not touch the substance of the settlement, which did not limit this obligation to the use of the special fund. No doubt the obligation was only laid on the eldest son, because he only had funds out of which he could fulfil it. But the intention that he should clear off these debts and not keep them up, when he took £25,000 under the appointment, is plain enough.

The conclusion at which I should have been inclined to arrive had the summons been framed for that purpose would have been to have found that the defender is bound to pay off these debts, not in respect of his taking the £25,000 under the appointment, but in terms of the manifest intention of the granters of the entail. The conclusions for irritating the right of the defender are in any view untenable, and from these the defender ought to be assoilzied.

The Court adhered.

Counsel for Pursuer—Fraser—Trayner. Agents —Dewar & Deas, W.S.

Counsel for Defender — Dean of Faculty (Watson) — M'Laren — Balfour — Mackintosh. Agent—A. P. Purves, W.S.

Thursday, November 2.

SECOND DIVISION.

[Lord Young, Ordinary.

BURD *v.* CATTO AND OTHERS.

Act 1617, *c.* 13—*Vicennial Prescription of Retours—Singular Successor—Fraud.*

A party sought to reduce a retour after the lapse of 57 years, on the ground that it had been obtained by fraud, perjury, and subornation of perjury on the part of the person retoured, from whom the property had passed to a singular successor. Deducting the minorities of the pursuer and her father, the full period of the long prescription had not elapsed.—*Held* that the action was barred by the vicennial prescription.

This was an action of reduction, count, reckoning, and payment raised by Mrs Jessie Burd, wife of Antonio Rocca, confectioner, Perth, against Robert Catto, surgeon, Peterhead, and others. The pursuer concluded for reduction of (1) an extract decree of general service expede before the bailies of Aberdeen in favour of Peter Burd, dated 22d May 1819, and retoured in Chancery; (2) disposition and assignation by Peter Burd in favour of Patrick Kilgour, dated 6th October 1820; (3) instrument of sasine, dated 17th and recorded 23d October 1820, in favour of Patrick Kilgour. Further, the defenders were called upon to convey to the pursuer the property in Peterhead to which the retour applied, and to account for the rents thereof since 1816. The pursuer alleged that she was the great-granddaughter of John Burd, thread manufacturer, Peterhead, who died in 1792, and was proprietor of the subjects in question. John Burd left a will, dated 14th June 1791, and recorded 21st January 1793, b which, after providing a liferent to his wife, he divided his whole means equally among his seven children—James, Charles, Thomas, William, Margaret, Peter, and Benjamin. All these fiars survived the testator, and they obtained a charter of confirmation from the superiors of the subjects in question on 21st October 1797. Thomas Burd, the testator's third son, died about 1815, leaving, it was averred, two children--George, who was never married, and Thomas, the pursuer's father, who was born about 1802, married 18th March 1851, and died 17th February 1855. The pursuer, his only child, was born 24th May 1851. Peter Burd, the sixth son, on 22d May 1819 obtained decrees of general service of himself as nearest and lawful heir of his brothers Thomas and William, both before the bailies of Aberdeen, and these decrees were duly retoured to Chancery. The pursuer asserted that Peter Burd "knew quite well that his brother Thomas had left issue, and the pretended service in his favour was obtained by fraud, perjury, and subornation of perjury;" further, that the bailies of Aberdeen had no jurisdiction, and that the pursuer's father, then a minor, was not called as a party to the process. Peter Burd sold the subjects to Patrick Kilgour on 6th October 1820, and Kilgour, it was alleged, knew the seller had no good title. From Patrick and Robert Kilgour (who together came to be vested in the whole property of the Burd family) the present defenders acquired the property through various transmissions, and were duly infeft. It was also alleged by the pursuer that her father at the time of his death had instituted proceedings to recover his rights.

