

1669. February 18.

SARAH COCKBURN and Mr PATRICK GILLESPIE *against* JOHN STEWART and the Tenants of Linton.

No 64.

The liberation founded upon an *aposta trium annorum* is but presumptive, admitting contrary probation.

SARAH COCKBURN being infest in liferent in an annualrent of 1200 merks yearly, out of the barony of Linton, she, and Mr Patrick Gillespie her husband, insisting for her annualrent, *in anno* 1657, obtained payment from John Stewart, and gave him a power to uplift the same from the tenants, and delivered to him the letters of poiding, to be put in execution. Thereafter, Mr Patrick obtained a second decret against some wadsetters, whose rights were posterior to the annualrent, for the years 1658, 1659, and 1660; and, upon payment of these three years, did acknowledge payment made of the said three years annualrent, and all bygones whereunto he had right. Mr Patrick having granted John Stewart a bond to warrant him anent the year 1657, and that he had given no discharges that might exclude him; the tenants of Linton suspend the charge for the year 1657, upon that reason, that Mr Patrick had discharged the annualrent for the years 1658, 1659, 1660, and all preceding whereunto he had right. Whereupon John Stewart charged Mr Patrick upon his bond of warrandice; who suspended upon this reason, that the discharge could not exclude John Stewart, albeit it bare all precedings to which he had right; because, when he granted the discharge, he had no right to the year 1657, which he had received from John Stewart, and given him warrant, and his letters to poid for Mr John Stewart's own use. It was *answered*, That unless that order had been intimated, the right remained with Mr Patrick; and so his general discharge extended thereto. It was *answered*, That albeit intimation was necessary to establish the right in the assignee's person, yet Mr Patrick's warrant was sufficient to exclude him; at least, the matter of his right being thereby dubious, the general discharge cannot be effectual against him, if, by the oaths of the wadsetters that got the discharge, it appeared that they paid him not the year 1657; and some of their oaths being taken, he who paid the money for himself and the rest deponed, that the year 1657 was not paid, and that there was no decret against the wadsetters for 1657, but only against the moveable tenants, to whom the discharge containing the said general clause was not granted.

THE LORDS found, That in respect of the oath, the general discharge extended not to the year 1657, and therefore suspended the letters against the said Mr Patrick upon his bond of warrandice, and found the letters orderly proceeded at John Stewart's instance against the moveable tenants of Linton, for the year 1657. The tenants further *alleged*, That since the year 1660, they did produce three consecutive discharges from Mr Patrick, which import a liberation of all years preceding, specially seeing Mr Patrick was never de-

nuded of the year 1657, nor intimation made. It was *answered*, That such a liberation is but presumptive *præsumptione juris*, and admits contrary probation, and is sufficiently taken away by the oath of the party, acknowledging that year unpaid, and the warrant given to John Stewart to lift it for his own use, before these discharges.

No 64.

THE LORDS repelled also this defence upon the three dischargees, in respect of the reply.

*Fol. Dic. v. 2. p. 136. Stair, v. 1. p. 606.*

1682. February: Earl of MARSHALL against FRASER of Strichen.

No 65.

IN an action at the instance of the Earl Marshall against Thomas Fraser of Strichen for certain bygone mails and duties, the LORDS found, That three subsequent discharges granted by the Earl's chamberlain did not liberate the tenants from preceding years, but only from the years mentioned in the discharges, the Earl being sequestrate for the time, and not *valens agere*.

*Fol. Dic. v. 2. p. 137. Sir P. Home, MS. v. 1. No 145.*

1699. December 8.

ALEXANDER GRAY against WILLIAM REID, Tenant in Wariston.

No 66.

WILLIAM REID and his father having possessed the lands of Wariston by a 19 years tack from the year 1680, Alexander Gray, as having right to the tack-duty, pursues for payment.

The defender *alleged*, That he could not be liable for rents preceding the 1687, inclusive; because he produced three consecutive discharges, one for the 1684; another for the 1685, granted by Alexander Cruikshanks, the pursuer's author, and a third for the 1686 and 1687, granted by David Cruikshanks and his tutor, who was the son and representative of the said Alexander and the pursuer's cedent.

Three consecutive discharges, two by the father, and one by the son, not equivalent to a discharge of all precedings, unless the son knew of the father's discharges.

It was *answered*; Three consecutive discharges granted by the same person, without reservation of bygones, do infer a presumption that all precedings were paid; and that presumption hath been sustained, though the consecutive discharges were not all granted to the said person, but two to the father, and one to the son; but they were never sustained when granted by different persons; nor is there reason for it; because the granter of three consecutive discharges knew of the two former when he granted the last; whereas, a son granting a discharge of a particular year, knows that the granting of a single discharge does not prejudice him as to bygones, and may be ignorant what his father had discharged.