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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.

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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

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Objected; That as Messrs Edie and Laird were creditors by heritable bond over Kerse alone for L. 2000, and bygone interest, a sum which exceeded the price it had brought, and as the renunciation executed by the Miss Robertsons was posterior to the date of the bond to Messrs Edie and Laird, the Miss Robertsons were not entitled to draw out of the price of the lands of Kerse and Daldaholm that proportion of the sum due to them, which they would have received out of the price of Clanochyett, had they not renounced their infeftment over these lands, because their doing so would have the obvious effect of diminishing improperly the only fund from which Messrs Edie and Laird must obtain payment of their bond. The common debtor was bound in justice to pay the Miss Robertsons out of the other lands, so as to leave Kerse free, for the satisfaction of the posterior debts with which he had burdened it; and if so, the Miss Robertsons were not entitled to concur in any deed which put it in his power to elide this duty. If a creditor, whose debt is secured by a cautioner, do diligence against the principal debtor, or obtain an heritable security from him, and afterward pass from the one, or discharge the other, the cautioner is *ipso jure* free from his obligation; 21st January 1729, M'Millan against Hamilton, and 16th July 1730, Graham against Lyle, No 39. p. 3390.; Erskine, b. 3. tit. 3. § 66. and tit. 5. § 11. Upon the same principle, the renunciation in the present case cannot affect the interest of the objecting creditors; Kames's Pr. Eq. b. 1. §. 1.

Answered; When an heritable bond is granted over several subjects, each is liable, not for a proportional part only, but for the whole of the debt, and the creditor may lay the burden entirely upon any one of them. The renunciation, therefore, as to Clanochyett, cannot weaken that security which the Miss Robertsons had *ab ante* over Kerse and Daldaholm.

When a person lends money upon land, he is presumed to have searched the records to learn with what preferable burdens the subject is affected. But when a creditor, having a prior catholic security, renounces it in part, there is no tie upon him, even in equity, to consult registers, in order to discover the effect this measure will have upon the interests of secondary creditors. The present, therefore, is very different from the case of a creditor who renounces a separate security, to the prejudice of his cautioner. The latter, on payment of the debt, would have been entitled to an assignation of that security, and the creditor cannot be ignorant of the existence of his obligation and claim of relief.

THE LORD ORDINARY having reported the question, on minutes of debate, it was

Observed on the Bench; When the Miss Robertsons granted the renunciation in question, they could not know that there was a posterior creditor who would be hurt by it. A person lending his money on land already affected by incumbrances, ought to be satisfied that it is sufficient both to purge them, and

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to pay his own debt, and not trust that the prior creditors will draw their payment from other collateral securities which may be renounced. There is no similarity between the present case and that of a creditor who has the security of a cautioner. There the creditor lies under an implied obligation to distress the cautioner as little as possible; but between the Miss Robertsons and Edie and Laird, there was no connection whatever. It is no doubt a general principle, that a catholic creditor is obliged either to draw proportionally out of all the subjects over which his right extends at the time when he obtains payment, or to assign; but in no case is he obliged even to do this, so as to hurt his own interest.

THE COURT unanimously repelled the objection.

Lord Ordinary, *Craig*. Act. *Wolfe Murray*. Alt. *Wm. Robertson*. Clerk, *Home*

Fol. Dic. v. 3. *p.* 175. *Fac. Col. No* 68. *p.* 146.

Relief among *Correi Debendi*, whether *in solidum* or only *pro rata*. *See* SOLIDUM ET PRO RATA.

Rights affecting the subject acquired by the disponee, cannot be extended against the disponer, bound in warrandice, further than to pay the transacted sum. *See* MUTUAL CONTRACT.

Superior taking a gift of recognition, &c. how far he can extend this against his vassal. *See* JUS SUPERVENIENS.

Creditor bound to maintain possession of the subject he derives from his debtor in security of his debt, and cannot invert possession to his prejudice. *See* MUTUAL CONTRACT.

Preferred creditor bound to assign to the postponed. *See* BENEFICIUM CEDENDARUM ACTIONUM.

See APPENDIX.