

1715. February 22.

ANDREW MAJORIBANKS of that ILK, against NISBET of DIRLETON.

MAJORIBANKS, as having right by progress from Woodcockdale to 3000 merks, contained in a bond granted to him by Sir John Nisbet of Dirleton *in anno* 1676, and 604 merks contained in a decret of furthcoming *in anno* 1685, insists against the now Dirleton on the passive titles for payment.

*Alleged* for the defender, That he could not be liable for the principal sums but in the terms of the Lord Dirleton's bond, whereof the term of payment is not yet come, the principal sums being only payable at the first term of Candlemas or Lammas, after the lands of Fentonbarns and others disposed by William Couper to him, should be purged, disburdened, freed, and relieved of the infeftments of annualrent of 500 merks yearly, disposed out of the same to David M'Culloch of Good-trees.

*Answered* for the pursuer; That the incumbrance is sufficiently purged, in so far as the infeftment being granted *in anno* 1623, the same is now long prescribed; *2do*, Dirleton hath been now near forty years in possession of the lands, since his author purchased the same; so that he is secured by the positive prescription, he and his author having possessed without interruption or distress.

*Replied* for the defender, That the prescription is not Dirleton's concern to debate, that being the business of M'Culloch's heirs, who cannot be concluded by any debate betwixt Majoribanks and Dirleton; and if this pretence had been enough, Sir John Nisbet needed not have detained a sum in his hands, effecting to the infeftment of annualrent, it being prescribed even at the time of granting the bond.

*Duplied* for the pursuer; That the prescription was not *jus tertii* to Dirleton; for he having founded his defence on M'Culloch's right, whatever was competent to remove him, was also competent against the defender. Nor was there any need to raise a declarator of extinction against M'Culloch's heirs, because prescription had as effectually extinguished the annualrent, as if it had been actually renounced.

THE LORDS found the defender ought to pay the sums libelled, the pursuer giving a discharge with absolute warrandice, and finding caution to relieve the defender of the infeftment of annualrent; which caution is to subsist for ten years (in case there be no distress within that time) from the date of payment.

Act. Messie.

Alt. Bennet.

Clerk, Sir James Justice.

Fol. Dic. v. 2. p. 359.

Bruce, v. 1. No 91. p. 102.

No 25.

Although incumbrances remained undischarged, which the seller had stipulated to discharge, yet the price was, in this case, ordered to be paid, upon absolute warrandice, and caution, and to subsist for ten years, to relieve of the subsisting burdens on the lands.

The long prescription had run.