

ther, who was cautioner for Monro of Foules, compearance was made for Foules, the principal, who proponed a defence of payment of the whole bond ; and, for verifying thereof, produced three discharges, one dated in August 1648, bearing the receipt of the whole byrun annualrents, and of £987 of principal ; the second, bearing a receipt of 1000 merks, dated the 1st of December 1646 ; and a third, dated the 6th day of the said month, 1646, bearing, at the date thereof, and of before, to have received payment of the whole preceding annualrents, and of the sum of £1148 ; whereupon he inferred that the three discharges did amount to the whole sum in the bond.

It was REPLIED for the pursuer, That the two first discharges were included in the last, which was granted within six days after the second discharge, and the sum therein contained did amount to the two sums contained in the two first discharges. Likeas, the defunct Mr Francis Hay, being a right honest and understanding man, would have granted a full discharge of the bond, or have given up the same ; whereas, after the said last discharge, he did assign the sums now pursued for as a part of his daughter's tocher.

The Lords, notwithstanding, finding the matter unclear ; in respect the last discharge, which was posterior to the first two, did bear a receipt of money at the date thereof ; before answer, they did ordain the persons who did pay the sums contained in the two first discharges, and such others as knew what was done at that time, to be examined upon their knowledge if the last discharge was given in contemplation of money given at that time.

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1670. February 11. BRUCE and CURATORS against JEAN JACK.

BRUCE, pursuing the said Jack, as executrix to her mother, for merchant goods alleged sold and delivered to her, extending to £150 sterling ; it was ALLEGED, That the action was prescribed, being for merchant goods, and not pursued for within three years ; unless the delivery were proven *scripto vel juramento*.

It was REPLIED, That the Act of Parliament did only comprehend merchants' accounts, where the goods were sold by retailers, but not where they were sold in gross, such as the goods libelled were ; it being offered to be proven that they were all delivered at two several times only.

The Lords did sustain the defence, founded upon the Act of Parliament ; which was general, [for] all merchants accounts : but, thereafter, the delivery of the goods being offered to be proven by the defender's tutors, who ought not to be looked upon as ordinary witnesses, their oath, *ex officio*, was ordained to be taken before answer.

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1670. February 15. BROWN against LEVINGSTOUN.

DAVID BROWN, being infest in a tenement of land in Dalkeith, and having  
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