

No 57.

acquittances, as the party offered to prove, were sufficient to produce liberation to the suspender from all bygones before these years discharged, the charger not having excepted nor reserved any year therein; neither was it respected that these three discharges were not granted to one and the same person, there being two granted to the father, and one to the son, now suspender, which was found sufficient, seeing, albeit the same were granted to divers persons, yet they were granted by one person, viz. by him who acclaimed the bygones, from which he was excluded by his own deed, L. quicumque lib. 10. t. 22. C. De apochis publicis: quod licet obtineat in negotiis publicis per dictam legem, tamen et obtinet quoque in rebus privitis. et Gloss. ad Legem 2. de jure emphiteutico dicit, tenere in solutione canonis pro prædio emphiteutico, ubi dicit hanc solutionem posse probari, vel per testes, vel per confessiones, vel per scripturam, idque dicit in margine teneri ab omnibus doctoribus.

Fol. Dic. v. 2. p. 136. Durie, p. 570.

1631. February 19. L. MORISTON *against* TENANTS of Eastnisbet.

No 58.

To found the presumption of payment of bygones upon *apocha trium annorum*, it is necessary that the discharges be in writing.

THE L. MORISTON having comprised the lands of Eastnisbet, and being infest, and arresting the corns *in anno* 1625 in the tenants hands, after which they paid the farms that year to Eastnisbet, from whom the lands were comprised; there-after Moriston obtains decret before the Sheriff against the tenants not com-paring, for payment of that year's farms; and they suspending, upon payment made to Eastnisbet, which, albeit it was made after the charger's arrestment, yet ought to be sufficient to liberate the tenants, by reason that, since the obtaining of his sentence, the suspenders have paid their farms completely, of four succeeding years immediately subsequent to the year now acclaimed, the payment whereof they referred to the charger's own oath, and which payment so made ought to import to them liberation of that year, and of all preceding years, as effectually as if they had reported several acquittances upon the payment thereof, and which, if they had obtained, in law would have freed them, specially seeing he never quarrelled the said payment made by them of that year's farm, nor ever mentioned the payment thereof when they paid to him the year's farm sinesyne; and so he must be presumed to have allowed the payment made, otherwise he would have exacted payment of the oldest debt, and not taken payment of the last year, and omitted the former years farms. This reason was not sustained; and the payment made by the tenants after comprising and arrestment was not allowed, nor they found to be freed by the subsequent years payment made since to the charger, except they will say that he expressly remitted to them that year, and prove the same by his oath, or otherwise by writ; for albeit *trium annorum apochæ* presume *liberationem præteritorum*, that holds only where the granter of the discharges having given three in writ, and made no reservation in any of them, the law presumes he had no

more to crave, having made no mention thereof, when he made the writ; but where payment was made without writ, the payer has followed the faith of his party; so that, if he shall say that he received that payment, without prejudice of the preceding years, as he now does, the debtor remains debtor therein, notwithstanding of the subsequent payment of the other years, and of the payment made to Eastnisbet of the year acclaimed.

No 58.

Fol. Dic. v. 2. p. 136. Durie, p. 572.

1631. March 23. L. ROSYTH against WOOD.

THE La. Rosyth, and Andrew Wood her spouse, having charged for payment of a victual duty, addebted to them by the Laird, conform to a tack of her conjunct fee lands set to him, and that for the crop 1626, for the which they had recovered decret against him; and he suspending, that since that sentence he had completely paid the crop 1627 and the year 1628, conform to their acquittances given thereupon; and also had paid the year 1629, except only 3 bolls, which he had offered upon acquittance, and was refused, and he is content presently to pay the same, and this must import to him liberation of the year 1626 controverted, and all years preceding, being *apochæ trium annorum*; the LORDS found this reason noways relevant to liberate the suspender of the years libelled, because there was no acquittance of the year 1629; but only there were produced certain particular tickets, or some partial receipts of some quantity of that year's duty, received at divers times, and which, being in sundry tickets, and received to account of that year's duty, and being all calculated together, made not up complete payment, but there was resting a little part of the whole duty, viz. 3 bolls; and, in respect thereof, they found that the suspender was not liberated thereby of the year libelled; whereas, if complete payment had been made of all, and had been instructed by acquittances, he would have been liberated that year, notwithstanding of the decret that year in special therefor; for the decret made it only appear to be a debt, which, without that sentence, would have appeared also by the tack, if there had been nothing to have taken away the same.

No 59.
Two years discharges, with partial receipts for the third, which, put together, wanted a little of the year, not found sufficient to infer presumption of payment of bygones, though the balance was offered at the Bar.

Act. Nairn.

Alt. ———

Clerk, Gibson.

Fol. Dic. v. 2. p. 136. Durie, p. 585.

1634. March 18. DOUGLAS against BOTHWEL.

THE deceast Lord Whittinghame, having a pension of L. 100, to be paid out of the blench-duties of the erection of Holyroodhouse, umquhile Mr Francis Bothwel being tutor to John now Lord Holyroodhouse, gives a bond to the said

No 60.
Three successive discharges found to support the presumption