

Respondent's Authorities.—Strathnaver, 2 Feb. 1728 (15,373); 3 Ersk. 8, 73; Feb. 17, 1831.
Gordon, Feb. 14, 1749 (15,384); Campbells, Nov. 28, 1770 (14,949); Baillie,
Feb. 23, 1809 (F. C.); Dyke, July 3, 1813 (F. C.); Mackenzie, Nov. 24,
1818, (F. C.)

SPOTTISWOODE and ROBERTSON — RICHARDSON and CONNELL, —
Solicitors.

JAMES HUME and others, Appellants. *Lord Advocate (Jeffrey)* — No. 5.
Walker.

WILLIAM DUNCAN, Respondent.—*Sandford*—*A. M'Neil.*

Prescription—Title to exclude.—Where a proprietor of heritable subjects granted an ex facie absolute disposition, on which infestment was taken, qualified by a back bond containing a power of redemption within eleven years; and he assigned this bond to a third party, and disposed the property to him; and the assignee, within the eleven years, raised an action of redemption, which fell asleep; and the heir of the original disponee acquired right to the assignation and relative action, which he afterwards wakened—Held, in an action of reduction on fraud and incapacity, (affirming the judgment of the Court of Session,) that although more than forty years had elapsed from the date of the above deeds, yet a prescriptive title had not been obtained, so as to exclude a challenge by the heir.

JAMES DUNCAN bought, as was alleged, for £600, certain Feb. 18, 1831.
heritable subjects in the Kirkgate of Leith, under a disposition
on which he did not take infestment; but requiring, in order to
pay them, a loan, he executed, on the 4th of September 1771,
an ex facie absolute disposition in favour of John Watson, with
assignation to the unexecuted precept on which Watson was
infest on the 19th (recorded on the 20th), and Watson on the
same day granted a back bond, declaring, that “albeit the said
“disposition does bear to be an absolute and irredeemable right
“of property to the said tenement and pertinents, I hereby
“declare that the same is redeemable and may be redeemed at
“any time within the space of eleven years from the date hereof,
“upon payment of the sum of £150 sterling,” the sum advanced
to Duncan.

1ST DIVISION.
Lord Meadow-
bank.

Thereafter, in 1773, Duncan entered into a transaction with
Robert Hope, by which he bound himself, “his heirs and suc-
“cessors, to grant a full and ample disposition, containing all

Feb. 18, 1831. “ the requisite and necessary clauses, and to free and relieve the
 “ subjects after mentioned, (the above premises) of all debts and
 “ encumbrances ; and, being so disencumbered, to grant the said
 “ disposition to and in favour of the said Robert Hope, his
 “ heirs and assignees,” of the subjects in question ; and he thereby
 not only de præsentî disposed these subjects, but also assigned
 the back bond by Watson, and acknowledged that “ the price
 “ instantly paid me by the said Robert Hope, together with the
 “ obligation hereafter mentioned, wherein he becomes bound to
 “ relieve me of the debt due to John Watson, is a full and
 “ adequate price for the subjects above mentioned.”

On the other hand, Hope bound himself to relieve Duncan of the debt due to Watson.

Hope assigned his right under this deed to Tod, as trustee for his creditors ; and in 1782 Tod raised an action of redemption against Watson, in which an interlocutor recalling a decree in absence was pronounced in July 1783 ; but the process afterwards fell asleep, and Watson died in the same year.

By a deed of settlement Watson conveyed the subjects to his son Samuel, who disposed them to his brother James. James was infest on the 27th of January 1787, and in 1792 he disposed them in trust to Hume, for behoof of his children. After the death of James Watson, Hume, on the 11th of May 1816, expedè a charter of resignation and confirmation.

In 1821 Tod wakened and transferred the process of redemption against Hume as trustee and against the representatives of John Watson. William Duncan, having obtained himself served heir in general to his father, brought, in January 1823, an action of reduction of the disposition in 1771 to Watson, and also of the assignation to Hope, on the ground of fraud, incapacity, and blindness.

In defence, Hume, as trustee of Watson, founded upon the absolute disposition and sasine in favour of Watson in 1771, with forty years' possession, as sufficient to give him, in virtue of the positive prescription, a right to the property ; and, on the lapse of that period, as sufficient, by the negative prescription, to extinguish the back bond containing the obligation to reconvey. Tod, as in right of Hope, in like manner founded upon the absolute conveyance in the deed 1773 as exclusive of the right of the respondent ; and both parties therefore declined to satisfy the production.

Pending this action, Hugh Watson (one of the representatives of the original disponee, John Watson,) acquired right from Tod to the deed in favour of Hope, and maintained the same pleas as Tod. The pursuer admitted that his father had received £150 from John Watson in 1771, and £100 from Hope; but he alleged that the sum which Hope ought to have paid was £400. Feb. 18, 1831.

The Lord Ordinary found, “ that the pursuer’s (respondent’s) “ title to insist is excluded by the operation both of the positive “ and of the negative prescription; and therefore sustained the “ title to exclude founded on by both defenders,” and dismissed the process. The pursuer reclaimed, and the Court having observed, that although he admitted the receipt of the £150 and £100, he concluded for reduction in toto, he proposed to amend the conclusions. The Court therefore recalled the interlocutor in hoc statu, and remitted to the Lord Ordinary to receive a supplementary summons. The pursuer then raised a supplementary action of declarator, to have it found that the above deeds were truly held only as securities, and concluding for count and reckoning, under deduction of the above sums. The Lord Ordinary conjoined it with the reduction, and then reported the case to the Court, who, on the 26th February 1829, “ repelled the defences “ stated by the defenders, arising from an alleged exclusive title “ to satisfy the production, remitted to the Lord Ordinary to “ proceed accordingly, and found the defenders liable to the “ pursuer in payment of the expenses of the present dis- “ cussion* ;” and which expenses were afterwards modified, and decerned for.

