

nuity. And as to the interruption, Mr Livingstone *answered*, That any interruption at Hairhope's instance was during the currency of the tack, before the prescription begun to run; and Mr Livingstone being reponed against his decret, the matter landed in a competition not wakened within five years.

No 250.

THE LORDS sustained the pursuer's title; but found that the act of Parliament 1669 did take place in this case.

Act. H. Dalrymple, sen.

Alt. Ja. Boswell.

Clerk, Hall.

*Edgar, p. 162.*

1729. July 10.

NISBET *against* BAIKIE.

No 251.

THE quinquennial prescription of mails and duties takes place equally whether the tenant has possessed by written or verbal tack.

Partial payments, made within the five years, found no interruption of prescription, as tending rather to fortify the presumption, that all bygones are cleared.

A tack of mails and duties falls not under the act, which regards only tenants who are in the natural possession, by labouring the ground.—See APPENDIX.

*Fol. Dic. v. 2. p. 117.*

1739. June 19.

STRAHORN *against* CUNNINGHAM.

No 252.

THE five years prescription of mails and duties, after the tenant's removal, does not take place against an heritor, though he have sold his lands, and that the purchaser has been five years in possession; the tenant still remaining in the ground.

*Kilkerran, (PRESCRIPTION.) No 2. p. 415.*

1771. March 7.

LAUHLAN DUFF *against* WILLIAM INNES of SANDSIDE.

No 253.  
Quinquennial  
prescription  
of the act  
1669, c. 9.  
pleadable by  
the cautioner  
of the tenant.

LAUHLAN DUFF, factor for Lord and Lady Fife, as executor of the Earl of Caithness, pursued Innes of Sandside for payment of a certain sum of money, in consequence of two obligatory missives, granted by Sandside's father. Sandside, in defence, *pleaded*, That these missives being cautionry obligations for mails and duties, owing by tenants removed from the land, and the debt against

No 253. the tenants being cut off by the quinquennial prescription of the act 1669, his obligation, which was only an accessory, must also be extinguished.

The Court having sustained this defence, Duff, in a reclaiming petition, *pleaded* ;

The act 1669, c. 9. established a prescription only as to the mean of proof; bygone rents might still be pursued for after five years, if the claim could be established, either by writing or the oath of party; so that as, in the present case, the obligation was proved by an explicit writing, the act of Parliament did not apply.

It was not a fair view of the case, to consider Sandside as a cautioner for payment of these rents. He did not bind and oblige himself, that the tenants should pay their arrears, but became bound himself to pay them. He took his chance of operating his relief from the tenants' effects; and as, in regard to the landlord, he substituted himself in place of the tenants, and was, in effect, not cautioner, but principal debtor, the act 1669, in no shape, applied to the obligation founded on.

Sandside *answered* ;

The obligation, in the present case, was unquestionably that of a cautioner. In one of the missives, he expressly binds himself as cautioner; and, in the other, he says he will see the debt paid; and it was a general rule of law, that every exception, competent to the principal debtor, was competent to the cautioner. No demand could be made effectual against the principal, as, unless it could be shown, according to the method prescribed by the act, that these rents were still owing, the statute itself was as valid a discharge as the most formal deed that could be devised, and must, of course, be equally effectual in extinction of the accessory obligation as of the principal; June 1681, Home against Lockhart, No 1. p. 2072.; 1735, Haliburton against Lockhart, No 3. p. 2073.; 19th December 1695, Doul against Home, No 2. p. 2072.

The Court adhered, (7th March 1771;) it being still competent to prove, by the oath of the tenants, that the debt was due.

Lord Ordinary, *Stonefield*.

For Duff, *Cosmo Gordon*.  
Clerk, *Ross*.

For Innes, *D. Armstrong*.

*R. H.*

*Fac. Col. No 87. p. 259.*