The pursuer pleaded—"(1) The pursuer being the nearest lawful heir of one or more of the parties favoured by the last settlement of John Burd, is entitled to decree as concluded for, with expenses in the event of expense being caused. (2) The defenders having no right to the share of the properties libelled, which is claimed by the pursuer, ought to be decerned to cede possession in her favour. (3) The defenders' pleas of prescription are inapplicable because of the minorities of the pursuer and her father falling to be deducted from the forty years. (4) The pretended service and retour of 1819 being wholly null or invalid, cannot be set up by any prescription. (5) The defenders having drawn the rents of subjects belonging to the pursuer, are bound to count and reckon with her."

The defenders pleaded—"(1) The action falls to be dismissed in respect the pursuers have no title to sue. (2) The action is excluded in respect of both the positive and negative prescription, or one or other of them. (3) The action is barred by the Act 1617, c. 13, establishing the vicennial prescriptions of retours. (4) In no view can the defenders be called upon to account for more than the rents of the subjects in question during the respective periods of their possession; and that possession having been *bona fide*, they are not even liable to account for these. *Separatim*, the pursuer's claim for bygone rents is barred by taciturnity and *mora*."

The Lord Ordinary sustained the plea founded on the vicennial prescription of retours, and assoilzied the defenders.

The pursuer reclaimed, and argued — The vicennial prescription is a plea personal to the heir served. It is a mere limitation of action.

The defenders argued—The fraud of authors

will not affect singular successors. [Lord Justice-Clerk—Is there not a distinction between rights which have been followed by infeftment and those which have not?] Fraud is entirely of the nature of a personal exception.

Authorities—Stair, iv. 40, 21; Bankton, i. 259, § 65; Ersk. Instit. iii. 5, 10; Act 1621, cap. 18; *Elliot* v. *Wilson*, 9th February 1826, 4 S. 429, n.e. 435, and 3 W. and S. 60; *Baird* v. *Neill*, 12th June 1835, 13 S. 927; *Williamson* v. *Shairp*, 3d December 1851, 14 D. 127; *Ireland* v. *Nelson's Creditors*, 5 Br. Supp. 287; *Forsyth* v. *Duncan*, 8th July 1863, 1 Macph. 1054; *Campbell* v. *Campbell*, 26th Jan. 1848, 10 D. 461.

The pursuer at this stage obtained leave to amend her statements as to perjury, and when the case was called again had added averments that the marriage of Thomas Burd senior was well known in Peterhead, and that Kilgour and every subsequent purchaser of the property knew it; also an account was given of the alleged subornation of a witness so as to obtain the service.

At advising—

Lord Justice-Clerk—It does not appear to me to be necessary to go into the various questions which have been raised—questions of some delicacy,—for there is sufficient in the conduct of the pursuer's authors to decide the case. Their taciturnity during all the long interval since 1819 is, I think, enough. The Lord Ordinary has sustained the plea of vicennial prescription, and I am content to adhere to his interlocutor. The case presented to the Court is a very strong one, as the lands were immediately after the service sought to be reduced, transferred to singular successors, by whom and by their successors they have been held since 1820. The cases of *Nelson* and of *Campbell*, referred to in the course of the argument, appear to me to be direct authorities upon the point. It was the protection apparently of singular successors that the statute enacting the vicennial prescription had in view, and for the security of the title to property such limitation was necessary. In the case of *Nelson*, the singular successor, it was held, might after the death of the heir served plead and be protected by the vicennial prescription, while the case of *Campbell* was one of pure propinquity; and yet the Court held it to be clear that the prescription could protect a retour. Holding these cases as distinct and direct authorities, I cannot here entertain any doubt.

But it was then argued that the retour was obtained by fraud. Now, I cannot say, and I do not express any opinion, whether in such a case a singular successor would be protected against the claims of the party defrauded; but here there really is not any relevant allegation of fraud at all. To say that perjury was committed does not seem to me to affect the matter, and though perhaps a relevant statement as to subornation of perjury might have been of some avail, there is here not even that. On the whole, I am for affirming the interlocutor reclaimed against.

