

1780. *February 16, and December 20.* ROBERT MANSON SINCLAIR *against*
JOHN SINCLAIR of Freswick.

IMPROBATION.

Title to exclude.

[*Fac. Coll. VIII. 122; Dict. 6723.*]

KENNET. If the heir of Sir William Sinclair had been the party here, the objection of an exclusive title might have been made; but it cannot be made by Freswick.

BRAXFIELD. This case has been assimilated to that of Drum, but the resemblance is not just; for *there* all the deeds founded on by Lord Aberdeen were concluded against, and none of them had been sanctified by positive prescription. This case rather falls to be assimilated to a later case of Sir Allan M'Lean and the Duke of Argyle. All deeds in the possession of the Duke of Argyle were called for: the Duke produced a charter and infeftment, and proved possession for 40 years, and the Court found this sufficient to exclude. In the present case, there is a charter and infeftment, as far back as 1722; Freswick stands in the right of it, and he and his authors have possessed. He is entitled to conjoin his own possession with that of his author. The action brought by M'Leod of Geanies, in 1728, will not vary the case: it related to different lands, and no action can go farther than the interest of the party concerned. It is *jus tertii* for the reverser to plead upon it. Latheron must either repudiate the transaction 1751, or must hold by it. If he repudiates it, then Freswick may avail himself of all rights in his person.

COVINGTON. If the deed challenged could never exclude, then there will be no such thing as an exclusive title; for a pursuer may easily object to all deeds.

KAIMES. Here is a title of prescription. Latheron may insist, however, for full implement of his bargain in 1751.

JUSTICE-CLERK. Many circumstances of fraud are charged here. Had Freswick produced a prescriptive title unconnected with the heir, his case would have been the same as that of the Duke of Argyle. The nature of Geanies's process shows what sort of a title Dunbeath's was. Freswick was, to a certain extent, trustee for Latheron, acting under double titles from Dunbeath and Latheron. I cannot think that he was entitled to plead prescription.

MONBODDO. I pay no regard to the process at the instance of Geanies: If the deed 1751 is considered as a trust-deed, Freswick cannot avail himself of the right acquired from the family of Dunbeath: but the difficulty is, that *here* there is both a *trust* and a *purchase*.

On the 16th February 1780, "The Lords found that Freswick had produced sufficient to exclude;" altering the interlocutor of Lord Gardenston.

Act. A. Wight, A. Crosbie. *Alt.* Ilay Campbell.

Diss. Gardenston, Kennet, Hailes, Westhall, Justice-clerk (in the chair.)

Non liquet, Alva.

December 20.—COVINGTON. I incline to alter the interlocutor in consequence of the proceedings in the process with Geanies. That process put Sir William Sinclair out of the question: Freswick therefore must have begun to possess on his own right, which right is not secured by prescription. Another interruption was by the process which Freswick himself brought on his trust-bond.

[Mr Ilay Campbell, for Freswick, denied that there was any such process.]

JUSTICE-CLERK. The evidence which arises from the proceedings in this case of Geanies, is sufficient to convince the mind of Judges that Sinclair of Dunbeath was merely an incumbrancer. If a separate title, unconnected with *that* challenged, could be produced, it might do, but there is no such thing.

BRAXFIELD. Sinclair of Freswick entered into a bargain with Latheron for the purchase of the estate: he was bound to bring Dunbeath to account, that Latheron might get payment of the stipulated price. If Freswick had paid the L.3000 over the table, there would have been no farther obligation on him to call Dunbeath to account: had Dunbeath continued in possession, his right would have been good by positive prescription. Freswick made a transaction with Dunbeath, and he is entitled to connect Dunbeath's possession with his own. What have we here as an interruption?—Geanies's process. But a reduction and improbation can go no farther than the interest of the pursuer. Geanies has still warrandice on the estate of Dunbeath, but *that* will not hinder a third party to acquire right by prescription. The next interruption is an action brought against Dunbeath by Freswick. It is odd if a process, brought by Freswick to secure himself, should have the effect of cutting down his right: besides, the existence of that process is denied. If it went no farther than an executed summons, after the lapse of seven years, it is good for nothing.

PRESIDENT. I do not lay this cause on an interruption of prescription. I think that no prescription can take place in this cause. The question at present is, not as to merits, but merely as to the title to exclude. When there is a doubt as to possession, charter and infestment do not exclude, because, without clear possession, the title is not clear. In the case of *Cumming of Pettulie* against *Abercrombie of Tulliebodie*, the Court allowed possession to be proved, at the same time that they assigned a day. The transaction between Freswick and Dunbeath was an unfair transaction. It is impossible that a purchase not made *bona fide*, can be a bar to the present action.

KAIMES. How can the Court sustain Dunbeath's title as good, which it knows, from record, to be good for nothing.

On the 20th December 1780, "The Lords found that Freswick has not produced sufficient to exclude;" altering their own interlocutor, 16th February 1780, and adhering to the interlocutor of Lord Gardenston.

Act. A. Crosbie. *Alt.* Ilay Campbell.

Diss. Stonefield, Braxfield.