

1782. *March* 1. THOMAS MAULE, Esq. *against* GEORGE, EARL of DALHOUSIE and Mr WILLIAM RAMSAY MAULE.

PRESCRIPTION,

Whether effectual against an Entail of Lands, when the Prescriptive Title is anterior, and, when posterior to the entail; against an Entail of a Personal Bond; and of Leases?

[*Fac. Coll. IX. 62; Dict. 10,963.*]

PRESIDENT. Negative prescription can take place against settlements and obligations, though not against rights of property. The case of M'Kerston was not carried to the House of Lords, but was taken away by my decret-arbitral. But the case of Kinnadie was determined in the House of Peers; and, on that occasion, Lord Hardwicke thought that the judgment in the case of M'Kerston was good law, and ought always to be so held. Lord Panmure made up his titles on the charter 1687, and possessed for upwards of forty years on an unlimited title, and by that means he wrought off the fetters of an entail, which entail I hold to have been delivered.

GARDENSTON. The settlement in 1730 is cut off both by the positive and the negative prescription. I always valued the laws of prescription. It is grievous for one to be dispossessed of what he has been long possessed. Lord Panmure possessed for more than forty years on an unlimited title. Baron Maule, the immediate creditor, might have enforced the deeds of entail, but he took no document on them. If the obligation did not prescribe in forty years, it could never prescribe at all: so prescription, both negative and positive, are clearly applicable to this case.

BRAXFIELD. The deeds were delivered. This deed was personal, but not latent. Lord Panmure ought to have made up his titles on the entail, but he did not. Had he made up no title at all, the entail would have been lost by the negative prescription. The positive prescription is a defence equally clear.

MONBODDO. The case of M'Kerston was very strong; for *there* the father had actually reserved to himself the power of making an entail; and yet only two judges (Elchies and Kilkerran, as the President told me,) dissented from the judgment.

ALVA seemed to think that there were specialties in this case, capable of taking it out of the general rule.

KENNET. The cases of M'Kerston, Kirkness, &c. ought to fix the rule for ever.

HAILES. Much has been said of *non valens agere*; but the truth is, that Baron Maule was *non valens agere*, and *that* is no defence known in the law of Scotland.

BRAXFIELD. Lord Panmure got free of the entail both by the negative and the positive prescription. If he was under no obligation, there was no need of prescription: but, if he was under an obligation, he has got free of it; for

there has been unlimited property, by charter, sasine, and possession, for upwards of forty years. As to the question, "Whether Lord Panmure could bind himself?"—that question does not occur here, for Baron Maule was a *party*; and I deny that, at the distance of forty or fifty years, any one is at liberty to inquire whether Baron Maule had an interest or not. He may have had twenty interests, of which we can know nothing at present. When I see two men joining in a deed, I consider them both as contracting parties.

GARDENSTON. Baron Maule, being the younger man, rather chose to take the chance of a greater estate than the certainty of a smaller, and so he did not insist that Lord Panmure's obligation should be executed.

MONBODDO. I have no notion of a man coming under an obligation to himself or his heir, who is *eadem persona* with himself.

PRESIDENT. I agree that there was a *jus quæsitum* to the heirs of entail, in consequence of the delivery. Negative prescription does run, but not positive. Had Lord Panmure kept the deed in his possession, it might have run; but he delivered it, and he did not possess upon any title inconsistent with the entail.

KENNET. If Lord Panmure had never done any thing contrary to the deed as to Balumbie, it would have been a subsisting deed, not only after forty, but after eighty years.

MONBODDO. If this deed had been kept in the possession of Lord Panmure, prescription would not have run against it; but the last clause of the deed determines that it was to take place on Lord Panmure's succeeding to the estate of Kelly. It was delivered, and so prescription began to run from the time of his succeeding to Kelly; and it has run.

ALVA. Consolidation would not do by itself; but, joined to all the circumstances, it is sufficient to put an end to the leases. [He changed at the vote.]

MONBODDO. If Lord Panmure had had only one right to the leases, there would have been difficulty; but he had two rights, one absolute, the other fettered, and therefore he must be presumed to have possessed on the unlimited right; and so indeed Lord Panmure has explained himself.

BRAXFIELD. The question as to leases is the most difficult of the whole. I never saw any tailie of a lease but those in this cause. The statute 1685 does not relate to subjects incapable of infeftment. Besides, a lease is a personal right; and the right itself is qualified, so that it is neither the better nor the worse for recording: but it is the subject of a settlement, and, if the granter fences it with prohibitory clauses, these will bar subsequent heirs from alienating. A lease is a proper subject of prescription; so that, if a man possesses for forty years, it would not hurt him, although it were to be shown that the lease flowed *a non habente*; but my doubt is as to prescription. Positive prescription does not run when there is nothing to be got *adjectione domini*; and, as to the negative prescription, it does not appear to me that there was room for an action until there was a contravention of the deed, by Lord Panmure doing something inconsistent with it. The assignation here is a complete deed, and the first in succession. What action could there have been brought to interrupt, at the instance of the heir of entail, as long as Lord Panmure lived? It would be a solecism in law to say that a right could be lost by prescription, while no action could be brought to interrupt. It has been said that the heir

might have brought an action for registration. I deny that. This is not a deed which ought to go to the register. Besides, registration does not prevent prescription. It is said that it was meant by the parties that all should go together. True; and this would have happened had the deeds 1730 been followed furth: but, if a man has lost one estate by his negligence, *that* is no reason for losing his another estate, when there was no negligence on his part.

PRESIDENT. I agree with what Lord Braxfield says as to prescription; and I admit that consolidation is not a proper expression: but I think that it was the intention of the parties to keep all the subjects together, and it would be hard to separate the two capital messuages from the rest of the estate for a long term of years. I incline to think that the right to the leases was absorbed in the *jus nobilius* of the estate. Lord Panmure made a settlement many years after he had got rid of the fetters of the entail. It would be strange that this personal right should rise up and overturn what he had done.

MONBODDO. *Non valens agere* is pleadable against positive prescription; but I think that *non valens agere* applies not here, for there lay an action for registering, at the instance of the heir, and *that* in terms of the leases themselves.

On the 1st March 1782, "The Lords preferred Mr William Ramsay to all the estates, excepting the leases, which they found Mr Maule, the heir-male, entitled to take up."

For Mr Maule, A. Ferguson, A. Wight, A. Crosbie. *Alt.* A. Elphinston, Ilay Campbell, Solicitor Murray.

[The state of the division on the question, as to the leases, was singular: the number of the Judges, by age, infirmities, and sickness, was reduced from fifteen to nine.]

For Mr Maule, Alva, Braxfield, Hailes. For Mr Ramsay, Monboddo, Ankerville, President.

*Non liquet*, Gardenston, Kennet, Westhall.

The newspapers were full of the learned and ingenious pleadings of the lawyers. But Lord Braxfield told me, that he never heard a cause worse pleaded; and that, of the lawyers who did any thing more than open the cause, Mr Ilay Campbell was the only one who spoke with judgment and propriety. Mr Solicitor claimed the reply, "lest he should disparage his office by yielding that charge to Mr Ilay Campbell." The President said, that, if he had known nothing of the cause except what he heard from Mr Solicitor, he would have given judgment in every article against the solicitor's client.

---