

[Mor. 10662.]

Mrs JACOBINA CLARKE, . . . . . *Appellant.*  
 The EARL of HOME, . . . . . *Respondent.*

1753.  


---

 CLARKE  
 v.  
 EARLOF HOME.

House of Lords, 16th April, 1753.

**PRESCRIPTION OF ADJUDICATION.**—Held that adjudication with charter and infeftment were not sufficient to save from the negative and positive prescription, no possession having followed of the lands adjudged, these having never been out of the proprietor's possession; and possession of a part not being sufficient to interrupt prescription as to the whole, but only the part so possessed.

WILLIAM TROTTER granted a bond to Gilbert No. 99. Clark for 4000 merks, payable to him, "his heirs, " executors, and assigns," upon which action was raised for payment, first against Helen Trotter, the executrix of the granter, and inhibition used thereon in 1652. Gilbert Clark dying, a new suit was brought by his executors in 1691 against John Fowlis, the grandson and heir of Helen Trotter, who in the mean time had died. Defences were given in to this action; but being overruled, the defender renounced, and decree assoilzieing him from the passive titles was pronounced, but decerning against him " *cognitionis causa tantum*, to the effect that the said " David Clarke (appellant's father) might have process, and action of adjudication, and others competent, *contra hereditatem jacentem et bona mobilia*."

1644.

1650.

Upon this adjudication was led, by which a decree of apprising, dated Feb. 7, 1655, obtained by Helen Trotter and John Fowlis, her husband, against *James, late Earl of Home*, for a debt due by him to her, amounting to L.1286, 13s. 4d., was adjudged; decerning and ordaining the said decree of apprising to belong to him, the said David Clark; and the present

1753.  
 CLARKE  
 v.  
 EARL OF HOME.

action of maills and duties was now brought against the present Earl of Home, respondent, whose lands had been adjudged by that apprising. The defence stated was, that no demand having been made on the original bond from 1644 to 1691, for more than forty years, the debt was prescribed. Reply that proceedings had followed on the debt, which was sufficient to interrupt prescription. In particular that the inhibition in 1652 had been used, and that David Clark was a minor from 1654 to 1670, and that an adjudication had followed thereon of Helen Trotter's apprising, into which the debt was now merged. Duply: Assuming this debt to be now merged in the apprising which was adjudged, this apprising was prescribed; and if the apprising was prescribed, so was the debt which it secured; and the Earl pleaded the positive prescription as to his own titles, and the negative prescription as to that part of Helen Trotter's apprising adjudged by the pursuer — no possession having followed upon it to make it effectual, as the Earl and his ancestors had never lost possession of the lands so appraised, but retained the whole all along.

*Answered:*—Although Helen Trotter had no possession herself under her apprising, yet she had been infest, and had conveyed part of the apprising to Trotter of Chester Hall, and part to Gibson of Durie, whose rights had been ratified by the Earl of Home, and whose possession of the lands appraised was sufficient to interrupt prescription as to the whole, which principle must govern in order to get quit of the anomaly of a right being retained in part, and lost in part.

November 20,  
 1746.

The Court “found that the said Jacobina Clarke  
 “(the pursuer) has not proved her reply of interrup-  
 “tion, and therefore sustained the defence of pre-  
 “scription.”

On second petition the Court adhered; and in pursuance of a remit to the Lord Ordinary, assoilzied the defenders, and decerned.

Against these interlocutors the present appeal was brought.

*Pleaded for the Appellant:*—The appellant's right to the incumbrance is completely established by the adjudication of the decree of apprising, to which therefore no objection lies in so far as the title is concerned. With regard to the negative prescription, which is the main objection stated to the apprising, as the ground of the present demand, all that by law is necessary to interrupt prescription, and to elide the plea, is, that a document be taken on the right demanded, and against which prescription is pleaded. In the present case document has been taken on the debt,—an adjudication has been led of an apprising, upon which infestment and possession have followed, and although this apprising was a right in security for payment of the debt, redeemable at any time within the legal, yet after the expiry of the legal it was converted into an absolute right in Helen Trotter. Helen Trotter conveyed part to George Trotter, who, upon the title, possessed part of the lands contained in the apprising, which possession was sufficient to interrupt prescription as to the whole. Also document was taken otherwise, sufficient to interrupt prescription, for by disposition granted by Helen Trotter to John Gibson, the entire apprising is conveyed, reserving a power to dispoise to a certain extent, to the executors of Gilbert Clarke, and also by a contract executed in 1716 by the Earl's ancestors, with Gibson of Durie the faculty or power above reserved to Helen Trotter, was expressly considered as a subsisting right, and the disposition by Gibson of

' 1753.

CLARKE

v.

EARL OF HOME.

January 27,  
1747-8.

February 11,  
1747-8.

1753.  


---

 CLARKE  
 v.  
 EARL OF HOME.

Durie to the Earl is granted, subject to and under burden of this faculty and power in favour of Helen Trotter. All which, with possession thereon, were sufficient to elide prescription.

*Pleaded by the Respondent:*—Helen Trotter's apprising of the defender's whole estate, upon which charter followed, was either an absolute right of property to that whole estate, or is no right at all. It could not be an absolute right, because it was a mere right in security, taken in legal course of diligence, to secure payment of the bond; but this right was redeemable at any time within the legal; and the adjudication itself is now prescribed, and good for nothing. The respondent's right in the whole estate adjudged, which has never been out of his or his ancestors' possession, is fortified by the positive prescription, in terms of the statute 1617. He produces a regular title so far back as 1638, under which he and his predecessors have continued in the uninterrupted possession of the estate, and by the statute is a title which totally bars every challenge. If therefore Helen Trotter's apprising is to be considered as only a claim of debt, every action competent, *eo nomine*, would be cut off by the negative prescription. The possession had by Mortonhall of the lands of Fogo and Sisterpath, and by Gibson of Durie of the lands of Longbirgham, is no interruption either of the negative or positive prescription. Their possession could be only attributable to the debt, and if the right itself is prescribed, the possession had upon it will be unavailing. But supposing it availing, it would not follow that this possession was good for the whole. They each purchased certain shares only of the apprising, and each possessed on his own right. They had no connection with Helen Trotter,

and therefore their possession, at the utmost, could only be good for their own part.

After hearing counsel, it was

*Ordered and adjudged, That the interlocutors complained of by the original and amended appeal of the said Jacobina Clarke be, and the same are hereby, affirmed, except as to such part of the lands of Longbirgham as were allotted and disposed to Alexander, Earl of Home, by the contract and disposition between the said Earl Alexander and Gibson of Durie, dated the 27th day of January 1716; and that as to such part of the said lands, the said interlocutors be reversed, and the defence of prescription be repelled. And it is hereby declared, that the apprising in question is a subsisting diligence as to that part of the said lands of Longbirgham. And it is further ordered and adjudged, that the mails and duties of that part of the said lands be subject thereto, and that same be applied accordingly; and that the accompt to be taken of the annual rent or interest of the principal sum of four thousand merks, claimed by the appellant, be not carried farther back than, but restricted to commence from the term of the first citation in this cause. And as to the several interlocutors complained of in the said cross-appeal, it is hereby further ordered and adjudged, that the same, so far as they are not hereby reversed, be affirmed. And it is hereby further ordered that the said Lords of Session do give the proper directions for carrying the judgment into execution.*

For the Appellant, *A. Hume Campbell, George Brown.*

For the Respondent, *W. Murray, Alex. Lockhart.*

1753.

CLARKE

v.

EARLOFHOME.