

But all this, notwithstanding, upon advising bill and answers, the LORDS found, "That after so long a time, there lay no action on the réceipt." No 313.

Kilkerran, (PRESUMPTION.) No 5. p. 427.

*** D. Falconer reports this case :

ALEXANDER CLARK, under the designation of writer, in Inverness, granted receipt, 30th August 1721, to William Wemyss, merchant, there, of a discharge by him to his debtor for L. 80 Scots, contained in a bill indorsed to him, and of another bill for L. 72 Scots, on which diligence had followed, and another for L. 6 Scots.

William Wemyss, in October 1744, inteded action against Alexander Clark, to account for these writs, which, on his death, was followed out by William Wemyss of Craighall, his son.

The Lord Ordinary, 23d November 1748, "found the defender liable either to produce the documents of debt contained in the receipt pursued on, or otherwise to account for the contents thereof."

Pleaded in a reclaiming bill; The defender, who is much failed in his capacity, can give little account of this matter; but as he got the papers as a writer, having given over the business of a messenger, which he formerly followed, it has either been to produce them in some court, or receive the money from the debtors, and in neither case ought he to be burdened with making them forthcoming at such a distance of time, since he satisfied his duty by producing them in Court, or if he gave them up to the debtors, he has paid the money to his constituent, and needed not to take a receipt for it, as there is in his receipt no obligation on him to restore the writs.

Answered, The obligation to restore the papers followed from his granting receipt for them. If papers given to a writer without receipt, may be restored or accounted for without one, yet when a receipt is taken, no writer will part with them without another; besides, the defender was a messenger, and got them to do diligence, which he ought to shew.

THE LORDS found, That no action could be sustained after so long a time on this receipt.

Act. *H. Home*.

Alt. *Hamilton-Gordon*.

Clerk, *Pringle*.

D. Falconer, v. 2. No 74. p. 80.

1751: November 22. Master FRANCIS SINCLAIR *against* SINCLAIR of Uilbster.

GEORGE EARL OF SINCLAIR having acquired several apprisings led against his predecessors, and made them his title to the estate, dispoed it and his honours, 8th October 1672, to John Campbell of Glenorchy, reserving a liferent

No 314.
A disposition of an old date found sufficient to exclude a reduc-

No 314.
 tion, notwithstanding there appeared a backbond, allowing redemption within a limited time, since which prescription was run, though interruptions were alleged, the backbond being recovered from the disponent, who was not presumed to have got it wrongously, but that it was given up to him.

of 12,000 merks to himself and his Countess, and the title of honour for life :
 ‘ Provided that, in case there should happen to be no redemption of the lands
 ‘ and others, from the said John Campbell, by virtue of a reversion granted by
 ‘ him, of the date of these presents, upon payment of sums of money therein
 ‘ contained, at the time and manner therein expressed precisely, and imple-
 ‘ ment of the remanent conditions thereof,’ so that the estate, title and digni-
 ty, should pertain to the said John Camphell irredeemably, he should be
 holden to use the surname of Sinclair, and the arms of the House of Caithness.

Sir Robert Sinclair of Longformacus had considerable debts affecting the estate, which by an agreement, 17th September 1672, he compounded for L. 6000 Sterling, provided that if it was not paid before Whitsunday 1675, he should be at liberty to recur to his diligences, to the full extent of his claim ; but, upon payment, as was said, he should be bound to denude in favour of the Earl, or any person he should nominate : This agreement being missing, the terms thereof appear only from a decret where it is founded on, betwixt the Earl and Sir Robert, dated 28th February 1673.

Glenorchy, 1673, executed a bond of reversion, reciting the disposition to him, and declaring it redeemable within five years after the term of Martinmas 1672, by payment of L. 6000, which he, as nominated by the Earl to receive the conveyance from Sir Robert Sinclair, was obliged to pay him, on his so conveying, with interest ; and by payment of a debt due to himself by apprising ; also by payment of 12,000 merks Scots yearly, which he was obliged to pay a blank person, during the lives of the Earl and Countess ; at least by payment of so much of the said sums as should remain unsatisfied by his intromissions with the rents of the estate : And failing redemption within the five years, it should be redeemable within one year more, when the reversion should expire ; provided, that if the Earl had a son of his body, the said son might redeem at any term thereafter. This reversion was recovered by a diligence in this process from the Earl of Breadalbane’s commissioners.

The Earl died in 1676, and Glenorchy, who had obtained possession of the estate in his lifetime, sometime thereafter married his widow.

George Sinclair, a collateral relation and heir-male of the family, taking the title of Earl of Caithness, in 1677, forcibly turned out Glenorchy’s servants, from the houses upon the estate, and took possession of it ; and amongst other lands, of those of Keis, which he *alleged* were his own paternal estate, though contained in the Earl of Caithness’s writings, as being derived from that family, and being some way in his possession, disponed with his other lands to Glenorchy.