Lord Neaves—I concur. It was argued to the Court that a general retour was personal to the party retoured, and did not survive to the benefit of his representatives. Now, in *Campbell's* case the general service expede was a service as heir of tailzie, referring of course to a particular estate, and there could not be service again to the person out of whose *hereditas jacens* it had thus been taken. Where nothing in the way of possession has intervened, then I think possibly recourse might be had to the original source, without regard to intermediate steps upon which nothing had followed; but that is not so here. Then we have the lapse of time, now so great, and the inevitable consideration that Thomas Burd must have known of his brother's fraud, and that he was alive and major from 1823 till 1855.

As to the question of fraud, I think the contention of the pursuer is quite unprecedented. The defenders' position is not dependent on the fraud of Peter Burd, but on a series of authoritative acts, followed by real possession for 57 years. I am disposed to go upon the special circumstances of the case in coming to the same conclusion as the Lord Ordinary.

Lord Ormidale—I am of the same opinion. If the retour were *ex facie* bad, then there is nothing to save it, for it never really had an existence; but there is no such case presented to us here. The retour is perfectly regular *ex facie*, and I do not think that after 20 years anything can affect it. The statute of 1617 is very distinct and very simple, and does not even require possession to follow on the retour, but there may be modifications of its stringency, and I propose to make a few observations on the objections which have been maintained.

Here we have possession ever since the date of the retour; there is no doubt of that, and accordingly it is not necessary to inquire into the soundness of the *dictum* of the Lord Chancellor in *Nelson's* case.

The first objection taken to the validity of the service was that there was no jurisdiction in the bailies of Aberdeen, but I think it is clear there is nothing in that. What occurred was that a brieve of inquest was taken out, and addressed to parties having jurisdiction. This, it is said, should have been at Peterhead, but I think that the county town was a more natural and, to my mind, a preferable place. It is not disputed that there was legal proclamation of the brieve, though it is said no one was called as defender. I should like to know who could have been so called. The brieve was a general summons to all parties having any interests involved.

The second objection took the form of an argument that a retour was only available to the party retouring, and was not after his death available to those who represented him. This was equal to a contention that a man thus retoured would, as long as he lived beyond the 20 years, be quite safe, but that after the lapse of all that time, if he died, then the retour could be challenged and set aside. I cannot sustain that view, and there is no authority to be found for it anywhere, and without going into other cases than those of *Nelson* and *Campbell*, I merely say that such a plea cannot be available here.

The third and only other objection is founded on fraud as a ground of reduction. The fraud here must be carefully distinguished from what would be an absolute nullity, for this only amounts to fraud sufficient to constitute an opening for an action of reduction. If it had been alleged that the whole proceedings here had been

forged and fabricated—that there had been no jury, no inquest, and so forth—then no reduction would have been necessary; an action of declarator would have sufficed; there would have been nothing to reduce, for all would have been null *ab initio*. But things here are quite different. The pursuer's father was *valens agere* for 32 years, and he did nothing. I take it on the authority of Stair, Bankton, and Bell that an allegation of fraud merely against the author of a singular successor who has been throughout in *bona fide*, and who paid a price, will not be relevant. I have no hesitation in holding that these allegations do not go to affect the proceedings, and indeed it looks very much as if the pursuer had waited till all the parties available for the defence were dead and then sought an opportunity of obtaining that to which she was not entitled.

Lord Gifford—I concur. The father of the pursuer was seventeen at the date of the retour, became major in 1823, and lived till 1855 without doing anything to challenge the detour. The case could not be stronger than this; and as the circumstances stand they clear it of all difficulties. The fraud is disposed of by its want of relevancy.

To get up a charge of subornation of perjury such as was attempted would require a series of specific averments almost equal to what would be required for a criminal indictment.

The Court adhered, with additional expenses.

Counsel for Pursuer—Campbell Smith. Agents—M'Caskie & Brown, S.S.C.

