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the second could not be extended by implication to the prejudice of the pursuer, any further than he himself consented: That he had paid 30 instead of 28 bolls, which addition he consented to, and was still willing to pay; but that justice would allow his concurrence to be carried no farther. Here he appealed to the case of Drymen, No 8. p. 10675.; where the heritors were not barred from founding on their sub-valuations, although they had so far derelinquished them as to take tacks from the Exchequer, the grassums of which were valued, not according to their former valuations, but the real rents of the lands when set.

It was *replied* by the college, That the dereliction had been a great deal more extensive than admitted by the pursuer; for it appeared from the college-books, that Lord Pollock, rector of the university, in 1705, applied for and obtained a deduction of 6 bolls yearly from the teind-duty payable out of the pursuer's lands. As to the case of Drymen, it did not apply; for the decreet there founded on had been carried away by Oliver Cromwell, and only lately discovered in the hogsheads returned; so the heritor could not relinquish a right he did not know existed.

'THE LORDS refued to approve the valuation of the pursuer's lands, assoilzied the defenders, and granted a proof to both parties of the present rental.'

Act. *W. Stewart.* Alt. *Alex. Lockhart.*

A. C. *Fol. Dic. v.* 4. *p.* 89. *Fac. Col. No* 131. *p.* 306.

1770. *August* 2.

WILLIAM ROBERTSON, Shipmaster in Leith *against* JANET ROBERTSON and HUSBAND.

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An adjudication was led against two distinct subjects, but no infeftment taken; so that it remained a personal right. Possession having been maintained only upon one, the right to the other found to be cut off by the negative prescription.

THOMAS ROBERTSON, the pursuer's grandfather, had two sons, Robert and Thomas. Robert was creditor to his father in different sums; and in security thereof, on the 28th April 1699, he obtained an heritable bond over his subjects in Leith and Inveresk. In 1709, an adjudication was obtained for this debt by a trustee for Robert's behoof over his father's subjects in Leith and Inveresk; which the trustee, on 27th October 1709, conveyed to Robert. The legal of the adjudication was allowed to expire; and the right having come into the person of the pursuer, Robert, the adjudger's son and heir, he, in 1754, brought an action of mails and duties before the Sheriff of Edinburgh against the tenants and possessors of the subject in Inveresk.

In this action appearance was made for Janet Robertson, daughter of Thomas, the common ancestor's second son, who claimed right to the subjects on the following grounds. In 1717, old Thomas Robertson had, in his son Thomas's contract of marriage, conveyed to him and the heirs of his marriage the subject in Inveresk; and in 1746 Janet, the child of the marriage, acquired right to the conveyance in the contract by disposition from her father.

After some procedure before the Sheriff, the cause was advocated; and, at the same time, Janet Robertson and husband brought a reduction of the pursuer's adjudication, so far as related to the subject in Inveresk; and in order to strengthen their plea, in October 1768 took infeftment of the subject upon the precept of sasine in the marriage contract. So that, upon the titles produced, the question betwixt the parties resolved into a competition betwixt an adjudication led in 1709, the legal of which was expired, and a posterior conveyance of the same subject in 1717 by old Thomas Robertson in his son's contract of marriage, the right of which was vested in Janet Robertson and husband. No 14.

The Lord Ordinary pronounced the following interlocutor: "Prefers the defenders upon their rights produced to the subject at Inveresk in question; reduces the pursuer's adjudication and other writs called for, in so far as respects these subjects.

In a reclaiming petition, the pursuer *pleaded*:

1mo, The defenders plea, that the adjudication was cut off by the negative prescription, the same having been led in the year 1709, and no steps taken for following it out till 1754, was not sanctioned by the circumstances that had occurred. It was not denied that, in virtue of the adjudication, the pursuer's father had entered into possession of the subjects in Leith, had continued that possession till his death, and that the pursuer had since possessed them on the same title. Such being the fact, as the possession of any part took off the presumption of derelietion, it necessarily had the legal effect of interrupting prescription *quoad* the whole; in the same manner as payment of the least fraction of annualrent within the 40 years preserved the whole of a debt; or as a partial payment made by one of two or more co-obligants prevented the negative prescription from running in favour of the rest. Stair, 22d June 1671, Lord Balmerino *contra* Hamilton, *infra h. t.*

2do, There were no *termini habiles* to establish the proposition that the defenders had acquired the subjects by the positive prescription. In order to make out the prescriptive title and period, it was necessary to found upon old Thomas Robertson's infeftment and possession, to which unsurmountable objections lay. For though a purchaser and singular successor were entitled to found upon the possession of their author, and connect it with their own, yet when there was a competition of rights flowing from the same author, the case was different. That was the case here; the right of Thomas the common author was admitted and founded on by both parties; and as the only question was with regard to the validity or preference of two separate rights derived from him, it was clear that his possession must be thrown out of the question, and that prescription could only be held to run from the time that possession had been attained upon the separate right, in support of which prescription was pleaded. Possession for 40 years, upon absolute titles of property, was sufficient to work off the fetters of an entail; but one founding on this plea would not

No 14. be allowed to go back to his authors before the entail, and, in order to make out the 40 years, connect their possession with his own.

