

1735. December 9.

JOHN BLAIR *against* ALEXANDER SUTHERLAND of Kinminity.

No 438.

Whether
a process
founding upon
a bad title,
where the
pursuer by a
separate title
had good
right to the
debt, afforded
interruption
of the nega-
tive prescrip-
tion of a
bond?

PATRICK SUTHERLAND of Clynie granted a bond to Thomas Roe merchant in Edinburgh, payable at Martinmas 1690; who, by a general disposition in January 1695, made over all his effects in favours of Hugh Blair, also merchant there, for the behoof of himself and the other creditors of the disponent; however, he never made up any title thereto. But, in February 1695, it appears, that he had obtained a signature or warrant for expeding a gift of Roe's single escheat; and upon Hugh Blair's death, the said John Blair his son was in May 1703 confirmed executor *qua* nearest of kin to him; and, in the year 1730, he brought an action for payment of the bond against Kinminity, as representing Patrick Sutherland the debtor, upon one or other of the passive titles; libelling in the summons his interest in the debt, thus: "As executor to the deceased Hugh Blair, who was donatar to the escheat of the deceased Thomas Roe, the creditor in the bond." Against this process several defences were proponed, whereby it continued in dependence till June 1735; when it was *objected, imo*, That the principal sum and annualrents of the bond, after the denunciation of the said Thomas Roe, were prescribed; because the same fell not within the pursuer's title libelled on, being only that of an "executor to a donatar of escheat;" *2do*, As to the annualrents due preceding the denunciation, and which might have fallen under the gift, the process behoved also to be ineffectual as to these, seeing it never was expedite.

Answered for the pursuer; That the objection to the gift of escheat is good; and it was a mistake to found upon it: But, with respect to the prescription of the bond itself, and annualrents due thereon after the denunciation, the prescription was sufficiently interrupted, in so far as this libel not only narrates the pursuer's right as executor to his father Hugh Blair, donatar to Roe's escheat, which is acknowledged to be an insufficient title; but it likewise mentions the pursuer's confirmed testament to his father, as giving him a right to the bond in question. In which testament the above general disposition is particularly specified, as the chief foundation of his father's right. And which testament was given out with the process to the defender in November 1730.

Replied; That the disposition itself is prescribed, counting from its date in January 1695 till June 1735, the first time it was either produced or founded upon. Neither can the overly manner in which it is used in the testament preserve it from prescribing; seeing the way how it came to be mentioned in the testament was, that in giving up an inventory of the sums due to Hugh Blair, a debt due by Captain Francis Charteris is specified; and to which sum it is therein said that he had right, not only by the above disposition from Roe, but likewise in virtue of a decret against the said Captain Charteris. As this is the fact, it can with no propriety be said to be founding on the general disposition,

as a title in this process to the said bond ; seeing it is only occasionally named in the testament, as what gave Hugh Blair a right to the debt originally due by Captain Charteris to Roe. But supposing it had been libelled upon expressly, it would have been no sufficient title to maintain an action, or obtain a decret for this debt ; as the pursuer has not confirmed the total right of the disposition to his father, so as to put himself in his place : And, even supposing that had been done, it would still have been requisite to do what was incumbent on his father, namely, to confirm the same upon his general disposition as executor-creditor to Roe. All which having been neglected, the same cannot now be done, as the debt is prescribed. And as no complete title was made up to this bond within the forty years, the citation in this process cannot serve to interrupt the prescription. See Stair, b. 2. t. 12. § 26. But whatever would have been the consequence of expressly libelling upon the general disposition, yet in fact it is not done in the present case ; seeing the libel ascribes the pursuer's right to a quite separate and distinct title, scil. to his being " executor confirmed to a donatar of escheat ;" which being acknowledged to be a title which is good for nothing, he should not, after the elapse of forty years, be allowed to produce and resort to a separate right to the debt, in order to save it from prescription ; which, though good when this process first commenced, is now cut off by prescription ; as it is a certain principle in law, That where there are different rights to a debt, diligence done upon one of them will not serve to interrupt the prescription against the others, as each must stand or fall according as diligence has been used or not. Thus, a bond bearing annualrent, which had belonged to a wife whose husband died forty years ago, though she or her representatives had pursued or obtained payment thereof, it would not follow, that the executors of the husband could, after forty years, pursue for the annualrents that fell under the *jus mariti* before that time. In the same manner, an action brought at the instance of one calling himself " executor to a donatar of escheat," supposing the title to have been good, cannot save from prescription a separate and distinct title to the debt itself. See January 1684, Colston, No 421. p. 11249. ; 11th February and 22d June 1681, Kennoway, No 9. p. 5170. ; Ross of Folly *contra* Duke of Gordon, *anno* . . . , (see APPENDIX.) And this doctrine applies with greater force since the act of sederunt 1723, which appoints all summonses to be fully libelled, and a copy thereof given to the defender, with certification, that he shall not be obliged to answer to more than what is contained in the copy ; consequently, where one partial title is libelled, as in this case, it is to that only the defender is obliged to come prepared to answer.

