

thod of making up titles to an estate known and established in the law of Scotland ; that it vests an active right in the truster, and transmits to his heirs." And to this decision the Lords adhered.

No. 35.

Observed on the bench : Mr Hepburn did not insist to be allowed to redeem upon payment of the sums in the adjudication ; neither, in the present case, was it competent, as the legal was expired ; and the equity of redemption could not operate in his favour against the representatives of the apparent heir.

Lord Ordinary, *Monboddo*.Act. *Geo. Wallace*.Alt. *Geo. Buchan Hepburn*.

C.

*Fol. Dic. v. 4. p. 276. Fac. Coll. No. 76. p. 130.*

1789. December 13.

ELIZABETH and JEAN SINCLAIR against ROBERT SINCLAIR.

THE lands of Duncansbay, Warse, and others, were purchased in the year 1741, by William Sinclair of Freswick, from Malcolm Groat, the apparent heir, who became bound to make up a proper feudal title in his person, and then to convey. The minute of sale also contained an assignation to the maills and duties ; and " for the farther security of the purchaser," a precept of sasine was inserted, and Freswick was immediately infeft.

After this, however, several creditors of Malcolm Groat, and among others Mr. Sinclair of Freswick himself, led adjudications against the lands. These adjudications were preceded by special charges. And the whole being vested in Mr. Sinclair, he, in 1755, obtained a decret of declarator of the expiration of the legal. Mr. Sinclair died in 1769, after having conveyed to his only son John Sinclair the whole debts due to him, and the adjudications following on them.

Immediately after his father's death, John Sinclair obtained from Malcolm Groat, from whom the lands of Duncansbay, &c. had been purchased, a new conveyance, which contained, as formerly, an obligation to make up titles. This conveyance was accompanied with a precept of sasine, but no infeftment followed. Mr. Sinclair also expedite a special service as heir to his father for carrying the estate of Freswick, and was infeft. In 1775, he executed an entail of his whole estates, including the lands which had been purchased from Malcolm Groat, in favour of Robert Sinclair, his cousin, to the exclusion of Elizabeth and Jean Sinclairs, his sisters, and heirs at law.

John Sinclair, the maker of this settlement, having died in 1784, it was brought under challenge, so far as related to the lands of Duncansbay, &c. by his sisters. In support of this challenge, it was

Pleaded : William Sinclair having been infeft in the lands purchased by him from Malcolm Groat, it was necessary for authorising his son to make any alteration in the succession, that they should be duly transmitted to him by service and infeftment.

No. 36.

A service once sufficient, not rendered invalid by a supervening alteration in the state of the right.

No. 36.

It appears to be of no importance, that the person from whom William Sinclair's infeftment was derived, was merely an apparent heir unentered. Until the infeftment was set aside as flowing *a non habente*, it was the title by which the succession of the lands was necessarily regulated.

Even although the investitures in the person of William Sinclair were to be considered as inept, they would have been at any time rendered complete by the disponent's making up titles, agreeably to the rule, that *jus superveniens auctori, accrescit successori*. At any rate, every objection to their validity was removed before John Sinclair the son's death, in virtue of the positive prescription; and thus the question must be viewed in the same light as if they had been originally unexceptionable.

It may perhaps be said, that, in consequence of the special service completed for the purpose of carrying the lands of Freswick, it being understood to comprehend a general service of the same kind, the other rights affecting the lands of Duncansbay, &c. consisting of the adjudications, followed with a declarator of expiration of the legal, were properly transmitted from William Sinclair to his son, so as to authorise a disposal of them. This, however, would be altogether erroneous. The minute of sale, with the infeftment on it, being the *jus nobilius*, necessarily absorbed and carried along with it all the subordinate rights. Indeed, had those rights been of the same nature, the priority of the minute of sale would have given it the ascendancy over the rest, an innovation of the possession never being presumed.

Very singular consequences might ensue, if a different determination were to be given. The adjudications being merely incumbrances on the property, may be liable to many objections; or, if the decret of expiration could be set aside, they might be cleared off by possession. Were an action therefore to be brought by the person against whom the adjudications were led, or by his creditors, the heir of the infeftment in favour of old Freswick would alone be entitled to plead the positive prescription, by which only such an action could be precluded; while the institute in the entail executed by his son, though preferred to the heirs of old Freswick, would be obliged to surrender the lands to those whose right was inferior to theirs. Our law cannot sanction proceedings so obviously inconsistent and absurd; Erskine, B. 3. Tit. 8. § 47.

Answered: The infeftment in favour of old Freswick, having been derived from one who was not owner of the lands, was an insufficient title of property; and on this footing, unless it could be shown that the seller had afterwards completed his own right, matters must have stood at the time when young Freswick succeeded to his father. The only voluntary right then belonging to old Freswick, being no more than an obligation to make up feudal titles, and to convey the lands, might, as well as the adjudications, to which indeed young Freswick had right by special conveyance, be transmitted by a general service, or by a special service, as including a general one of the same kind.

If, therefore, the proper methods were taken for carrying to John Sinclair the rights belonging to his father as they stood at the time, it is of no consequence

that, by the aid of prescription, a more complete and unexceptionable title of property has been since established. It never could be intended by this statutory privilege, to render invalid the rights of those in whose favour it had been introduced. It must be in their power either to avail themselves of it or not, as is most convenient for them; and it is evident from the whole proceedings of old Freswick and his son, that their purpose was to rest on the other titles in their persons, which were liable to no objection. No. 36.

The rules which have been mentioned for explaining the nature of the possession held by one who has in his person different titles to possess, cannot have any weight in such a case as this. It is true, that in general a man having attained possession under one title, cannot afterwards impute it to another, in a question with him from whom his possession flowed. But, in a competition with every other party, it is a fixed point, that one having in his person many titles to possess, may ascribe his possession to the one which is most beneficial to himself; and in questions of succession, it is the will of the possessor, if expressed with sufficient clearness, which must ever be the governing rule; See No. 89. p. 10803. *voce* PRESCRIPTION.

The Lord Ordinary "repelled the reasons of reduction."

And, after advising a reclaiming petition for the pursuers, which was followed with answers, the Lords unanimously adhered to that judgment.

Ordinary, *Lord Dreghorn.* Act. *Dean of Faculty.* Alt. *Maconochie.* Clerk, *Mitchelson.*  
G. *Fol. Dic. v. 4. p. 275. Fac. Coll. No. 97. p. 175.*

Service of Lands holding of the Prince; See PRINCE of SCOTLAND.

See REPRESENTATION.

See APPENDIX.