

S E C T. II.

Discharging the Debtor different from discharging the Debt.

1675. July 8. MARGARET SCRIMGEOUR *against* The EARL of NORTHESK.

IN a reduction at the instance of the said Margaret, as heir to her father, who stood publickly infest in the lands of Auchmouthie, against the Earl of Northesk, of his right and disposition made to him by Patrick Guthrie, who was common debtor, whereupon no infestment followed until the year 1655, which was four years after the public infestment upon the pursuer's father's comprising, and so was *a non habente potestatem*, the disponent being denuded; it was *answered* for Northesk, That the reason was no ways relevant, because albeit his father's infestment was posterior, yet his disposition was prior to the comprising, and was granted for the feu-duties of the lands, which was a prior cause, and did affect the same before the pursuer's comprising; feu-duties being *debitum fundi*, and a real right which affects the ground against all singular successors. It was *replied*, That the said disposition did only bear for an onerous cause, and relief of cautionry, and not flowing from the superior, either by disposition or assignation, could not give the defender right to the same: The superior having granted a discharge of the feu-duties, the same was extinct and could not affect the lands against a singular successor. It was *duplied*, That the disposition was affected with a back-bond of the same date, bearing, that Northesk being cautioner for the feu-duties, was the true cause thereof, neither could the feu-duties be said to be extinct, seeing the heritor was not discharged who was principally liable. THE LORDS having considered the first reason and reply, did sustain the reduction of the disposition, as being voluntary and flowing from Auchmouthie after he was denuded by comprising, there being no decret obtained over the lands for the feu-duties; and the Earl of Panmure, as donatar, having only granted a discharge, but no assignation to his right, would not defend against a compriser who was really infest, and ought to be preferred to Northesk, who had no right to the feu-duties. Thereafter it being *alleged*, That the defender had an assignation from this Earl of Panmure, whereupon he might presently comprise, which being done, he would thereupon be preferred to the pursuer upon that former allegiance, that it was *debitum fundi*, and did affect the lands before the comprising; it was *replied* for the pursuer, That they were not obliged *hoc loco* to debate that question, but should answer when the defender should get a legal title in his person to the feu-duties. THE LORDS, considering that the pursuer's comprising was expired, and would take away the right of the whole lands for an inconsiderable sum,

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A discharge to a cautioner on payment, is not competent to be pleaded on by the principal debtor, unless the cautioner concur. This discharge was not absolute of the debt itself, but only of the cautioner's obligation.

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did ordain that they should debate presently, if Northesk's comprising or adjudging for the said feu-duties, would be preferred to the comprising; whereupon it was *alleged* for the pursuer, That the feu-duties being discharged by the last Earl of Panmure the same were extinct, and this Earl as heir could not grant an assignation for that which was not in being. It was *answered*, That the discharge being only granted to Northesk, as cautioner for the heritor, in a suspension, who made no payment, a discharge by a cautioner did not extinguish the debt; but he may take an assignation to pursue for relief, likeas the discharge bears an express obligation to renew the same in most ample form. THE LORDS did find, that a cautioner getting only a discharge of the debt to himself, to save him from horning and caption, and not being relieved by the principal debtor, may take an assignation from the creditor, who may lawfully grant the same to the effect he may distress the principal, and seek his relief, such a discharge and assignation being noways inconsistent.

Fol. Dic. v. 1. p. 244. Gosford, MS. No 773. 774.

* * * Stair reports the same case :

In the reduction, at the instance of Margarat Scrimgeour against the Earl of Northesk, decided the 8th day of July instant, the LORDS having reduced a voluntary disposition and infeftment, albeit granted for relief of feu-duties, but prejudice of the feu-duties, to be made use of as *debita fundi*, as accords, the parties having debated upon a discharge of the feu-duties granted by the superior in favours of Northesk's father, and it being desired, that seeing that point was disputed, that the Lords would give their interlocutor thereupon, to be insert in the reservation, that the parties might not be put to unnecessary expenses upon the feu-duties, if they were extinct; which desire the Lords granted. And it being *alleged*, That there could be no reservation upon these feu-duties, because they were extinct by the discharge produced; bearing, That the Earl of Ethie, Northesk's father, having become cautioner in a suspension for Achmethie, the vassal, for payment of these feu-duties, the letters were found orderly proceeded, and therefore Ethie made payment, and that therefore the superior had discharged Ethie the cautioner, and was obliged to renew the discharge in 'ample form, keeping the substance above written,' whereby it is clear that the feu-duties are paid, which doth liberate both principal and cautioners; for albeit a discharge to a cautioner, without payment, liberates not the principal, yet where payment is made, both the cautioner and the principal are liberate, for *solutione tollitur obligatio etiam ignorante, vel invito debitor*, *J. In. Quibus modus tollitur obligatio.*

It was *answered*, That the allegiance of payment, though it be most relevant, yet it is not competent to be proponed for the principal debtor upon payment made by his cautioner, unless the cautioner concur with the debtor

therein, otherwise the defence is *super jure tertii*, and there is nothing more ordinary than that cautioners having paid, make use of the name of the creditor, even without an assignation, and if the principal debtor allege payment, it is ordinary to reply *non relevat*, except the payment were made by the debtor, because the charge, albeit in the name of the creditor, is declared to be to the behoof of the cautioner, which was ever sustained; and in this case, the discharge is only to the cautioner, and not a simple discharge, and hath a provision in it 'to be renewed in ample form,' which therefore ought to be in the terms that discharges to cautioners are usually granted, viz. 'discharging the debt as paid by the cautioner, assigning him thereto for recovering his relief,' and all cautioners have *beneficium actionum cedendarum*, which though it be not at the first granted, yet *ex post facto* the creditor may be compelled to give an assignation by way of action as well as exception, and in this case the creditor hath given an assignation, which is produced; and it were of extreme rigour that the pursuer for a small sum should bruike an estate of five times more value by an expired apprising, upon account of a discharge to a cautioner, and wording thereof. It was *replied*, That an assignation to a cautioner, and a discharge to him are very consistent *in continenti*, because thereby there is no solution, but qualified in favours of the cautioner, who might renounce or give up his discharge, if there were no more concerned but the creditor and himself, but this he cannot do in this case, because there is *medium impedimentum*, and *jus acquisitum tertio*, viz. to the pursuer another creditor, and that *beneficium cessionis* is not competent *ex intervallo*, l. 76. ff. de solutionibus.

THE LORDS having called the pursuer to know, whether she would declare the apprising redeemable, and that being refused, found that unless the cautioner did concur with the principal debtor, he could not found upon the discharge, and that therefore the creditor or cautioner deriving right from him, might distress the principal or his lands notwithstanding thereof.

Stair, v. I. p. 343.

1682. February. EARL OF MARSHALL against LAIRD OF STREICHAN.

FOUND, that three consecutive discharges for three several years, granted by a chamberlain, put in by the English the time of my Lord Marshall's sequestration, did not cut off bygones, but that the pursuer might pursue for the same. Here the discharge for one of the years was two partial discharges for 24 bolls of victual, which was full teind-duty for that year; which the LORDS thought did not alter the case, seeing the presumption is from the party's having had bygones thrice under consideration when he granted the three discharges, (which one discharge for three years would not operate) and here bygones were four times under consideration.

Harcarse, (DISCHARGES.) No 416, p. III.