

and cited to attend the Lords, in order to punishment, (*supra*, 16th November 1699,) did this day present himself: and, after hearing him, the Lords rejected his excuses, and fined him in 100 merks to the poor, for his compliance in such a matter; and sent him to prison, there to lie during their pleasure. Some of the Lords, who thought his fault and malversation grosser than the rest, did vote "deprive;" but the milder opinion prevailed. Some moved the imprisoning him in Aberdeen, as more exemplary, the thing happening to be done there; and on his return he might deny he met with any censure here.

*Vol. II. Page 70.*

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1699. December 7. The EARL of DUNDONALD *against* The TOWN of PAISLY.

IN the mutual declarators betwixt the Earl of Dundonald and Town of Paisly; the Earl founding on some reservations contained in their old charters from Abbot Shaw, or the Lord Abercorn, restricting their right to the controverted moss; and the town refusing to propale their writs, and offering to depone they had no writs containing such clauses; and this tending to make them judges on the import of these writs,—the Lords fell on this medium, That they should produce them to the Ordinary in the cause; and if, after perusal, he found they had nothing relative to the Earl's allegiance, then to give them back again to the magistrates; but if he should find any clause tending that way, they allowed him in that case to put them in the clerk's hands; by which method the opening of charter-chests was avoided.

*Vol. II. Page 71.*

[*Vide infra*, page 480.]

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1669. December 8. ALEXANDER GRAY *against* WILLIAM REID.

Alexander Gray pursues William Reid, late tenant in Wariston, for payment of his rent, crop 1680.

ALLEGED,—Absolvitor; because I have three consecutive discharges for three subsequent years after that acclaimed; which presumes payment of all precedings,—they not being accepted in any of these reiterated discharges.

ANSWERED,—*Apocheæ trium annorum* is a good defence by the Roman law, and ours; but then they must be all granted by one person, and be total as to the full rent; whereas, here, the first two years are discharged by Cruikshanks, the father, and the third by his son, with consent of his curator; likeas, one of them is only *quoad* the money and victual-rent, but not of the kains, customs, and straw.

REPLIED,—That *pater et filius* being *una et eadem persona*, especially where he is heir, their discharges ought to be conjoined, to the effect to import liberation of preceding years; and Dury observes that the Lords sustained three discharges granted by a minister, whereof two were to the father, and the third was to the son: And, as to the omitting to mention the small casualties in the discharge, that was nothing; for they use commonly to be paid without any receipt in writ.

The Lords considered that the three consecutive discharges, hitherto sustained to infer liberation for precedings, were always where granted by one and

the same person ; for law presumes he has got payment of the preceding years, else he would not have forgot to [have] excepted in one of these three discharges ; and that it is not a like case to be granted by a father and a son, as to be granted by one person to a father, and then to his son ; which is the *species facti* in Dury, 27th February 1631, *Williamson* contra *L. of Balgillo* ; seeing the son might be ignorant what his father had received or discharged. Therefore, to supply that, it was here offered to be proven by Cruickshanks's son's oath, and his curator's, that they knew that his father had discharged the two preceding years, and that his discharges were shown to them. Upon which allegiance the Lords ordained them to depone before answer, the tenant's case being favourable after so long a time.

*Vol. II. Page 71.*

1699. December 14. PATRICK PARK and WILLIAM M'CRAW against JOHN LIDDALE.

PATRICK Park in Glasgow, and William M'Craw, his assignee, pursue John Liddale, as heir to William Liddale, his father, for payment of a sum contained in his father's bond.

ALLEGED,---This debt is discharged, in so far as the said Park, in a discharge he gave the said William Liddale of a former debt, not only discharges him of that, but of all bonds granted or to be granted by the said William Liddale to him, unless one of the said William Liddale's three sons be consenting and subscribing thereto ; but so it is, Park takes this posterior bond from Liddale, without any of his sons consenting : and so is null.

ANSWERED,---This nonsensical discharge of a debt, before it was existing, or *in rerum natura*, can never meet this bond granted since ; for, *esto* it were an interdiction, yet it can never operate, being in such an unusual latent and extraordinary method, not known by law, without either publication or registration ; and, being in Liddale's favours, what hindered him to pass from the same, especially being a restraint laid on him *sine causæ cognitione* ? and, by his giving this posterior bond, he has actually renounced it.

REPLIED,---Though this restraint could not have the effect of an interdiction against third parties, yet it was sufficient against Park, who inserted it in his own discharge ; and he needed no intimation, for *certioratus non est amplius certiorandus* ; and the father was known to be a simple, facile man, and so the quality that his sons should consent was not without cause ; and the bond, by that prohibition, was *ab initio* null, and never obligatory ; *et quod à principio vitiosum est, non potest, ex post facto et tractu temporis, convalescere.*

The Lords thought the clause of discharging posterior bonds incongruous ; and that, as it was a voluntary deed of the father's, he might loose himself when he pleased ; and, as to his facility or levity, there was no standard settled by law for that, but only idiocy, furiosity, or dotage, that he was insensible or imposed on : and therefore refused to put the parties to expense in trying his condition, unless there were pregnant qualifications of his weakness given in to convince the Lords of the same.

*Vol. II. Page 73.*