

argument, if good, here, would never serve any other person ; for the trustees would always divide upon the spot, instead of bringing home the goods.

KAIMES. I have no doubt that the trustees would have been preferred in Virginia. The goods of Dunlop were brought home to this country : How can this make any difference ? I do not see how the creditors-arresters can be preferred. I am for a *pari passu* preference.

JUSTICE-CLERK. All that the trustees did was by a right, good every where from necessity, not *ex comitate*. The Bankrupt Act, 1696, operates upon effects in Scotland. The trustees, had they touched such effects, would have been holding a subject contrary to the law of this country. But here the case is different : they hold the goods by a title valid in the law of Virginia. It makes no difference whether the trustees had divided the proceeds in Virginia, or brought them home.

ALEMORE. This is a very favourable case. But, suppose that a bankrupt should seek to prefer any single creditor, might he not do it in this shape ?

GARDENSTON. The present case depends upon the local situation of the goods. If there was a valid right to them in Virginia, how could it cease upon the goods coming to Scotland ? How shall property play bo-peep in this manner ? I do not apprehend any danger from partial preferences. Fraud will not stand anywhere : It is reprobated by the laws of every country.

PRESIDENT. This presumption of fraud being unavailable, will not do. In many cases there may be no fraud other than the statutory fraud by Act 1696. The deed of trust is a good title to recover ; but, when the effects are brought to Scotland, then the law of Scotland must take place.

On the 26th July 1770, the Lords preferred the trustees.

Act. R. Blair. *Alt.* H. Dundas.

Hearing in presence, after report, by Auchinleck.

Diss.—Auchinleck, President. *Non liquet*,—Kennet, Strichen. Kaimes for a *pari passu* preference.

1770. August 2. WILLIAM ROBERTSON *against* JANET ROBERTSON.

PREScription.

An adjudication being led against two distinct subjects, but no infertment taken ; so that it remained a personal right, and possession maintained only upon one,—the right to the other found to be cut off by the Negative Prescription.

[*Faculty Collection*, V. p. 105 ; *Dictionary*, 10,694.]

MONBODDO. The only argument for the pursuer is from the decision in 1671, *Balmerino*. I think that decision erroneous, and that the Court did not make a proper distinction between the debt and the *jus hypothecæ*.

COALSTON. I doubt as to all the points. Do not think that the negative prescription has run. In a question with the debtor, possession as to part, by adjudication, will interrupt as to the whole. There is no pretence for the positive prescription: the possession of the author, before the date of the donee's right, can never come *in computo*.

PITFOUR. I have ill-will to quit with the decision of *Balmerino*, because of old acquaintance. I do not regard the authority of a decision of yesterday, further than as I am led to it by my respect to the judges who pronounce it. But an old decision is of more weight: it has the acquiescence of the nation, otherwise there would be nothing but a *jus vagum et incertum*. The case of *Balmerino* does not apply. Here I go upon the negative prescription. A disposition, irredeemable, without infeftment, cannot save from the negative prescription. In a right of property there is no unity, as in a right of annual-rent.

KAIMES. I have no idea that old Thomas's possession can come *in computo*. So, positive prescription is out of the question.

AUCHINLECK. It is extraordinary that this pursuer, who has lain by for 40 years, should be allowed to come in upon the adjudication, and take a second crop of it. Possession of one part upon a right of security will save as to the whole. But here there is a right of property, if it is any thing. Here one tenement kept. The reserver did not object; which he might have done had possession been taken of both tenements. When one does not follow out his right, the reverser is safe. An adjudger has only a personal right till infeftment is expedite: here no infeftment even at this date. There is nothing to hinder the other party from taking infeftment.

MONBODDO. I considered the decision of *Balmerino* as a single decision. It would be extraordinary if the creditor, by possessing one part, should, at the distance of forty years, or even of an hundred years, have recourse upon the rest. Take the adjudication as you will, prescription is run. If an adjudication is a right of property, the negative prescription will not apply, but the positive will. Thomas Robertson was in the course of acquiring by the positive prescription. The donee from him may plead the prescription begun in his person. Upon the supposal that the adjudication is a right in security, the negative prescription will take place. The *mora* ought also to be considered.

PRESIDENT. I would be sorry to shake any principle already established. An adjudication may, in its consequences be a right in security, but in its nature it is a sale. Suppose two dispositions:—no infeftment on the one—neither possession nor infeftment on the other; I consider this last as derelinqquished after forty years. I doubt as to positive prescription, when Thomas Robertson's possession is pleaded, for he is the common author. I doubt also as to the *mora*.

On the 2d August 1770, “the Lords assoilyied the defender;” adhering to Lord Stonefield's interlocutor.

Act. R. Blair. *Alt.* J. M'Claurin.

Diss. Coalston. No vote.