Duplied for the pursuer ; The using the disposition as the foundation of the testament is a plain interruption of the prescription, sufficient to entitle any person having a right thereto, to found on it as a valid title to the bond, any time within forty years after such document, provided the bond itself remains unexpired. And, supposing it were admitted not to be a document taken thereon (the defender not having been specially called to the confirmation)

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yet, as the libel mentions the testament which recites and is founded on the said general disposition, that is a sufficient interruption of the prescription from the citation in this process, although the disposition was not expressly named in the libel, seeing, from the time of giving out the testament, the disposition must be considered as making part of the pursuer's ground of claim, and thereby judicially notified to the defender as much as if it had been expressly set forth in the libel. And indeed it would be a very great extension of the doctrine of prescription, to find that a writing mentioned in the deeds recited in the libel, and which was the only foundation upon which they could be made effectual, should become void by prescription during the dependence of the process founded on such libel: So that the argument pleaded for the defender, anent the necessity of libelling on the true grounds of debt, in order to save them from prescription, does not apply to the present question, where the pretended defect in the particularity of the libel is so fully made up; more especially considering such a doctrine is contrary to the principles both of the civil and municipal law of this kingdom, as appears from law 3d Cod. De Annali Excep. Si quis obnoxium suum iudicium clamaverit, et libellum conventionis ei transmiserit, licet generaliter nullius causæ mentionem habentem, vel unius quidem specialiter, tantummodo personales vel hypothecarias continentem; nihilominus videri jus suum omne eum in iudicium deduxisse, et esse interrupta temporum curricula, cum contra desides homines et juris sui contemptores odiosæ exceptiones propositæ sunt. See Lord Stair, tit. PRESCRIPTION, § 26.; and July 26th 1637, Lawyers, No 31. p. 10719. As to the decisions quoted for the defender, it is answered in general, That they all relate to the prescription of inhibitions, from which no argument can be drawn to the case of obligations, assignations, &c., seeing inhibitions produce no effectual action against the debtor, but only against third parties.

Neither is the argument drawn from the act of sederunt of any force, as the terms of it are here fully complied with by libelling on the bond and testament. Besides, the certification in the said act is not, that a summons imperfectly libelled shall not interrupt prescription; but that the defender shall not be obliged to answer to more than what is contained in the copy given to him; but still it will serve as a good interruption of the prescription. And as to the observation, that no legal title having been made up to this bond within the forty years, the citation in this process cannot serve to interrupt the prescription;

It is *answered*; There was no occasion for Hugh Blair's confirming to Roe in order to give him an active title to pursue, seeing it is a point established, that a general disposition is sufficient, the disponent confirming before extract; which, though it has not hitherto been done, yet that is what he can still do, as the citation at his instance who had such a right must stop the prescription's taking place.

To which the defender *triplied*; The doctrine, that libelling upon one title to a debt does not save a separate one from prescribing, is well founded, not-

withstanding of Justinian's constitution in the law, quoted; as it establishes a principle, the reason whereof may be justly doubted. The creditor, in that case, might have got a privilege of declaring which of the debts due to him he meant to insist for: But that an action, *e. g.* for payment of a hundred pounds, should serve to interrupt the prescription as to five different claims for a hundred each, does not appear to have a very solid foundation. Besides, Peresius, in his Commentary upon that title, observes, that the law concerns a particular case. In the *next* place, There is nothing solid in the argument, that the general disposition is in effect libelled upon in this process; as it does not appear from the testament, that the disposition contained a general assignation of all debts due to Roe, or that particularly comprehended the bond in question. And, if it was impossible to discover that from the testament, How can it be maintained that this libel proceeded upon the disposition, or was a document taken thereon, or upon a debt that fell under the conveyance thereof?

THE LORDS found, that the bond was not prescribed.

But, upon petition and answers, "they sustained the defence of prescription,"

C. Home, No 4. p. 12.

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1747. February 12.

Captain JOHN RUTHERFORD *against* Sir JAMES CAMPBELL of Aberukle.

LETTERS craving payment, written to the defender within the three years, were found not to interrupt the prescription of an account, the words of the act being express, "that such action cannot be pursued after three years, unless proved by writ or oath of party." See APPENDIX.

Fol. Dic. v. 2. p. 128.

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1739. January 16.

REID *against* KER.

AN adjudication against Patrick Livingstone was not sustained, even to the effect of interruption of the negative prescription of the debt, in regard the bill of adjudication upon which the same proceeded was against John Livingstone.

Fol. Dic. v. 4. p. 114. Kilkerran, (PRESCRIPTION.) No 1. p. 414.

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1739. November 30.

M'DOUGAL *against* M'DOUGAL.

A SUMMONS executed interrupts prescription, though it never be called, for it is the citation itself that interrupts: So the laws suppose that appoint citations

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