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plained of be, and the same are hereby affirmed, with £100 costs.

For the Appellants, *C. Yorke, Al. Wedderburn.*

For the Respondents, *All. Forrester, Fred. Campbell.*

NOTE.—Unreported in the Court of Session.

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MEARNS, &c. v. FARQUHARSON, &c.

[Mor., p. 2290; Kames' Sel. Dec., p. 142.]

Mrs MEARNS and Mrs GRANT (both Farquharsons, and their Husbands), . . . *Appellants;*

JAMES FARQUHARSON, Esq., and Others, Trustees of James Farquharson of Inverey, deceased, for behoof of Alexander Farquharson, ... } *Respondents.*

House of Lords, 20th February 1759.

DESTINATION—GENERAL CLAUSE—SETTLEMENT.—A party executed a general conveyance of all lands and heritages that should happen to belong to him at his death. The estate of Auchlossen belonged to him at the time he executed this settlement. He afterwards succeeded to the estates of Inverey and Tulloch, which had belonged to his brother, and the question was, Whether the heirs whatsoever under the above settlement, had a right to the Inverey and Tulloch estates. Held that they had not. Affirmed.

Charles Farquharson, deceased, Writer to the Signet, executed a deed, of date 26th October 1721, whereby he conveyed, assigned, and disponed "to, and in favour of Patrick "Farquharson of Inverey (his elder brother), his heirs and "assigns whatsoever, all lands, heritages, tenements, annual "rents, debts, sums of money, heritable and moveable, &c., "that shall happen to pertain and belong to me at the time "of my decease." At the time of executing this deed, Charles Farquharson was seized of the lands and estate of Auchlossen, in the county of Aberdeen, of the yearly value of £200 sterling or thereabouts, which he had lately purchased, and likewise of a considerable personal estate.

Patrick Farquharson, his brother, the grantee in the above deed, was then seized of the lands and estates of *Inverey* and *Tulloch*, in the county of Aberdeen, the ancient inheritance of the family, which having for ages been limited by the in-

vestitures thereof to heirs male, were, by his marriage articles with Elizabeth Black, his second wife, executed, with the consent of the said Charles Farquharson, settled upon the heirs male of that marriage; remainder to the heirs male of Patrick Farquharson's body of any other marriage; remainder *to his other nearest heirs male.* And by a procuratory of resignation and deed, executed by Patrick Farquharson upon his buying in some adjudication affecting the estate of Tulloch, in 1724 these lands were again settled upon the heirs male lawfully procreated, or to be procreated, of Patrick Farquharson's body; remainder *to his heirs male whatsoever.* And Charles Farquharson framed, and was witness to, the execution of this deed, whereupon charter and infeftment duly passed. Oct. 22, 1714.

Patrick Farquharson had issue of his first marriage four daughters; and of his second marriage, two sons and two daughters.

Upon his death, Joseph, his eldest son, was served heir male to him, and was duly infeft in the lands of Tulloch, but died before completing his title to the lands of Inverey. Benjamin, his brother, was served heir male to his father and brother, and duly infeft in both estates; but he also dying in December 1738, the said Charles Farquharson, his uncle, and granter of the deed 1721, succeeded to both these estates, and completed his title by service as heir male to the said Benjamin Farquharson, and upon warrants from the superiors, was duly infeft. Mar. 30, 1737.

The family inheritance thus descending in the male line, Charles Farquharson thought proper, immediately upon its devolving upon him, to settle his other estate of Auchlossen, which was his own purchase, in the same way, and accordingly, of this date, resigned it into the hands of the superiors for new infeftments to himself and the heirs male to be procreated of his own body; remainder to his *other heirs male,* thereby excluding his own daughters and heirs female. And all other deeds, after this date, proceeded upon this plan and intent, of heirs male succeeding in both estates. Feb. 18, 1739.

In particular, a deed was executed on 16th October 1739, limiting the estate of Inverey to heirs male; and the widow of Patrick having received satisfaction of her claims and demands out of her husband's estate, executed a discharge, discharging Charles Farquharson, apparent heir male of the estate of Inverey. Oct. 1739.

Charles Farquharson, of this date, executed a bond of pro- Aug. 18, 1744.

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vision in favour of Charles Farquharson, his natural son, *which failing, to return or to remain with the granter's nearest heirs succeeding to him in his lands and estate by succession or destination.* Another bond of provision was granted in favour of the said natural son, provided that, in case this sum should be gratuitously assigned by his said son, and paid before his full age of twenty-one, then the *same should be repaid to the granter's heirs for the time being succeeding to him in his lands and his estate.* He died, and was succeeded by James Farquharson, the heir-male.

In these circumstances, the present action was brought by the appellants, two of the surviving daughters of Patrick Farquharson, for declaring their right to the estates of Inverey and Tulloch, by virtue of their uncle, Charles Farquharson's deed of 26th October 1721, and concluding that James Farquharson should denude himself thereof, in their favour.

