1758. *March* 3. ANDREW ANDERSON *against* ARTHUR NASMYTH.

No 9.
An expired adjudication, with infeftment, will be cut off by the negative prescription, if no possession has followed.

IN a competition upon a mails and duties, Andrew Anderson founded on an adjudication in the year 1682, of the common subject, on which infeftment had immediately followed, but no possession at any time. Arthur Nasmyth founded on an adjudication of the same subject in the year 1690, on which infeftment followed in the year 1745, and possession.

Objected by Nasmyth to Anderson's title, That it was lost by the negative prescription, no possession having followed on his adjudication.

Answered for Anderson; An expired adjudication with infeftment, though no possession has followed upon it, cannot be lost by the negative prescription, unless another has acquired by the positive. Adjudication is not merely a right in security, but is a right of property, redeemable within the legal, but irredeemable after; and it is a rule of law, that a right of property cannot be lost *non utendo*. This has never been called in question since the decision 24th December 1728, Presbytery of Perth against the Magistrates, (See APPENDIX): And, upon the footing of this rule, Anderson's adjudication is safe.

Replied for Nasmyth, An adjudication in itself is merely a diligence of law. Within the legal, it is obviously, although infeftment follows upon it, no more than a security. Whatever apprisings may have been in their origin, it has been the continual aim of courts and of parliaments to soften their severities, and in many events to limit them to be securities, when in strict law they might have been entitled to be deemed rights of property. The presumption of law then is, that as adjudications within the legal are rights in security, so even after the legal is expired, they continue to be rights in security, and remain of their former nature, unless the party who is entitled by particular laws to convert them into rights of property shews his intention to take advantage of those laws by some overt act. The law of itself does not in a moment transmute what within the legal was a right of security into a right of property, when the legal is expired; but it allows the creditor to make this transmutation. It presumes the diligence of adjudication to retain still its primary nature; but it allows this presumption to be thwarted by the creditor; and if he neglects to do so for forty years, he loses the right to do so at all.

The general strain of our law on this subject proceeds on the same plan. After the legal, a man may either accept the irredeemable property of the lands *in solutum* of his debt, by shewing his intention to do so; or he may repudiate the property, and hold his apprising only as a security for the debt. So it is laid down by Lord Stair, lib. 3. tit. 2. § 30, who says, 'That infeftment upon 'an adjudication remains but as a security, which the appriser may renounce, 'or make use of other securities till he be satisfied.—The like, though after the 'legal was expired.' And so the Lords decided, December 7th 1631, Scarlet against Paterson, No 17. p. 218, where it was found, That an expired appris-

ing hindered not the apprisers to pursue the heir of the debtor for the same debt; and that, notwithstanding thereof, the creditor might comprise the heir's lands, and poind his goods for satisfaction. And Lord Stair, in the above passage, taking notice of this decision, observes specially, 'But here the appriser had attained no possession.' From which it is plain, Lord Stair understands, that possession is the criterion to constitute the adjudication a right of property or a right in security: For if the appriser had in that case attained possession, he must have kept the lands apprised in satisfaction *pro tanto* of his debt, and could neither have comprised the heir's lands nor poinded his goods; whereas, by not entering to possession, and waving his privilege to take the property, he kept up his adjudication only as a security and burden upon the property. No 9.

From this reasoning, the consequence is direct, that the adjudication in question being only a security or burden, is, like other securities and burdens, subject to the negative prescription.

2*dly*, The rule established in the case of Perth does not apply to the present case. When a man pleads the negative prescription, who has no title in him but merely that of possession, who can plead no right but *possideo quia possideo*, he will not be heard; and on this principle the decision of the Town of Perth went. But when one can shew a right to the subject, he may then plead the negative prescription. And in the present case, Nasmyth having adjudged the right of reversion competent to the original debtor, and got the possession, may plead every right which his author could have pleaded.

"THE LORDS found Anderson's adjudication prescribed."

For Anderson, *Arch. Murray, Lockhart.* Alt. *J. Dalrymple.*

J. D. *Fol. Dic. v.* 4. *p.* 88. *Fac. Col. No* 105. *p.* 186.

1758. *June* 16.

The MANAGERS of KING JAMES VI.'s HOSPITAL in PERTH, *against* The MAGISTRATES and TOWN COUNCIL of PERTH.

No 10.
The managers of an hospital had for many years neglected to take up a fund due to them by a burgh. The magistrates had, however, annually taken credit for the sum as due to the hospital. In a declarator of the right

BY the most ancient charters of the borough of Perth, there was a feu-duty of L. 80 Sterling payable to the Crown.

Before the Reformation, L. 69 : 8 : 8d. Sterling, part of the said feu-duty, was granted in alms by the Crown to the prior and convent of St Andrew's, and other religious houses.

After the Reformation, King James VI. by a charter dated 9th August 1569, granted "to the poor members of Jesus Christ residing within the town and territory of Perth," all lands, tenements, revenues, &c. which had belonged to the Carthusian friars, the Dominican friars, and other religious houses within the said town and territory; "as also rents or revenues whatever, which had been paid