Glenorchy applied to the Privy Council, and, on their remit, obtained decret of removing before the Sheriff ; and that not being obtempered, obtained from the Council letters of concurrence, by means of which, he, with a party of the King’s troops, and his own dependents, attacked, and, in a skirmish at

Old-Marlack, defeated the Earl of Caithness, and recovered possession of the estate. No 314.

The Earl of Caithness petitioned the Parliament, praying to be repossessed of his paternal estate, and that the charter-chest of Caithness might be sequestered; and that the Earl of Breadalbane which Glenorchy was now created, might depone as to the abstracting of writs out thereof: To which he made *answer*, That he received many of the rights of the estate from the Earl of Caithness in his lifetime, at the date of the disposition, and the remainder and greater part from Sir Robert Sinclair, when he paid him his money, so that he got them by the usual method of the disponent delivering them to the buyer; and the petitioner, if he fancied there was any reversion, might pursue exhibition thereof. The Parliament remitted the cause to the Privy Council, who, 23d September 1681, found Breadalbane had unwarrantably dispossessed the petitioner of the lands of Keis, &c. and ordained him to be repossessed.

The Earl of Caithness held his own estate till he died in 1693, when he was succeeded by John Sinclair of Murkle, and he dying in 1705, was succeeded by the present Earl.

The Earl of Breadalbane, son to the former, disposed what remained with him of the estate of Caithness, part being formerly alienated to Sinclair of Ulbster; which disposition was so conceived, as that Ulbster remained without the right of an onerous purchaser, subject to all challenges competent against his author's title.

The Earl of Caithness granted bond to Mr Francis Sinclair his brother, who adjudged from him the estate, as charged to enter heir to his predecessors, and pursued a reduction and improbation of Breadalbane's and Ulbster's rights: And Ulbster produced the disposition 1672, as an exclusive title, and afterwards produced disposition 1675 from Sir Robert Sinclair of his rights.

THE LORD ORDINARY, 20th February 1751, " Found that the defenders had produced sufficient to exclude."

Pleaded in a reclaiming bill, The disposition 1672 is not exclusive; it is apparent Caithness did not intend to convey his estate, but to relieve it of the burdens due to Sir Robert Sinclair; and though conceived in the form of a conveyance, it was really only a nomination of the person to whom Sir Robert's rights were to be made over; and the purpose was, that Glenorchy should be enabled, out of the rents, to pay Sir Robert's interest, and, with what he could save, and by disposing of part of the estate, to discharge the sum: This appears from the backbond which was intended to have been executed of the date of the deed, and which Glenorchy has got into his possession after the Earl's death, as he had then the possession of his whole estate, and afterward married his widow.

It is said, That instrumentum apud debitorem repertum præsimitur solutum or discharged: But this may be elided by stronger presumptions; the backbond was the only security the Earl had, either for himself or the heirs-male

No 314.

of his body, and there is an apparent probable manner by which it might come into Breadalbane's hand: He confessed before the Parliament he had got the writs from the Earl of Caithness at the date of the disposition, and partly from Sir Robert Sinclair; the backbond was never in Sir Robert's hand, and is of a posterior date to the disposition. It is said that the reversion expired in 1678; and though after that the party should be found entitled to redeem, the *pactum legis commissoriæ* being reprobate, yet this equity of redemption is prescribed: But it is apprehended the reversion could not expire, when Glenorchy, during the currency thereof, had got the bond into his custody; as neither could the equity prescribe, so long as he secreted it from the persons having interest therein: Also there is no prescription run, as the application to Parliament in 1681 was an interruption, within forty years of which this process was commenced.

Answered, The disposition to Glenorchy was no trust, but an onerous deed under reversion, which expired by the lapse of the time, and that competent to the heirs of the Earl's body, by his dying without any. If it were necessary the defender could plead prescription, having possessed forty years on the disposition and infestment that followed upon it, and having a negative prescription against any claim the pursuer might have, to be reponed against the lapse of the time for redeeming, there being a prescription run since the lapse, as was found Pollock against Story, No 51. p. 7216.; of which the petition to Parliament can be no interruption, both as the petitioner had no title to the reversion in his person, which is required by the 28th Act. P. 1469, and as that was not a method of bringing a declarator of redemption of a real estate: These answers would be good, if the reversion were in the hand of the pursuer; but, on the contrary, there is no evidence Glenorchy came unwarrantably by it: The presumption is, that Caithness having no hopes of being able to redeem, nor of male issue, as he died soon after, delivered it up.

THE LORDS adhered.

Act. R. Craigie.

Alt. W. Grant.

D. Falconer, v. 2. No 232. p. 281.

1759. February 9. ALEXANDER DUNBAR of Boath *against* Sir HARRY INNES.

No 315.
Implement of
a contract
presumed af-
ter a long in-
terval.

DUNBAR's predecessor being creditor to the predecessor of Sir Harry Innes in L. 1103:13s. Scots, the debtor, in 1682, became bound, in payment of this debt, to deliver 200 bolls of bear of that crop before the last of March 1683, under the penalty of L. 8 Scots for every boll undelivered. This obligation was in the form of a mutual contract, and the testing clause is in these terms: ' In witness whereof, these are written by John Brodie, servitor to the Laird of