

the same person ; for law presumes he has got payment of the preceding years, else he would not have forgot to [have] excepted in one of these three discharges ; and that it is not a like case to be granted by a father and a son, as to be granted by one person to a father, and then to his son ; which is the *species facti* in Dury, 27th February 1631, *Williamson* contra *L. of Balgillo* ; seeing the son might be ignorant what his father had received or discharged. Therefore, to supply that, it was here offered to be proven by Cruickshanks's son's oath, and his curator's, that they knew that his father had discharged the two preceding years, and that his discharges were shown to them. Upon which allegiance the Lords ordained them to depone before answer, the tenant's case being favourable after so long a time.

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1699. December 14. PATRICK PARK and WILLIAM M'CRAW against JOHN LIDDALE.

PATRICK Park in Glasgow, and William M'Craw, his assignee, pursue John Liddale, as heir to William Liddale, his father, for payment of a sum contained in his father's bond.

ALLEGED,---This debt is discharged, in so far as the said Park, in a discharge he gave the said William Liddale of a former debt, not only discharges him of that, but of all bonds granted or to be granted by the said William Liddale to him, unless one of the said William Liddale's three sons be consenting and subscribing thereto ; but so it is, Park takes this posterior bond from Liddale, without any of his sons consenting : and so is null.

ANSWERED,---This nonsensical discharge of a debt, before it was existing, or *in rerum natura*, can never meet this bond granted since ; for, *esto* it were an interdiction, yet it can never operate, being in such an unusual latent and extraordinary method, not known by law, without either publication or registration ; and, being in Liddale's favours, what hindered him to pass from the same, especially being a restraint laid on him *sine causæ cognitione* ? and, by his giving this posterior bond, he has actually renounced it.

REPLIED,---Though this restraint could not have the effect of an interdiction against third parties, yet it was sufficient against Park, who inserted it in his own discharge ; and he needed no intimation, for *certioratus non est amplius certiorandus* ; and the father was known to be a simple, facile man, and so the quality that his sons should consent was not without cause ; and the bond, by that prohibition, was *ab initio* null, and never obligatory ; *et quod à principio vitiosum est, non potest, ex post facto et tractu temporis, convalescere.*

The Lords thought the clause of discharging posterior bonds incongruous ; and that, as it was a voluntary deed of the father's, he might loose himself when he pleased ; and, as to his facility or levity, there was no standard settled by law for that, but only idiocy, furiosity, or dotage, that he was insensible or imposed on : and therefore refused to put the parties to expense in trying his condition, unless there were pregnant qualifications of his weakness given in to convince the Lords of the same.

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