Counſel appearing for the appellant, but no counſel for the reſpondents, and the appellant's counſel being heard, *It is ordered and adjudged, that the interlocutory ſentences or Decrees of the 18th of February 1715, the 29th of November and 1ſt of December 1719, complained of in the ſaid appeal, be reverſed; and that the interlocutor of the 29th of January 1715, be affirmed: and it is further ordered and adjudged, that the Lords of Seſſion do proceed in the cauſe, in ſuch manner as if the ſaid interlocutors complained of had never been made.* Judgment, 31 Jan. 1723-4.

For Appellant, - *Will. Hamilton.*

John Earl of Breadalbane, Sir James Sinclair of Dunbeath, and John Sinclair of Ulbſter, Eſq; - - - *Appellants;*

Alexander Earl of Caithneſs, - - *Reſpondent.* Caſe 104.

20th *March* 1723-4.

Reduction Improbation.—In an action, where various objections were made to the purſuer's title, the Court having ordered production to be made, and afterwards granted certification; the judgment is reverſed, and it is ordered that the defenders be not obliged to take a term for production, until the purſuer make out his title, upon which he founds his ſuit.

Uſury.

IN 1719, the reſpondent brought an action of reduction improbation againſt the appellants before the Court of Seſſion, in which he inſiſted for production of the rights and titles by which the appellants held or claimed the lands of Ormly, Slebſter, milnlands and multures thereof, the towns and lands of Shanwell and Acharraſkell, with the teinds and pertinents of the ſame; which had been part of the eſtate of Sir James Sinclair of Murkle, deceaſed. The circumſtances of the caſe which gave riſe to the action, as ſtated by the reſpondent, were:

That the reſpondent was the lineal deſcendant and heir of Sir James Sinclair of Murkle, who was heir of George late Earl of Caithneſs, who died without iſſue; ſo that all the eſtate of Caithneſs would, by the courſe of law, have come to the reſpondent, as well as the honours; but this Earl George was prevailed upon, without any valuable conſideration, to make over his whole eſtate in Caithneſs to John late Earl of Breadalbane, deceaſed, the father of the appellant Earl John, ſubject indeed to a right of reverſion not expreſſed in the deeds of conveyance, but in a ſeparate deed, which was ſecreted, and which but lately came to the knowledge of the reſpondent:

That after the death of the ſaid George Earl of Caithneſs, the ſaid late Earl of Breadalbane poſſeſſed himſelf, not only of the whole eſtate of Caithneſs, which belonged to the ſaid Earl George, but

but alſo of the lands of Ormly and other lands in Caithneſs, which were part of the eſtate of the ſaid Sir James Sinclair of Murkle, under pretence that the ſaid late Earl of Caithneſs was in poſſeſſion of thoſe lands as a creditor of the ſaid Sir James Sinclair by a decree of appriſing; and the Earl of Breadalbane alſo got poſſeſſion of the writings of the family of Caithneſs, which occaſioned complaints to the privy council of Scotland, and to the parliament of that country; and which had ever ſince been the ſubject of law ſuits, though the low circumſtances of the Caithneſs family, and the minority of the preſent earl, hindered theſe diſputes from being brought to an iſſue:

That the reſpondent claimed a right to the ſaid lands of Ormly, &c. under a decree of appriſing, obtained by John Murray of Pennyland, with ſaſine thereon, and which, after ſeveral meſne conveyances, was veſted in the reſpondent: and ſome years ago, endeavours were uſed to ſettle differences between the reſpondent and the appellant the Earl of Breadalbane; but the other appellants, Sir James and John Sinclair, on purpoſe to prevent any agreement, in 1718 purchaſed the ſaid lands of Ormly and others from the Earl of Breadalbane; but as the claims of the reſpondent were no ſecret, the Earl of Breadalbane was ſo cautious, as not to bind himſelf in warrandice of the purchaſe, but, on the contrary, the purchaſers became bound to indemnify him.