3*tio*, The objection that the pursuer had been *in mora* in following out the adjudication in 1709, so that the competing right should be preferred, was unfounded. There was no such *mora* as could exclude that right from the preference to which it could otherwise in law have been intitled. Soon after the adjudication, the pursuer's father took possession of the subject in Leith; which was enough to exclude the idea of being *in mora*, or to having derelinquished the right, it being an established principle, that the only *mora* to which such effect could be given must be total. The adjudication led had the effect of rendering the subject litigious; and though a *mora* might have thereafter intervened, yet the effect of the action of mails and duties in 1754 was to purge that *mora*, and to restore the subject to its original character of litigiosity. The subsequent act of the defenders in taking infeftment in 1768, could have no effect where the pursuer's prior right could not authorise them to found upon the supposed *mora* that had occurred; and according to the maxim *pendente lite nihil innovandum*, that infeftment taken after the subject was rendered litigious, could not avail to give the defenders claiming under it any preference.

The defenders *answered*;

1*mo*, The negative prescription unquestionably applied to the present question. The adjudication was led in 1709; no claim was made on the subject till the 1754, a period of upwards of 40 years; so that the benefit of this personal right, *quoad* the tenement in Inveresk, was by that rule of law cut off. The pursuer's argument as to his partial possession could have no effect; the subject in Leith and those in Inveresk were separate and distinct; and though the possession of one of the subjects might save the debt from prescription, it never could save the adjudication from being lost as to subjects of which no possession had in consequence thereof been assumed. The falacy of the pursuer's argument lay in supposing that the adjudication of the several parcels converted them into one individual subject; but as no such union was thereby created, the possession of one of the subjects contained in the adjudication could not save that right from being prescribed as to the other. The justice of the judgment in the case of Balmerino was much doubted of by Erskine, B. 3. T. 7. and had besides no similarity to the present; a right of annualrent being a burden or servitude, and consequently indivisible, whilst an adjudication was acknowledged to be a legal disposition or sale under reversion.

In the present case, also, no infeftment had followed on the adjudication, which had remained a latent personal right; so that if, after what had followed, the defenders were to be turned out, the security of the records and of property would be much unhinged.

2*do*, The defenders had acquired right to the subject by the positive prescription. Old Thomas Robertson was himself infeft in the subjects; and as

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he, the defender's father, and herself, had possessed the lands upon charter and sasine for 40 years without any interruption, they were precisely in terms of the statute 1617. The objection, that, for the greatest part of the time, the defender and her father had not a sasine in their own persons, was of no consequence; the law had not said that the persons pleading prescription must produce a sasine in their own persons, but that they be able to shew a charter of the lands granted to them or their predecessors. When the warrant was produced, there was no occasion to shew a renewal of the investitures in the persons of the after possessors; so that though the infeftment in 1768 was laid aside, the defenders were nevertheless intitled to the benefit of the positive prescription.

3*tio*, Though the pursuer's adjudication had not been cut off by the negative, nor the defenders right established by the positive prescription, yet they ought to be preferred, having a complete right granted after the adjudger was *in mora*, and when, consequently, his adjudication could be no bar to third parties from acquiring a right to the subjects from the debtor. The pursuer's argument upon the inherent litigiosity of the subjects, in consequence of the adjudication, was unfounded: If the adjudger did not proceed in due time to complete his right, so that it might be established and known, the litigiosity of consequence flew off. This could only be done by taking infeftment, which, entering the record, certified creditors and purchasers. A process of mails and duties was not equivalent; and far less could the possession of one tenement have the effect to keep up the litigiosity, and preserve the adjudication in force as to another, which the adjudger did not possess, but the debtor himself.

This doctrine was established by repeated decisions, 26th July 1764, Duchess of Douglass *contra* Scott, No 87. p. 8390. *Lastly*, As to the infeftment in 1768, the principle of law *pendente lite nihil innovandum*, applied not to the present case, where that infeftment had been taken upon a warrant in the defenders favour, existing long before any process had been thought of.

In giving judgment, their Lordships were of opinion, that there was a manifest distinction betwixt an annualrent right and an adjudication, which was a sale or right of property under reversion; and that therefore the partial possession could not apply to protect the whole right originally in the adjudication. Their Lordships were also clear, that as no infeftment had followed upon this adjudication, it was cut off by the negative prescription, to which all personal rights of property were liable; and hence, that it was unnecessary to decide if the defenders right to the subjects was established by the positive prescription: as to which great doubts were entertained.

They therefore adhered to the Lord Ordinary's judgment.

Lord Ordinary, *Stonefield*. For William Robertson, *Blair*.
Clerk, *Pringle*. For Janet Robertson, *Maclaurin*.

R. H. *Fac. Col. No 38. p. 105.*