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.* No 150.

2*do*, 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.

3*tio*, 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. *Rae.* 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.

No 151.
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.

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, disponed 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 disponed to Freswick the estate of Dunbeath; and Fres-

No 151. wick, on the other hand, besides taking the burden of certain debts affecting Sir William's other lands, procured him a discharge of all claims competent to Mr Sinclair of Latheron.

Upon James Sinclair's death, his son, in order to bring these transactions under challenge, granted a trust-bond for L. 15,000 Sterling to Mr Manson-Sinclair of Bridge-end, who, thereupon, obtained an adjudication against him as charged to enter heir to his predecessors; and raised a process of reduction, improbation, declarator, and payment, against the representatives both of Freswick and Sir William Sinclair.

Freswick produced two sets of titles; the one flowing from the original adjudger, in virtue of his transaction with Sir William Sinclair; and the other from the heir of the reverser, completed by the adjudication above mentioned. These, he contended, were sufficient to exclude the pursuer's title.

Pleaded for Bridge-end; When the defender, in a reduction, attempts to found an exclusive title upon some of the very deeds called for in the summons, it is incumbent on him to show, that these deeds could not possibly be set aside, even if the pursuer were admitted to challenge them. Upon this principle, in the case of Drum,* although the Court sustained a decree of sale, which is the most unexceptionable of all titles, as sufficient to exclude; yet, as it was alleged, that the sale had been carried on by fraud and collusion, the House of Lords reversed the judgment, and obliged the defenders to make a full production.

But here the defender has not so good a title to produce. The writings founded on give him indeed a seeming title to the estate. But, as the charge of fraud, if it had been made good, would have proved fatal to the decree of sale, in the case of Drum, so it may prove fatal to the defender's right to the estate of Dunbeath, that Sir William Sinclair, one of his authors, had no interest in it; and that the transactions with him and with James Sinclair, the other pretended author, were both of a fraudulent nature.

Answered for Freswick; It is not *hujus loci* to enquire, whether Sir William Sinclair's title to this estate was good or bad. His father's charter and infeftment were obtained in the 1722. Under that title the estate has ever since been possessed; and the right is now established by the positive prescription, beyond all possibility of challenge, except on the head of Falsehood; Erskine, b. 3. tit. 7. § 4.

Accordingly, it has been the practice of the Court in similar cases, to sustain possession for 40 years upon a charter and sasine, as sufficient to establish an exclusive title. So it was found in the case of Johnston *contra* Balfour, 7th June 1745, *voce* Prescription; and such was the judgment pronounced by the Court, and affirmed by the House of Lords, in the question between the Duke of Argyle and Sir Allan M'Lean, 29th June 1781, *voce* Tenor.

Neither does the decision in the case of Drum at all impugn this doctrine. It may be true, that a defender, founding an exclusive title upon a prior infeft-

* Irvine of Drum against Earl of Aberdeen, *voce* Tailzie.

ment, must be in a condition instantly to instruct that it is clearly preferable. No 151.
But this can never be the case with a posterior infeftment, unless secured by the positive prescription. The title founded on by the defenders in the case of Drum, was posterior to the pursuer's; and how unexceptionable soever it appeared *ex facie*, it could not *per se* afford an exclusive title, when challenged upon relevant grounds, within the years of prescription.

If then the title, which was in the person of Sir William Sinclair, is now secured by the positive prescription, the defender cannot be obliged to enter into any discussion of it. A challenge of fraud is now incompetent; and there is no room for enquiry, how, or in what manner the title was obtained; Bankton, b. 2. tit. 12. § 49. It is, therefore, to no purpose, for the pursuer to contend that the conveyance from Sir William Sinclair to Freswick was fraudulent. Such a plea is *jus tertii*. Had Sir William continued in possession, his right would have been established by prescription. The defender coming in his place, must be considered as continuing his possession; and any defect in the connection, however it might entitle Sir William or his heirs to a claim of restitution, cannot give the smallest aid to the pursuer's plea.

2*dly*, Although the disposition granted by James Sinclair in the 1751, on which the defender founds his other title, be certainly within the years of prescription, yet, it is competent for the pursuer to challenge it on the head of fraud, without making up titles as heir to his father, the granter. So it was found in the case of Douglas *contra* Somerville, 22d July 1713, *voce* TITLE TO PURSUE; and so it has been uniformly decided ever since.

Neither is the special charge against the pursuer to enter heir to his predecessors sufficient to supply this defect. It, no doubt, connects him with such of his predecessors as were infeft, and may give him a title to try the validity of infeftments and other rights flowing from them or their predecessors. But it does not, in any shape, connect him with his father, who himself never made up titles to the estate in question.

