On the 27th June 1771, "the Lords ordained the name of Mr Bruce to be expunged;" adhering to interlocutor 14th February 1771.
*Act.* R. M'Queen. *Alt.* D. Rae.

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1771. *June 27.* JOHN SINCLAIR of Freswick *against* SIR JOHN SINCLAIR of May.

PRESCRIPTION—TEINDS.

**An heritable right to Teinds, not acquired by the Positive Prescription by possession upon tacks only.**

[*Fac. Col. V.* 269; *Dict.* 10,836.]

KAIMES. I am not fond of the precept of *clare constat*, 1662; it bears a rasure, vitiation, or superinduction: but I must not determine merely on my liking or disliking. It is certain that the Bishop of Caithness was not titular: we are not to presume that he would confer a right which he had not. The sense of the precept, when freed of the superinduction, is thus:—"I give you such *decimæ garbales* as are *inclusæ et nunquam separatæ*." It lies upon the holder of the precept to show that more was understood. I do not see possession upon the precept 1662: The very idea of possessing upon it, was relinquished till the means of proving the contrary was cut off. I doubt of prescription at any rate: the estate was sold in 1694, upon the supposition that there was no right to the teinds. The apprisings containing a right to the teinds were not the cardinal rights of the estate.

AUCHINLECK. I thought possession was very dark, but I had a bias for the proprietor against the titular. *Now* we are relieved. The exception of Byrelandlorne is plainly a superinduction. The most I can do for a vitiated deed, is to hold the superinduction *pro non adjecto*, and when I do so, I see no difficulty in the clause, which Lord Kaimes has rightly explained; at any rate, I see no possession.

HAILES. I see the force of the argument for this interpretation of the precept 1662. I cannot explain it in another sense, when the after conduct of parties is considered: if the clause, without the manifest superinduction, could not aid May. I cannot allow him to draw an argument for the superinduction in his own favour; this would be allowing a party to profit by the defect in the deed on which he claims. The sale 1694 satisfies me that the parties concerned either conceived the precept 1662 as insufficient for the purpose of establishing an heritable right to the teinds, or otherways informal; for the teinds, in 1694, were supposed not to have belonged to May. I have no doubt that the sale 1694 was held to be the cardinal right on which the family of May continued to possess, for it was a much better right than the collateral clampers of adjudication. But what puts the matter beyond doubt with me, is the

conduct of Sir James Sinclair. In all the various processes, he never so much as insinuated any heritable right. On the contrary, he pleaded on a tack of teinds, and a prorogation of the possession thereon *per tacitam relocationem.* So late as 1722, he expressly averred, that the tack had been produced by him, and borrowed up by his doer, John Dowall, then alive. Can I believe that his right was heritable, when he himself averred it to be temporary? or, can I suppose that he changed the *causa possessionis* when he himself affirmed he had not?

Monboddo. I am clear of opinion to adhere. *Here* is a good title of possession as proprietor. As to this vitiation of which so much is said, were it by the person to whom the precept was granted, I would give the deed no credit; but the clause is stronger in his favour without the exception superinduced, so that is of no benefit to the grantee. In matters of prescription, *nemo potest mutare causam possessionis suæ* does not apply as to the prescriptibility of parsonage teinds. Had the parson continued parson, I should think them not prescriptible; but the teinds went out of the beneficed person in 1618, by reason of the decreet of modification, which rendered him a stipendiary.

Alemore. Parsonage teinds were not prescriptible till 1693. The teinds of the regular clergy were soon carried off, but the teinds of the secular clergy were never taken off from the church. I do not think that the modification in 1618 is of any consequence: In those days the patron, when he presented, took care to secure himself in a tack of teinds from the presentee, at an elusory tack-duty; this made it necessary to allow an augmentation to parsons thus deprived of the means of living: Nevertheless, the titularity was not thereby destroyed. The parson, at the expiry of the tack, had still the right of the teinds in him; for, if *he* had not, *who* had? Thus matters continued till 1693. The construction put upon the precept is improbable: the Bishop could not truly say that the teinds were *decimæ inclusæ.* I see a vitiation. I do the deed no injury, when I suppose that it is agreeable to truth. Here, then, is no title, neither is there possession. Supposing a title, May has ascribed his possession to a tack: Must Freswich, at this distance of time, bring a proof that May acted properly? Or, can May say, "I have told you a story for 30 years together, I did *not* possess upon the tack: prescription on an heritable right has now run, and *you* must prove possession of the tack."

