

second point, I am against the interlocutor. An English creditor may either claim under the statute, or let it alone; but this only respects English subjects, and it will not hinder him from attaching subjects in Scotland. Perhaps the assignees may repeat from him what he has already recovered in England.

COVINGTON. If the first point is settled, I must be of the opinion of the interlocutor. As to the *second*; if a commission of bankruptcy is equal to an assignation by the bankrupt, every one who accepts such assignation is bound by it, and cannot interfere.

On the 14th June 1776, "The Lords found that the assignees have a right of action;" adhering to their interlocutor, January 1776. But, as to the other point, they ordered memorials.

*Act. G. Ferguson. Alt. R. Sinclair. Rep. Hailes.  
Diss. as to the first point, Stonefield, Covington.*

*N.B.*—No memorials were given in; but the Court, having given judgment in the case *T. and T. Khone against Parish and Schreiber*, adhered to their interlocutor in the case of *Vazie against Glover*.

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1776. *February 21 and July 5.* JOHN ROBERTSON *against* JANET ROBERTSON and OTHERS.

#### PRESCRIPTION.

How far an action, brought by a person in his own right, will interrupt the negative prescription of the same claim, which might have been competent to him in the right of another.

[*Fac. Coll. VII. 237; Dict., Appendix I.—Prescription, No. 2.*]

*February 21.*—MONBODDO. If it were not for the marriage-contract, 1725, I should have great doubt. That contract was a virtual assignation; and from that time the brother stood in the sister's right. Were it not for that, the right would have remained in Grizel, and would have prescribed.

KAIMES. John Robertson thought that he had right to the 1000 merks, though unjustly: he raised an action within the 40 years. Suppose that his sister had had a right to part of the 1000 merks, as there was but one debt, would not Robertson's action have interrupted prescription as to the whole, just as an adjudication led by a putative heir will accresce to the true heir? The same also is the case as to inhibitions.

GARDENSTON. The discharge, 1725, imported an obligation to grant an assignation and a virtual right.

HAILES. The opinions given seem to affect a necessary, though not favoured part of our law, that of negative prescription. How can the negative prescription, as to Grizel, be interrupted by a claim made by John, which not only

makes no mention of Grizel's claim, but is utterly inconsistent and incompatible with it.

PRESIDENT. The original demand was not made till after 38 years. There was not a word of Grizel's claim for 48 years. I think that a claim so antiquated ought not to be listened to.

GARDENSTON. *Post tantum temporis* it must be presumed that John Robertson, the brother, got funds from his father in satisfaction.

On the 21st February 1776, "The Lords repelled the defence of the negative prescription;" adhering to Lord Alva's interlocutor.

*Act.* W. Nairne. *Alt.* A. Elphinstone.

*Diss.* Gardenston, Hailes, President.

July 5.—GARDENSTON. The interlocutor, if it stands, will hurt a valuable part of our law—that of negative prescription. I cannot comprehend how a party, who has no right at all, can, by pursuing, keep open the right of another. Neither can I comprehend how a party can gain any thing by obtaining an assignation to a prescribed debt.

HAILES. To this I have to add, that the action at John Robertson's instance could not be a *document taken* on Grizel's claim; for his claim went upon the supposition that Grizel had none. He claimed the whole of the 1000 merks. She claims the third of that sum: so that *his* claim is inconsistent with *hers*; and, consequently, a document taken on the one can be no document on the other.

COVINGTON. In a late question between the Earl of Home and certain creditors of the family, the Court gave a different judgment; and they found that a man, having right to the half of a debt, and, without any authority, entering a claim before the Commissioners of Inquiry for the whole of the debt, interrupted prescription as to the whole, although the parties interested in the other half did not claim within the years of prescription.

PRESIDENT. That case was different; for the claim of the one party was consistent with the rights of the other. The debt was one, though the parties might, on payment, have divided the subject held *pro indiviso*; and it came to be considered as if a mandate had been given from the beginning, by reason of ratihabition.

On the 5th July 1776, "The Lords sustained the defence of prescription as to the third claimed;" altering their interlocutor of 21st February 1776.

*Act.* C. M'Cormick. *Alt.* A. Elphinstone.

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