Counsel for Defenders—Darling. Agent—Alex. Morison, S.S.C.

Saturday, November 4.

FIRST DIVISION.

[Bill Chamber.

NOBLE *v.* CAMPBELL AND HENDRY.

Bankruptcy—Trustee—Agent—Sale.

A sale by a trustee upon a bankrupt estate to the agent in the sequestration is not void under the Bankruptcy Statutes, and is reducible only at common law.

Observed (*per* Lord President) that the term agent in a sequestration is a misnomer, as no such official is recognised under the Bankruptcy Statutes.

This was a suspension by Alexander Noble, shipmaster, Fraserburgh, of a charge at the instance of Ann Noble or Campbell and Jean Noble or Hendry, with consent of her husband, of the sum of £19, 14s. 9½d. The complainer was a shipmaster, and had granted a bill, payable 3 months after date, to a merchant in Fraserburgh for furnishings supplied to a vessel belonging to him (complainer). Meanwhile the merchant's estate was sequestrated, and the debt, for which decree had been obtained in the Sheriff Court of Peterhead by the trustee appointed upon the bankrupt estate, was assigned by him to Robert Anderson, writer in Fraserburgh. Anderson again assigned it to John Proctor, law-clerk in Fraserburgh. Each of these assignations, the complainer averred, was made without value. Proctor afterwards assigned to the two chargers, who were sisters of the complainer. That assignation, the complainer stated, was also without value; and it was further averred—"The charge given to the complainer does not deduce or set forth the charge in the original action and assignation by them of the said decree, nor has the complainer seen said assignations. The complainer has also reason to believe that the debt has been paid by some one of the other owners referred to in the charge."

The complainer, *inter alia*, pleaded—"(1) The trustee on William Yeats Gray's estate having illegally assigned the decree charged on to Robert Anderson, writer, Fraserburgh, the chargers' title is vitiated *in essentialibus*, and is inept—*vide* 54 Geo. III. cap. 137, sec. 56, and the Bankrupt Act 1856; Murdoch on Bankruptcy, 3d ed. pp. 276, 277. (2) The charge is defective in respect it does not set forth the progress of the assignations by which the chargers got control of the said decree against the complainer."

The chargers and respondents denied the statements of the complainer, and, *inter alia*, pleaded—"(1) The chargers being in right of the debt for which a charge has been given, and the charge being in every respect formal and regular, the note of suspension ought to be refused, with expenses. (2) The assignation by Gray's trustee to Anderson having been for value, is not vitiated in respect of 54 Geo. III. cap. 137, and Bankruptcy Act 1856."

The Lord Ordinary in the Bill Chamber (Gifford) pronounced the following interlocutor:—

"*Edinburgh, 30th September* 1876.—The Lord Ordinary having considered the note of suspension and answers thereto, with the productions, refuses the note, and finds the complainer liable in expenses, and remits the amount thereof to the Auditor to tax and report.

"*Note.*—The complainer does not deny that he is justly due the debt charged for. The debt is constituted by decree *in foro* in the Sheriff Court of Aberdeenshire, dated 8th June 1870; and the complainer does not pretend that he ever paid any part of the sum decerned for. His averment that he 'has reason to believe' that the debt has been paid by 'some one of the other owners' plainly cannot be admitted to probation.

"The debt thus constituted has been passed by three assignments, *ex facie* regular, and has been vested in the chargers, and they hold regular warrants as assignees to enforce diligence. The assignments are produced, and there does not appear to be any good objection to the procedure and diligence."

The complainer reclaimed, and was allowed in the course of the hearing to amend his statement with reference to the assignation of the debt without value to "Robert Anderson, writer in Fraserburgh," by the addition of the words "who was then the agent in the sequestration." He argued—The assignation to Anderson was illegal, because it proceeded upon the purchase by the law-agent in the sequestration of part of the sequestrated estate. Such a sale would not give a title to an assignee in a question with the debtor.

The respondents argued—Such a sale was re-