

1759.

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

MEARNS, & C.
v.
FARQUHARSON,
& C.

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

1759.

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

SINCLAIR, & C.
v.
THE EARL OF
BREADALBANE,
& C.

EARL OF BREADALBANE, SIR WM. DUNBAR,
SIR WM. SINCLAIR, and GEORGE SIN-
CLAIR 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.

In 1720, the present action of reduction, and improbation, was thereupon brought by the appellants to set aside the respondents' right to the said lands, and, in particular, the foresaid disposition of 1672, setting forth that none of the respondents had possessed the said lands and estate peaceably, without interruption, for the space of forty years; that the said Alexander, Earl of Caithness, or his predecessors, had, by processes and other legal means, interrupted the respondents' right of prescription; that, at any rate, the said Earl of Breadalbane, or his predecessors, had the foresaid lands and estate only under redemption, and that there was a clause of redemption in the body of the deed itself, and there was also a separate letter of redemption in reference to this deed, drawn out at the same time.

In defence, the respondents pleaded a right of prescription to the lands and estate in question, which they alleged they had possessed above forty years, without any interruption; and, having insisted that the title deeds and writings relative to the estate, had been delivered to the Earl of Breadalbane, in consequence of his right by the disposition 1672, a proof was thereupon allowed and taken, 1st, With respect to the respondents and their predecessors' possession of the estate of *Caithness* and others during the years of prescription; and, 2dly, With respect to the Earl of Breadalbane's having access to the charter chest and writings of the family of Caithness, immediately after the death of George, first Earl of Caithness, and his carrying off and possessing the same since that time.

With respect to the possession of the estate of Caithness, and other lands claimed by the appellants, it appeared from the testimony of several witnesses, and from the proceedings before the Parliament and Privy Council, that George, first Earl of Caithness, died at Thurso East, in May 1676. That in the year 1677, George, second Earl of Caithness, attained possession of his paternal estate of Keiss, Tister, and Northfield. That in the year 1679, he took possession of the estate and earldom of Caithness by force of arms, but was dispossessed thereof in 1680 by the Earl of Breadalbane, also by force of arms; and that the said George, Earl of Caithness, was restored by act of Privy Council, to the possession of his paternal estate before mentioned, in 1686, and continued to possess the same till his death in 1698, when the Earl of Breadalbane again seized the possession, and placed a body of men in the House of Keiss.

1759.

 SINCLAIR, &C.
 v.
 THE EARL OF
 BREADALBANE,
 &C.

1759.
 SINCLAIR, &C.
 v.
 THE EARL OF
 BREADALBANE,
 &C.
 Jan. 6, 1747.

Upon this state of the case Lord Minto, Ordinary, pronounced this interlocutor:—" Finds it proven that the Earl of Caithness continued to possess the lands of Keiss, Tister, and Northfield, until his death in the year 1698 or 1699 ; and therefore repels the defence of an exclusive right by prescription *quoad* these lands." On representation, the Lord Ordinary "repelled the defences pleaded for the defender *in hoc statu* in respect of the answers. And finds that the production made for him is not sufficient, without the aid of the positive prescription to exclude the pursuers *quoad* the lands of Keiss, How, Nibster, Tister, and Northfield, and therefore refuse the desire of the representation."

A third representation was given in, for the respondent, George Sinclair, against the foresaid interlocutors, in which he insisted that the disposition 1672, and charter and infeftment thereupon, were a sufficient title to exclude the appellant's claim; and answers having been put in to this representation, the Lord Ordinary, of this date, was pleased to order informations.

Counsel having accordingly been heard on these; it was pleaded by the respondents, 1. That the disposition 1672, and charter and infeftment thereupon, afforded a title sufficient to exclude the appellant and all other persons claiming as heirs of George, Earl of Caithness, the granter of that disposition; that the estate was conveyed to the Earl of Breadalbane for an adequate value, as he was himself a very considerable creditor, and paid the debt due to Sir Robert Sinclair, and an annuity of £666, 13s. 4d. to the Earl and Countess of Caithness. That the Earl of Breadalbane had consented that the estate should be redeemable within the space of six years, as a favour to the Earl of Caithness, in case he should find a purchaser who would give a higher price or better conditions. That he had further consented that the estate should be at any time redeemable by the heirs male of the Earl of Caithness' body; but that no such redemption having been made within the space of six years, and the Earl having died without issue male, the deed of reversion was void and at an end, and the conveyance became absolute and irredeemable.

2. That the respondent's title was confirmed by the positive prescription established by the Act 1617, which declares that whosoever shall possess their lands and estate for forty years continually and together, shall never thereafter be troubled therein. That the respondents and their predecessors had

accordingly possessed the estate in question more than forty years from the date of the infestment in February 1673, to the commencement of this action in 1720, no *lawful* interruption having been made during that space.

1759.

 SINCLAIR, &C.
 v.
 THE EARL OF
 BREADALBANE,
 &C.

3. That the appellant's claim was now lost and expired, as it had not been prosecuted within the years of prescription established by the Act 1469. And in this case, more than forty years had elapsed, from the expiry of the redemption in 1678, and the appellant had moved no claim or taken any document on the deed of reversion.

Upon advising the cause, the Lord Ordinary pronounced this interlocutor: "Find the defenders (respondents) have produced sufficient to exclude; and therefore assoilzie and decern; superseding extract till the 8th of June then next." On reclaiming petition to the Court their Lordships unanimously adhered.

Feb. 21, 1751.
 Nov. 22, 1751.

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 are, hereby affirmed.

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

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

NOTE.—Unreported in the Court of Session.

[Fac. Coll. vol. ii., p. 216; et Mor. 2081.]

JOHN GRANT the Elder, and JOHN GRANT
 the Younger, *Appellants;*

THOMAS FORBES, *Respondent.*

1759.

 GRANT, &C.
 v.
 FORBES.

House of Lords, 29th March 1759.

CAUTIONER—DAMAGES FOR OPPRESSIVE AND ILLEGAL EXECUTION OF DILIGENCE.—An action of damages was raised by the respondent for oppressive and illegal execution of a caption against him for debt, brought against the cautioner of the messenger and another, who was accessory to these proceedings. Held the appellants liable in £100 damages. Affirmed on appeal.