

1757. February 11. LUDOVICK GRANT *against* CHARLES MACLEAN.

No 70.

Whether the defence arising from three consecutive discharges can be taken off by contrary presumptions?

IN July 1718, William Fraser, as factor for the Duke of Gordon, obtained decret against John Maclean for L. 533:6:8 Scots, as the feu-duty of his lands for the years 1715, 1716, and 1717. The factor raised and executed horning on this decret 18th June 1719; and, at a clearance the same year, assigned the decret and diligence to the Duke.

The factor received, on the 10th June 1719, the feu-duty for the year 1718, and gave a discharge for that, and afterwards two other discharges for the subsequent feu-duties of the years 1719 and 1720; after which a new factor was appointed, and the feu-duties for the following years were regularly paid and discharged.

The Duke died in 1728, and his executrix brought an action, in 1745, against John Maclean, for the L. 533:6:8, and for annualrents, *nomine damni*, from July 1718, and obtained decret in absence.

A process was brought upon this decret, against Charles Maclean, the son of John, at the instance of Ludovick Grant, as assignee of the executrix. There was produced in defence the three consecutive discharges, 1718, 1719, 1720, and also regular discharges from that time to the 1751, and these were *pleaded* on as affording a presumption of payment sufficient to cut off the debt.

*Answered,* The presumption arising from three consecutive discharges admits of contrary evidence. It does not exclude a reference to oath, or proof by writing. It may be also taken off by contrary presumptions. Three discharges granted to a son, do not found a presumption that bygones due by his father were paid. One discharge for three terms has not been found sufficient; nor two years discharges, and partial receipts for the third. Three discharges by a factor are not sufficient; nor two discharges granted by a father, and the third by his son. And, upon the same principles, a bond granted for bygones will be sustained, notwithstanding three posterior discharges. These cases have been decided, and a decret ought to have the same effect with a bond. In this case, not only was a decret obtained before the factor granted the first discharge, but he had assigned that decret to the Duke before he granted the other two; and the production of all the discharges from the 1718 to the 1751, shows, that no discharges had ever been granted for the three years in question, otherwise they would have been preserved; besides, that John the father allowed a second decret to go against him in absence in 1745, when, if he had appeared, resting owing could have been proved by his oath.

“ THE LORDS found the defender liable for the sums pursued for.”

Upon a reclaiming petition,

“ They restricted the claim to the principal sum, without allowing annualrents.”

Act. *Johnstone.*

Alt. *Hamilton Gordon*

Clerk, *Kirkpatrick.*

*W. J.*

*Fol. Dic. v. 4. p. 120. Fac. Col. No 11. p. 20.*