

No 66.

It was *replied*; The heir is *eadem persona cum defuncto*, and therefore the discharges must be conjoined. *2do*, It appears, by the son's discharge, that he perfectly knew of his father's; because the discharge enumerates several particular payments made to his father, and some to himself or his tutor, making up two years rent discharged; so that, having seen these particular receipts, he must also be presumed to have seen these two former discharges.

It was *duplicated*; The heir is *eadem persona* as to the representation; but this presumption, arising from the granting of three discharges, that the granter knew precedings paid, depends upon the particular knowledge of the granter; and the son may be ignorant of what was known to the father. *2do*, The son's discharge enumerating the father's receipts, proves that the son knew of the receipts enumerated; but proves not his knowledge of the two former discharges; which, if it were instructed, would certainly be relevant.

“THE LORDS did not incline to conjoin the son's discharges with the father's, to infer the presumption that precedings were paid, unless the son's knowledge of the father's discharges were qualified; and, before answer, ordained the son and his late tutor to be examined, if they saw or knew of the said former discharges.”

*Fol. Dic. v. 2. p. 136. Dalrymple, No 21. p. 26.*

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1728. July 18. Marquis of ANNANDALE *against* JOHNSTON of Elshieshiels.

No 67.

FOUND, That the *apocha trium annorum* inferred a sufficient discharge of all by-gones, even where some of these by-gones were constituted by writ. *N. B.* The writ here was not a bond for a liquid sum of money, but a note only, whereby the debtor became bound ‘to make just count, reckoning, and payment of his bygone feu and teind-duties, and of what he was resting thereof since his last discharge;’ though it was *pleaded*, that this made no difference; because, if ever these by-gones had been counted upon, the said note would have been given up to the debtor. See APPENDIX.

*Fol. Dic. v. 2. p. 136.*

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1729. February 5. Sir ALEXANDER REID *against* OGILVIE.

No 68.

A DEBTOR in a bond bearing annualrent, counting with his creditor, *alleged*, That, several years before, he had paid the annualrent of one year twice over, which he offered to instruct by one general discharge of that year's annualrent, and several partial receipts of the same year. The creditor *pleaded* the *apochae trium annorum*. He put the case, That he were now insisting against his debtor

for some old remains of annualrent, his three last discharges would be objected to him; and he contended, that a creditor is rather better founded who argues from three consecutive payments made by the debtor, that all former scores are cleared betwixt them; and that, in this case, either there never was superpayment, (the general discharge likely having come in place of the partial receipts), or, if there was, that it has been reckoned upon in some of the following discharges. The defence of *apocha trium annorum* was sustained to the creditor. See APPENDIX.

No 68.

*Fol. Dic. v. 2. p. 137.*

1744. December 5. HOMES against ANDERSON.

GEORGE HOME, town-clerk of Edinburgh, having verbally set to George Anderson part of the lands of Dreghorn, for one year, from Martinmas 1727, at the rent of L. 300 Scots, afterwards, by a written tack, set him the whole lands for 1200 merks, to commence at Martinmas 1728; and, of the same date with the tack, viz. 22d November 1727, drew on him the following bill, which he accepted, 'Pay to me or order L. 300 Scots, at the terms following, viz. L. 150 ' as the just and equal half thereof, at the term of Candlemas 1729, and the ' like sum in payment of the whole at Lammas thereafter, which, when paid, ' these presents shall be to you a sufficient discharge of a full year's rent for ' your possession of the lands of Dreghorn, set by me to you, and that for crop ' 1728, and oblige your friend,' &c.

No 69.

A bill of an old date, bearing to be for rent of land, was found to be taken away by three consecutive discharges of rent on a posterior tack, the last of which discharged all precedings.

After Mr Home's death, a process was brought on this bill by his two daughters, in which the tenant pleaded on the age thereof; and that he produced three consecutive discharges of the rent of the lands of Dreghorn, and that it appeared by a discharge, 18th November 1730, that Mr Home then received payment of L. 163 : 16 : 4 Scots of rent not due till Candlemas 1731, including 100 merks allowed for repairing the sit-house at Dreghorn.

The LORD ORDINARY, 10th July 1744, "In respect the bill pursued on was granted for rents then to become due, and that there were three consecutive discharges produced, granted by the deceased George Home to the defender, the last whereof discharged all proceedings, therefore sustained the defence; and assoilzied and decerned, especially considering the long taciturnity on the bill, and that no demand was made upon it during the father's life, though surviving the date of the bill several years." And, 22d November 1744, he adhered.

*Pleaded* in a reclaiming bill, That the consecutive discharges being for rents due on another tack, did not apply, and that Mr Home being obliged to repair the sit-house, the tenant was entitled to deduct the 100 merks he bestowed thereon out of the first and readiest of his rent.

THE LORDS adhered.

*Pet. Lockhart.*

*Fol. Dic. v. 4. p. 120. D. Falconer, v. 1. p. 16.*