

No 2.
nominatim,
 will be sufficient to defend against any process on a prior obligation, though for a larger sum than those mentioned in the discharge.

by a general clause therein contained of this under-written tenor, had also discharged the defender of all action they had competent against him, for payment of any debts or sums of money resting to the pursuer's goodsire, by the defender's father, by contract, decret, bond, or otherwise whatsoever, or paid by him for the said Laird of Ardkinlass, at any time preceding their deceases; in respect of the which discharge, bearing the said general clause, granted by this pursuer long after the date of this bond, now pursued for, the defender *alleged* absolutor, and the pursuer *replying*, that the general clause contained in this discharge, which is subjoined, but accessory to the two particulars expressly discharged, cannot extend to this sum now acclaimed, seeing the same is far greater than the sums particularly discharged; and it is not probable, that it was then intended, that this sum of 2000 merks should have been discharged under the general clause, there being two less sums mentioned *specifice*, and this greater sum never being mentioned, so that the discharge cannot be esteemed to meet this, but this must be esteemed as *non cogitatum*; for if it had been treated on, or thought it should meet the same, it could not have been conceived to discharge 600 merks in two bonds, and to have omitted a far greater sum; this reply was not respected, and the exception was found relevant, and proven; for the general clause foresaid was found ought to extend to this greater sum, albeit the special sums discharged were less.

Act. Hart.

Alt. ———

Fol. Dic. v. I. p. 340. Durie, p. 797.

1678. July 13. PRESTONGRANGE against RICHARD WAIRD.

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 A general discharge granted to a vassal, though referring to a special account, was presumed to include the feu-duties for which he was personally liable, tho' not mentioned in the account; but not the feu-duties of years before the vassal's right, for which no action lay, but a pointing of the ground.

PRESTONGRANGE pursues Richard Waird his vassal for the feu-duty of Dolphington, for thirty-nine years preceding the summons; the defender *alleged* absolutor from 1656, and preceding, because he produces a general discharge by the pursuer to Bryssie, then heritor, of all debts, sums of money, and others whatsoever, that he could lay to Bryssie's charge, for any cause or occasion preceding any manner of way. The pursuer *answered*, That this general discharge had a special account of the same date, and could be extended no further than to writs of that nature, which are contained in the account, and at most to personal debts, but not to feu-duties, which are *debita realia*. Likeas Bryssie, by a declaration produced, declares, 'That the feu-duties were neither paid nor considered in that discharge,' but whatever might be pretended for the years Bryssie was heritor, because he might have been personally overtaken and pursued for these years, yet as to former years which were in his author's time, though the ground might have been pointed therefor, yet it could not be said in any way that Bryssie was debtor therein. It was *replied*, That the petty account produced is only about an hundred pounds Scots, whereas, in this gene-

ral discharge, there is an exception of an hundred pounds Sterling resting, and this discharge is only general, and hath no particular by which the generality might be limited; and as to Bryssie's declaration, it was after he was denuded, when neither his writ nor his oath could prejudge a singular successor.

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THE LORDS sustained the general discharge for the years that Bryssie was heritor, and so debtor, but not for the years of his authors, which were only *debita fundi*.

Fol. Dic. v. 1. p. 340. Stair, v. 2. p. 632.

*** Fountainhall mentions the same case :

THE LORDS found, that a general discharge did not extend to cut off the payment of bygone feu-duties owing to a superior as *non cogitatum*.

Fountainhall, v. 1. p. 7.

1695. November 14. FORBES against GORDON.

ARBRUCHEL reported Janet Forbes, relict of Patrick Gordon, against Charles Gordon of Blelack, for payment of 2000 merks contained in his father's bond to his brother Patrick, whereto she was constituted assignee by her said husband. The defences were, *1mo*, That the bond being in 1656, there were two general discharges past betwixt them subsequent thereto, the one in 1661, the other in 1663; which, though they at first mentioned only farms and rents of lands, yet had also a general clause of all counts and reckonings, borrowings and lendings, or any thing else betwixt them, with an exception of 350 merks resting to Patrick, the discharger; and he who was so cautious as to insert a reservation of that smaller debt, would much more have secured himself by mentioning the greater sum of 2000 merks, if it had been resting, so that *exceptio firmat regulam in casibus non exceptis*. And it being *objected*, That these discharges were intended no farther but allenarly to clear his mail and duty, as tenant, and that they were holograph, and so did not prove their date, it was *answered*, That such discharges, after count and reckoning, needed no witnesses, and there was *geminatio actuum* here; and the Lords had found so, 17th December 1680, between James Stuart and Agnew of Sheuchan, *voce* PROOF; and the defender's father was dead before the assignation now pursued on. The *2d* defence was on compensation, that Blelack was cautioner for the said Patrick, the cedent, in several debts, and had either paid, or was distressed. *Answered*, That did not meet the pursuer, who was assignee, unless the distress and payment had preceded her intimation. *Replied*, It was sufficient, if the obligation of relief was prior to her assignation, though it was purified after, as had been oft found; *viz.* 11th Jan. 1627, Paton, No 50. p. 2601.; 23d Dec. 1635, Keith, *voce* PERSONAL AND REAL; 16th March 1639, Forsyth, No 116. p. 2650.; and lately, in

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An old bond being pursued on by an assignee, the defender produced two general discharges, mentioning rents of lands, and subjoining a general clause of all accounts, &c. or any thing else between the parties, with the exception of a sum smaller than that pursued for. The Lords found these two discharges extended to the bond, though they did not mention it.