Pitfour. Were all statutes but one to be abolished, the statute 1617 would probably be the *one* preserved. The question is not, Whether 40 years can secure the lieges? but, Whether 500 years can? for, if you lay aside the statute 1617, 500 years are as unavoidable as 40. No inquiry as to the legality of the right is competent after possession for 40 years, upon a proper title of prescription. The rules of the canon law, nothing: our own acts of annexation are stronger than the canon law; and yet possession upon a title will be good against them. A conveyance by a minor would be good after 40 years. The rule—*quod nemo potest mutare causam possessionis,* is just as long as the *causa possessionis* is *ens reale.* A wadset right, engrossed in a letter of wadset, is good, as long as the wadsetter has occasion to use it; but, if he has once taken a charter and infeftment from another, *that,* with 40 years' possession, will be good against the reverser in an action of reduction and improbation. Prescription is the transmissibility of an unlawful right by a lawful way. To suppose an

original *bona fides* is incongruous. An alteration of an entail always begins with fraud. When there is any flaw in the title, it is another case. With respect to argument, that the minister could not have drawn his stipend unless May had paid, the answer is good,—that, independent of May's lands, the fund of payment was sufficient. When May says that he possessed upon tacks, I will not believe him; for I will not presume that a man possessed his lands while another possessed the teinds: *this* would be contrary to the legal presumption. Here is a rasure, but no vitiation of the precept 1662; for the rasure was made before the deed was signed. By the sale 1694, all titles were conveyed to the purchaser; and, consequently, the charter of apprising was also a title, and it was a prescriptive title of the teinds.

ELLIOCK. I would be sorry to impinge upon the statute of 1617. Were there evidence that May had possessed for 40 years without challenge, the defence would perhaps be good. The argument as to 1617 does not apply. There was a parsonage: the *initium possessionis* was a tack which did not expire till 1707. In 1708, the parson, for such Freswick was become, challenged May's right. May did not plead on any heritable right, but on his tack. May he, after 30 years, go back to his heritable right? No. The answer is good,—You, by acknowledging your possession on the tack, have put it out of my power to prove your possession, especially as the means of proof must be in your own hands; and you will not depone and exhibit without an agent at your elbow.

KENNET. When the question is as to the nature of teinds, I will inquire into the right of teinds. The bishop had no right, neither had the family of May; nothing but *decimæ inclusæ* granted, that is only the Piper's Croft: so there is no title here, neither is there 40 years' possession. May could not change his possession, nor did he change it.

JUSTICE-CLERK. After the new light thrown upon the cause, I can have no doubt. I do not touch, nor mean to touch upon the salutary law of prescription; but I hold that, in interpreting charters, we must follow the same rules as in interpreting any other deed. Possession upon tack was admitted judicially, and mankind must be bound by judicial deeds.

PRESIDENT. I wish that the argument from the favour of the statute 1617 had been omitted; for I am as fond of the statute 1617 as any one can be, and it is in no danger from a judgment in this case. Forty years' heritable title is not all which that statute requires: *Possession* also is requisite. It is plain that the bishop had no right, and that there was no possession on the heritable right. Neither do I like the vitiation in the precept 1662.

On the 27th June 1771, the Lords found that the defender has produced no heritable right to the teinds of his lands in question; and therefore found him liable to the pursuer for those teinds; adhering to interlocutor 18th January 1769, altering interlocutor 16th June 1769.

*Act.* W. M'Kenzie, A. Lockhart. *Alt.* D. Rae, R. M'Queen.

*Reporter*, Stonefield.

*Diss.* Pitfour, Monboddo.

After determination, Lord Barjarg said, that Pitfour had galloped away upon his hobby horse, the Act 1617. Hailes said, that Pitfour regarded nothing in that statute but the sheep's-skin part of it, laying possession out of the idea.