The appellants contended that the intent of Charles Farquharson's deed in 1721, was to convey every kind of estate which belonged to him at his death, as effectually as if each particular had been enumerated; that the lands of Inverey and Tulloch having come to him in fee simple, and he, as a man of business, well apprised of the import of his deed, having never thought fit to alter it, there can be no doubt as to his intention;—that the circumstances alleged by the defendants were by no means sufficient to establish a presumption of Charles Farquharson's meaning, to except the lands of Inverey and Tulloch from his general settlement; and as that settlement was not simply in favour of *Patrick*, but likewise of his heirs whatsoever, it could not be annulled by Patrick's dying in Charles' lifetime, and therefore the appellants, under the character of heirs whatsoever, were undoubtedly entitled to take their shares of Inverey and Tulloch under this deed, which did not require delivery to make it effectual, that solemnity being expressly dispensed with by the granter.

In answer, the defenders contended, that this general deed made in 1721, could not possibly comprehend the estates of Inverey and Tulloch, as nothing was more absurd, than for Charles to convey to Patrick what this last was then absolute owner of, and held by him and his sons for eighteen years thereafter;—that, if these estates could not have been granted *particularly*, neither could they be comprehended within the *general* description in the deed;—that the granter being at this time so infirm and valetudinary, that his life was

despaired of, made the deed *intuitu mortis*, intending only to give his own estate and effects to his brother Patrick, who, dying before him, the deed was void; it being established by the law of Scotland, and by precedents of the greatest authority, that, in testamentary deeds where the donor survives the donee, the donation is lapsed and ineffectual;—that, even had Charles been actually possessed of these estates in 1721, such a general deed as this had not been sufficient to alter the general course of the family settlements, which all run in favour of heirs male; and much less could it vary them when the estates were actually in Patrick, and might probably never come to Charles;—that his own acts sufficiently denoted his intent, which was to add his new purchase to the family estate, for which reason he had settled it upon the heirs male, excluding even his own daughters, presently after his coming to this family estate; and he had, in a variety of other deeds, plainly showed his apprehension that Inverey and Tulloch stood limited to heirs male.

The Lord Ordinary repelled the defences pleaded for the defenders, and decerned. On representation, with answers, he adhered. Dec. 21, 1752. Feb. 23, 1753.

The respondents reclaimed to the Court, and the Lords were pleased to pronounce this interlocutor: "Find no action competent to the pursuers in virtue of the deed 1721, against the defenders, to oblige them to denude of the estates of Inverey and Tulloch, and therefore assoilzie and decern." Feb. 11, 1756.

The appellants then also petitioned the Court, specially craving to explain the above interlocutor, by giving special judgment upon the several defences pleaded; whereupon the Lords, of this date, pronounced the following interlocutor: March 2, 1756.
"Repel the objections to the titles made up by Charles, Joseph, and Benjamin Farquharson, to the lands of Inverey and Tulloch, and adhere to their former interlocutor, finding no action competent to the pursuers in virtue of the deed 1721, against the defenders, to oblige them to denude of the estates of Inverey and Tulloch."

Against these interlocutors the present appeal was brought to the House of Lords.

After hearing counsel,

It was ordered and adjudged, that the interlocutors complained of be, and the same is, hereby affirmed.

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MEARNS, &c. *v.* FARQUHARSON, &c.

For the Appellants, *C. Yorke, Fred. Campbell.*

For the Respondents, *R. Dundas, Al. Forrester.*

1759.

SINCLAIR, &c. *v.* THE EARL OF BREADALBANE, &c.

FRANCIS SINCLAIR, Esq., Brother of the Right Hon. Alexander, Earl of Caithness, and HIS MAJESTY'S ADVOCATE for Scotland, ... } *Appellants;*

EARL OF BREADALBANE, SIR WM. DUNBAR, SIR WM. SINCLAIR, and GEORGE SINCLAIR of Ulbster, Esq., . . . } *Respondents.*

House of Lords, 22d February 1759.

PRESCRIPTION—NEGATIVE AND POSITIVE.—A conveyance by the Earl of Caithness, of his estates, reserving to himself power to redeem within six years, and to the heir male of his body at any time, to be irredeemable after that period;—Held that the long prescriptive possession, for more than forty years after the expiry of the six years, and failure of issue male, was a sufficient title to exclude.

George, Earl of Caithness, executed a disposition in 1672, and conveyance of the estate and Earldom of Caithness, with the heritable jurisdictions and titles of honour, in favour of John Campbell, Esq. of Glenorchy (afterwards Earl of Breadalbane), upon the narrative "that he had advanced, "paid, and delivered to his Lordship, and his creditors, in "his name and by his direction, certain great sums." The lands, &c., were made redeemable within six years, but declaring, if not redeemed from the said John Campbell, "that the foresaid lands, living, and estate, title, and honour "and dignity, shall fall, accresce, and pertain to the said "John Campbell, and his foresaids, heritably and irredeem-"ably for ever," in which case, John Campbell was taken bound to "wear and use the surname of Sinclair, and arms "of our house of Caithness." There was a separate letter, granted by Campbell, binding himself to give redemption of the lands. A charter under the great seal was obtained upon this disposition, and he was infeft, but the clause of reversion before recited did not appear in the subsequent infeftments; and possession followed, although this had been disturbed in some measure by the lawless attempts of the appellant's family to regain their estate.

Jan. 31, 1673.
Feb. 27, 1673.