Hume, Tod, and Watson appealed.

Appellants.—The deed of 1771, and sasine thereon, vested in John Watson a sufficient title to acquire an absolute title by prescription, so as to exclude all extrinsic objections. In virtue of this title he and his successors possessed the subjects unchallenged till 1821; so that more than forty years had elapsed. The title is therefore rendered free from all exception by the positive prescription. Again, the back bond, being a mere personal obligation, was extinguished by the effect of the negative pre-

* 7 Shaw and Dunlop, No. 243.

Feb. 18, 1831. scription. In like manner the deed of 1773 has been fortified by the positive prescription.

Respondent.—The sole question at present relates to a preliminary objection taken by the appellants to satisfy the production. They say, that because they have possessed on deeds ex facie absolute for forty years, it is not relevant to say that those deeds were acquired by fraud and deception; but wherever a deed is challenged on that head it must be produced, and the party must enter on the merits, as to whether there was fraud or not. This was expressly so decided in *Sinclair v. Sinclair*.

LORD WYNFORD.—My Lords, so long ago as the 4th September 1771, James Duncan, the father of the present respondent, purchased certain houses, for which he was to pay £600. He had not at the time the £600, but borrowed £150 from John Watson, the father of one of the appellants, and made an absolute conveyance of the property to him, so that it appeared as if Duncan had obtained the whole consideration money from Watson. At the same time a back bond, that is, an instrument by reference to which the real nature of the transaction is to be understood, was given. At a subsequent period Duncan conveyed the estate and assigned the back bond to a person of the name of Hope, who contracted to pay off the debt due to the original mortgagee, and to pay an additional sum of £400. We have no means of knowing whether that £400 was paid or not. It is insisted, that although the consideration appeared to be £400, in point of fact only £100 was paid. It is also further stated, although we have not the means of knowing the fact, that Duncan was in a condition to have a fraud practised upon him—that he was perfectly blind, and an imbecile person. Upon these grounds his son instituted an action of reduction of all the deeds; to this action it was answered, that the title of the pursuer is excluded by prescription. But the pursuer insisted, that, there having been fraud on the part of the other parties, prescription was no title to exclude; and in looking attentively to the authorities on the case, it appears to me that he is not precluded by the length of time. The law of Scotland upon the subject of prescription seems quite settled by the cases of the Duke of Gordon and of *Sinclair*. It appears to me that the judgment of the Court below was right. I shall therefore beg leave to move your Lordships, that the judgment of the Court below be affirmed.

The House of Lords ordered and adjudged that the interlocutors complained of be affirmed.

Appellants' Authorities.—3 Stair, 1, 13, Stat: 1617, c. 12; 2 Stair, 12, 15; 3 Ersk. Feb. 18, 1831.
7, 8; 2 Bank. 12, 16; Younger, Nov. 28, 1665 (10,925); Murray, March 18,
1807 (10,721); Stewart, July 6, 1711 (10,722); Clerk, Jan. 27, 1746 (10,662);
Paul, Feb. 8, 1814 (F. C.); M'Donell, Feb. 26, 1828 (6 Shaw and Dun. 600.)
Respondent's Authorities.—Sinclair, July 4, 1781 (6,725); 2 Sandford on Heritable
Suc. 127.

RICHARDSON and CONNELL—J. DUTHIE,—Solicitors.

STEIN'S ASSIGNEES, Appellants.—*Knight*—*Sandford*.

No. 6.

BROWN and GIBSON-CRAIG, Respondents.—*Lord Advocate*
(*Jeffrey*)—*Solicitor General*—(*Kaye*).

Foreign—Homologation.—Held (reversing the judgment of the Court of Session), that
English assignees under a commission of bankrupt have no power to homo-
logate a trust-deed executed by the bankrupts in relation to their effects in
Scotland, which, it was alleged, fell under the commission.

JOHN STEIN, Thomas Smith, Robert Stein, James Stein, and
Robert Smith, were partners of a banking company in Fenchurch-
street, London, under the firm of Stein, Smith, and Company; and in Edinburgh under that of Scott, Smith, Stein, and Com-
pany. These firms were one and the same company, being
composed of the same partners.

Feb. 23, 1831.

1ST DIVISION.
Ld. Corehouse.

John Stein, Robert Stein, and James Stein at the same time
carried on business in Scotland in partnership, as distillers at
Canonmills, under the firm of John Stein, and at Kilbagie
under that of Robert Stein and Company. On the 22d of
July 1812 the London banking-house stopped payment, and
four separate commissions of bankrupt were, on the 23d, issued
against Thomas and Robert Smith and Robert and James
Stein, who were then in London, but not against John Stein,
who was then in Scotland. The Edinburgh house also stopped
payment on the 25th.

In consequence of the stoppage of the banking establishment
the affairs of the distillery concern became embarrassed; and,
on the 3d of August, a meeting of the distillery creditors was
held at Edinburgh, when, it appearing that there were sufficient
funds to pay them, it was resolved that a trust-deed should be
executed in favour of Brown and Gibson-Craig, which accord-
ingly was done on the 6th by John Stein, as the acting partner