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be secure from propaling the titles to their estate, to any person whose predecessors, at whatever distance of time, were possessed of the estate. *3tio*, The defenders cannot discover upon what ground this pretended form of process is founded; the process itself is not grounded on any statute that has given it this form; and as it must be allowed a good defence against producing their titles, that the estate is their property, they must be allowed the opportunity of proving the same; for that a defence should be good, and yet the party not allowed to prove it, seems to be a contradiction.

THE LORDS allowed the defenders to prove their possession for 40 years backward, &c.

*C. Home. No 170. p. 286.*

1760. December 23.

JOHN GRANT younger of Rôthmaise, and ROBERT FLEMING, great-grandson of John Fleming of Board, *against* LADY CEMENTINA FLEMING, and CHARLES ELPHINSTON, Esq; her Husband.

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Not competent, in a reduction-improbation, to allow a proof of possession, in order to found prescription upon titles produced, as sufficient to exclude, after acts have been extracted for the first and second terms.

UPON the 24th of August 1374, King Robert II. confirmed a charter granted by Robert Lord Erskine, to Patrick Fleming, of the lands of Board, and others, to be held *de Domino Baronix de Lenzie, in feodo et hereditate*. These lands were possessed by Patrick's descendants, and were in 1583, disposed by John Fleming of Board, to John Fleming then younger of Board, his eldest son.

John Grant younger of Rothmaise, having got a trust-bond from Robert Fleming, great-grandson of the said John Fleming younger of Board, charged him to enter heir to his predecessors in these lands; and in the year 1741, obtained a decret of adjudication; upon which title a process of reduction, improbation, and declarator, was brought against Lady Clementina Fleming and her Husband, in order to set aside any claim they might pretend to the property.

In this process, days were assigned to the defenders for satisfying the production, and acts for the first and second terms were extracted; but when certification was craved for not-production on the second act, they produced certain writs vesting the barony of Lenzie in the person of Lady Clementina; and *alleged*, That although the lands of Board were not particularly mentioned in these writs; yet as she and her predecessors had possessed them for more than 40 years, as part of the barony of Lenzie, they had acquired right to them by the positive prescription; and had therefore produced sufficient to exclude the pursuers.

*Objected* by the pursuers, *1mo*, It is not competent to a defender, in a process of this nature, to resort to the plea of an exclusive right, after the pursuer's title has been sustained, acts for the first and second terms extracted, and the

time assigned for satisfying the production is elapsed. The taking a day to produce, imports a contract judicially entered into between the pursuer and defender, whereby the latter solemnly engages to produce the whole writs called for, or to allow them to be reduced as forged; and after both terms are elapsed certification must be granted *contra non producta*.

2do, The writs produced are insufficient, without a proof of possession; whereas a production to exclude should be sufficient of itself, without the aid of parole evidence, which ought not to be allowed until a full production is made.

3tio, Possession for the years of prescription upon the rights produced, would not establish a title to the property of the lands in question, exclusive of the pursuer's. For though the infeftment of the superior, containing these lands, would be sufficient against all others; yet it will not exclude the vassal; and before any prescription can run against him, the superior must shew some title by which the property might have been consolidated with the superiority. Could the defenders produce a disposition, or a resignation *ad remanentiam*, of these lands, even though granted by one who was not truly the vassal, prescription might have taken place; but the grants of the superiority, in which the lands fall to be narrated, will by no means afford any title for prescription.

“THE LORDS found it incompetent to allow a proof of possession, in order to found prescription, *in hoc statu*.”

Act. Rac.

Alt. Hamilton-Gordon.

I. C.

Fol. Dic. v. 3. p. 311. Fac. Col. No 264. p. 490.

1781. July 4.

ROBERT MANSON-SINCLAIR of Bridge-end *against* JOHN SINCLAIR of Freswick.

THE estates of Latheron and Dunbeath formerly belonged to a younger branch of the family of Mey; but, in the year 1720, the last mentioned estate was carried off by an adjudication. In the 1751, James Sinclair of Latheron, the apparent heir of Dunbeath, disposed his right to said estate in favour of William Sinclair of Freswick, who undertook to insist in a reduction of the debts and diligences affecting it, or, at least, to call Sir William Sinclair, the son of the original adjudger, to account for his own and his father's intromissions; and engaged to pay Latheron whatever balance should remain of L. 3000 Sterling, after clearing off the debts with which the estate was burdened.

Freswick, having completed his title, by charging James to enter heir to his predecessors, and by leading an adjudication upon a trust-bond for the accumulated sum of L. 12,207 Sterling, raised a process of reduction, improbation, and declarator of extinction, against Sir William Sinclair. They afterwards, however, in the 1752, entered into a private transaction, in consequence of which, Sir William disposed to Freswick the estate of Dunbeath; and Fres-

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A title to exclude, produced by a defender, which the pursuer challenges on the head of fraud, found not to be effectual for the purpose intended.