieson, and Co. for the money.

This bill, when due, was protested for non-payment against the acceptors, who, before that time, had become bankrupt; and afterwards the Creditors brought an action against all the partners of the old company, for payment of their account.—No appearance was made for any of them except Mr Somerville, the others being likewise partners of the new company, and acceptors of the bill.

Pleaded in defence for Somerville; The debt due to the pursuers by Bogle, Somerville, and Co. was discharged by the pursuers, who took in place of it the bill accepted by the new company;—consequently the defender is not liable.

The pursuers are, at any rate, *in mora*. They ought to have demanded their payment from him at the time the company was dissolved. If they had done so, he could have paid them safely, as the new company were at that time solvent. But the pursuers wilfully postponed their payment, by taking the bill at six months. They have themselves therefore only to blame, that they have come too late, and after their debtors are insolvent.

Answered for the pursuers; It is a transaction which will not, *in dubio*, be presumed, that a creditor consents to his debtor becoming free, upon another becoming bound. The consent of the creditor to free the original debtor must be clearly established; and, if circumstances can admit of another construction, it will not be inferred.

No 48.

In this case, the pursuers did not give any absolute or unqualified discharge of the account to the partners of the old company on getting the bill. The discharge was only conditional, upon payment of the acceptance received for the amount of their account. If the bill had been paid, the condition would have been purified, and the discharge effectual to all parties. But, as it was not paid, no person is free from the debt who was formerly bound; and the partners of the old company, to whom the furnishings were made, are still liable.

This transaction did not cut out the defender from any relief against the partners of the new company, which he would otherwise have been entitled to. The claim of the pursuers for payment must have preceded any step taken by the defender for relief. If the pursuers had allowed the matter to lie over during these six months upon the footing of the open account, without taking any acceptance, the defender still would have remained liable;—yet, in that event, he would have been equally deprived of his relief, as in the case that has really happened.

THE COURT 'sustained the defences, and assoilzied the defender.'

Lord Ordinary, *Hailes*. Act. *Ilay Campbell*. Alt. *Wight*. Clerk, *Tait*.

Fol. Dic. v. 3. *p.* 175. *Fac. Col. No* 71. *p.* 135.

1793. *June* 29.

MESSRS EDIE and LAIRD, and the Other CREDITORS of JOHN WEIR, *against* RACHAEL and ANNE ROBERTSONS.

No 49.
A preferable catholic creditor may, before the bankruptcy of his debtor, renounce part of his security, without diminishing his right over the remaining subjects contained in it, although such renunciation should hurt the security of a secondary creditor, obtained before its date.

IN 1773, John Weir granted an heritable bond for L. 470 Sterling, over the lands of Kerse, Daldaholm, and Clanochyett, in favour of Margaret, since dead, and of Rachael and Anne Robertsons.

In 1777, Mr Weir granted an heritable bond for L. 2000, over the lands of Kerse alone, to Messrs Edie and Laird.

In 1782, the Miss Robertsons renounced their heritable security over Clanochyett, with the sole view of accommodating Mr Weir, who intended to exchange these lands for others belonging to a neighbouring proprietor.

Mr Weir having afterwards become bankrupt, his estate was brought to judicial sale, when the lands of Kerse were sold for L. 1900, those of Daldaholm for L. 910, and the projected excambion of the lands of Clanochyett never having been carried into execution, they were sold for L. 810.

Miss Robertsons having applied to the Court for a warrant on the purchasers for L. 600, to account of the principal and interest due on their bond, their petition was remitted to the Lord Ordinary in the ranking; before whom Messrs Edie and Laird, and the other creditors of Mr Weir