

No 412.

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.