

1667. December 13. Sir THOMAS NICOLSON *against* The LAIRD OF PHILORTH.

PHILORTH elder, being pursued as representing his grandfather for payment of a debt due upon bond granted by the Earl Marischal and his grandfather as cautioner; it was *alleged*, That the bond being dated above 40 years ago, was prescribed. It was *replied*, That interruption had been made by payment of the annualrents by the principal debtor. It was *answered*, It was prescribed as to the cautioner, there being no interruption by any document or pursuit against him, or payment by him.

THE LORDS repelled the defence in respect of the reply; and found that the ground of prescription as to personal actions being *odium* and *negligentia non pe- tentis*, that it doth not militate in this case, the creditor having gotten annual- rent; so that he cannot be said to be negligent.

Act. Lockhart.

Alt. Cunningham.

Fol. Dic. v. 2. p. 129. Dirleton, No 122. p. 50.

\* \* \* Stair reports this case :

UMQUHILE Sir Thomas Nicolson having pursued the Laird of Philorth before the late Judges, as representing his grandfather, who was cautioner in a bond for the Earl Marischal, there being an interlocutor in the process, Sir Thomas dying, his son transfers the process and insists. The defender *alleged*, That the bond was prescribed as to his grandfather, by the act of Parliament King James the VIth, anent prescription of obligations, bearing that if no pursuit were moved, nor document taken within 40 years, that these bonds should pre- scribe; *ita est*, there was no pursuit nor document against the defender's grand- father by the space of 40 years, and therefore as to him it was prescribed. The pursuer *answered*, That he opposed the act of Parliament, and interlocutor of the Judges in his favours, and offered him to prove that the annualrent was paid by the principal debtor, within these 40 years, and his discharge granted thereupon, which was sufficient document; and the pursuer not having been negligent, nor at all bound to pursue or seek the cautioners, when he got an- annualrent from the principal, the obligation of both stands entire. The de- fender *answered*, That the principal and cautioners being bound conjunctly and severally, albeit in one writ, yet the obligations of each of them was a distinct obligation, and as the cautioner might be discharged, and yet the prin- cipal obligation stand, so the prescription is a legal discharge, presuming the creditor past from the cautioner, seeing he never owned him for 40 years, which is most favourable on the part of cautioners, who otherwise may remain under unknown obligations for 100 years. The pursuer *answered*, That albeit there might have been some appearance of reason, if the persons obliged had been all co-principals, or bound by distinct writs; yet where the writ and obli-

No 412.

Negative pre- scription is saved as to the whole, the creditor doing dili- gence against any one of the principals or cautioners, or receiving annualrent from either.

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gation is one, and the cautioner's obligation thereby but accessory, and the creditor no way negligent, there is no ground of such a presumption, that the creditor past from any party obliged; and the obligations mentioned in the act of Parliament, are not to be meant according to the subtilty of distinction of different notions of obligations, but according to the common style and meaning of obligations, whereby one writ obliging principal and cautioners, is always accounted an obligation, which is sufficiently preserved by payment obtained from the principal.

“ THE LORDS adhered to the former interlocutor, and repelled the defence of prescription in respect of the reply, of payment made of the annualrents made by the principal.”

*Stair, v. 1. p. 497.*

\* \* \* A similar decision was pronounced in the case Earl of Marchmont against Earl of Home, 23d February 1714. No 354. p. 11154.

1671. June 21.

LORD BALMERINO *against* HAMILTON.

No 413.

An infeftment of annualrent reaching two tenements, diligence done against the one, or payment made by the debtor, saves prescription as to both; and this, although the annualrent was constituted upon the two tenements by two different sines.

In a poiding of the ground at Balmerino's instance against Hamilton, upon an infeftment of an annualrent of L. 40 out of a tenement of land in Leith, wherein Hamilton was infeft as heritor; it was *alleged*, No poiding of that tenement, because the defender, and his authors, who were singular successors, were infeft therein, and in possession thereof by the space of 40 years free of any such burdens or any diligence done thereupon. It was *replied*, That the foresaid annualrent being constituted by the pursuer and defender's author, who was heritor of that, and another tenement belonging to him by infeftments given upon resignations in the superior's hands to the pursuer's author, who had obtained payment either from the granter, or by decreets out of the other tenement, it did interrupt prescription, and the annualrenter's right did remain entire as to both the tenements, though he was only paid out of one of them. THE LORDS did sustain the poiding, and found, that a right of annualrent being *jus indivisible*, and granted out of two distinct baronies, or tenements of lands, the payment of the annualrenter by the granter himself, without any diligence, did instruct possession, and *quocunque tempore* the annualrenter might pursue a poiding, unless prescription could be alleged upon that ground, that neither payment was made, nor diligence done by the space of 40 years.

*Fol. Dic. v. 2. p. 129. Gosford, MS. p. 173.*

\* \* \* Stair's report of this case is No 6. p. 3350., *voce* DEBTOR and CREDITOR.