It is true, the pursuer's father granted a disposition to the late Freswick, and allowed the lands to be adjudged from him on a special charge. But that did not vest the right of the estate in him, except *fictione juris*, and to the effect of creating a title upon which deeds affecting the estate might be challenged. He thereby, no doubt, incurred a passive title; and, by the act 1695, c. 24. his onerous deeds were good against the estate. But the estate never was in his person. Had the pursuer, therefore, made up a voluntary title, even by *special service*, it would not have given him the smallest representation of his father, or enabled him to challenge any deeds granted by his father while in a state of apparency. This doctrine is confirmed by the decision, Gordon against Ogilvie, 17th February 1761, *voce* RES INTER ALIOS.

Replied for Bridge-end; The disposition from Sir William Sinclair to Freswick, was in consequence of the previous transaction between Freswick and Latheron. They were *partes ejusdem negotii*; and, if the previous transaction is

No 151. liable to be set aside on the head of fraud, the subsequent conveyance must be thereby affected, and is insufficient to connect the defender's possession with that of his author, so as to establish a prescriptive right in his person.

At any rate, the possession founded on has been broken by repeated interruptions. The barony of Dunbeath had been disponed in warrandice to Mr Macleod of Geanzies; and, in the 1728, Sir James Sinclair, as an adjudging creditor, endeavoured to set aside that right, by an action of reduction, improbation, and declarator. Geanzies brought a counter-action; and, in the 1740, prevailed in having it found, that Sir James's claims were extinguished, satisfied, and paid, by his intromissions, and, therefore, that he had no right to the estate of Dunbeath. It is true, this challenge was not made by the reverser or his heir. But, on the other hand, Sir James's right was not such as required that circumstance to establish a valid interruption. He was, *ab initio*, no more than an incumbrancer, whose title was extinguishable by his intromissions; and, therefore, a judgment at the suit of any third party, finding his right to be null, was sufficient to throw a *vitium reale* upon it, of which others having interest are entitled to avail themselves, and which, even *quoad* them, cannot be removed, without a new possession of forty years from the date of the judgment.

Further, the possession in question was again interrupted by the process of reduction, &c. at the instance of the late Freswick, and which produced the transaction between him and Sir William Sinclair. In that action Freswick, though assuming the character of an adjudger, was really the trustee of Latheron; and, therefore, it must be considered as a valid interruption of the prescription, on the part of Latheron.

2*dly*, It is not necessary that Latheron should make up titles to his father by a general service. The present action is not in his name, but in that of an adjudger. Such titles are daily sustained in the persons of actual creditors; and it makes no material difference, that the adjudication in question was intended to serve the injured representative of this family.

At any rate, Freswick's own title is of precisely the same nature. He cannot pretend to establish a feudal title, upon the disposition which his father obtained from the late Mr Sinclair in the 1751; but is obliged to have recourse to the adjudication led upon the trust-bond granted by Mr Sinclair. And, if an adjudication upon a trust-bond granted by an apparent heir is sufficient to vest a feudal title in the person of the adjudger, an adjudication upon a similar bond granted by the next apparent heir, will surely afford a sufficient title for challenging the former right, upon the head of fraud in the transaction which gave rise to it.

Duplied for Freswick; The circumstances founded on are not sufficient to interrupt the prescription. No action can go further than the right of the pursuer. Macleod of Geanzies had no interest, but to disencumber his own purchase, and to preserve his own warrandice on Dunbeath; and to that effect only could his action reach. A process interrupting prescription is like a reduction

capite inhibitionis; which, as to all others, except the inhibitor, is of no avail. *Res inter alios acta vel judicata aliis nec nocet nec prodest*; and this rule applies particularly to the interruption of prescription by a process; Bankton, B. 2. tit. 12. § 54. No 151.

In the other action founded on, the late Freswick sustained a twofold character. As purchaser of the estate from James Sinclair, he insisted for restitution of it; as trustee for Latheron, he called Sir William Sinclair to account, that as much as possible of the price might be saved for his constituent. In the one view, Freswick was the only person at all interested in the action; and no third party is entitled to found upon it, to any effect whatsoever. The other conclusion is altogether inconsistent with the present plea, and pre-supposes that James Sinclair had previously given up all title to that estate, of which his son was now claiming the property. At any rate, this action was never called in Court, and, therefore, has long ago lost its effect as to interrupting the course of prescription; act 1669 c. 10.

Observed on the Bench; This process of reduction-improbation is peculiar to the law of Scotland. The defender is thereby obliged to expose his title-deeds to the whole world. To exempt from this disagreeable necessity those who have, upon heritable titles, enjoyed estates for the course of the long prescription, without interruption, the equity of this Court has introduced the expedient of producing titles sufficient to exclude. But to give a defender a claim to this privilege, his titles and possession must be such as cannot admit of challenge. If otherwise, although his right may ultimately be found preferable to that of his competitor, the action must take its ordinary course.

THE COURT pronounced contrary interlocutors; but finally found, 'That the 'defender had made no production of rights sufficient to exclude the pursuer's 'titles to proceed in the reduction.'

Lord Ordinary, *Gardenston*. Act. *Wight*. Alt. *Ilay Campbell* et *Elphinston*. Clerk, *Menzies*.

L. *Fol. Dic. v. 3. p. 312. Fac. Col. No 72. p. 122.*