To this action the appellants made defences; and the circumſtances which gave riſe to the action, as ſtated by them, were: That in October 1672, George late Earl of Caithneſs, by deed for a valuable conſideration, conveyed to the late Earl of Breadalbane all the lands and eſtate in Caithneſs, particularly the lands of Ormly and others (before mentioned); in 1673 a charter of the premiſes was granted by the crown, upon which ſaſine was taken:

That part of theſe lands had formerly been the eſtate of Sir James Sinclair of Murkle, grandfather to the reſpondent; but being much encumbered, the ſeveral real ſecurities affecting the ſame, which greatly exceeded the value of the eſtate, had been purchaſed by the ſaid George Earl of Caithneſs, ſome time before the ſaid ſale, and theſe incumbrances were likewiſe aſſigned to the Earl of Breadalbane: and the reſpondent's father, by deed in 1677, reciting that his eſtate was under great encumbrances, and that the Earl of Breadalbane had right to the lands of Ormly and others part of the premiſes by appriſings and otherwiſe, therefore obliged himſelf, his heirs and ſucceſſors, never to quarrel, queſtion, or impugn his rights to the ſaid lands:

That as the Earl of Caithneſs had been in quiet poſſeſſion of the premiſes for ſeveral years before 1672, ſo the late Earl of Breadalbane, and the appellant the earl his ſon, had continued in quiet poſſeſſion of the premiſes ever ſince; and in 1718, the earl, for a valuable conſideration, ſold the premiſes and all other his eſtates in Caithneſs to the appellants Sir James and John Sinclair:

That

That one John Murray, for a debt of the ſaid Sir James Sinclair of Murkle, of 6000 merks Scots, in 1652 got a decree of appriſing of the lands of Ormly and others, part of the premiſes, and likewiſe of other lands, part of the ſaid Sir James Sinclair's eſtate, and thereupon took infeftment; but there being ſo many prior encumbrances upon that part of the eſtate conveyed to the Earl of Breadalbane, and of greater extent than the value of the lands, no poſſeſſion was attained, by virtue of that decree, of any part of the premiſes conveyed to the Earl of Breadalbane; and the reſpondent having renounced to be heir to his father and grandfather, procured right to this old dormant appriſing, and, under colour thereof, brought the preſent action.

The appellants in defence, at firſt, contended, that the right under which the reſpondent claimed was preſcribed, no poſſeſſion having been attained of any part of the lands in the poſſeſſion of the appellants in 40 years after the date of the reſpondent's right: but the reſpondent offering, before the production of the deeds, to prove that ſeveral ſteps had been taken to prevent his claim from being preſcribed, the Court, on the 2d of December 1720, "Found the allegation of preſcription againſt the reſpondent's "title, where the reſpondent offered to prove interruption during "the running of the term to be aſſigned for production, could "not ſtop the appellants taking a term to ſatisfy the pro-"duction."

It was then inſiſted by the appellants, that the decree of appriſing was uſurious, as having been taken for compound intereſt, and that it was therefore null and void. But after anſwers for the reſpondent, the Court, on the 4th of January 1721, "repelled the objection proponed againſt the reſpondent's title, "that the appriſing is uſurious, and found that the reſpondent's "title is ſufficient to oblige the appellants to take a day to pro-"duce the right called for."

It was next inſiſted, that the appriſing under which the reſpondent claimed was led for a debt due by his grandfather, to whom he was heir apparent; that the reſpondent had been in poſſeſſion of ſeveral of the lands contained in the appriſing for a great many years, and that by his receipt of the rents the debt appriſed for was more than paid; and this the appellants offered to prove by the reſpondent's oath; and if this were ſo, they contended that the reſpondent had no right to oblige the appellants to produce any of the deeds. The Court, on the 11th of January 1721, "Found that the appellants' objection againſt the appriſing "which is the reſpondent's title in this proceſs, that the reſpon-"dent has been in the poſſeſſion of the ſubject appriſed of ſuch "extent and for ſo long ſpace as the free rents of the ſaid ſubject "intromitted with by the reſpondent, did exceed the ſums in the "appriſing, is in this ſtate of the proceſs competent to be proved "inſtantly by the reſpondent's oath." But the reſpondent having reclaimed, inſiſting that his poſſeſſion of the lands contained in the appriſing was not by virtue of this deed of appriſing only, but by virtue of other rights and diligences in his perſon, and there-

fore

fore that his receipt of the rents was not to be imputed only to the ſatisfaction of the decree in queſtion. After anſwers for the reſpondents, the Court, on the 7th of February 1721, "adhered "to their former interlocutor of the 11th of January 1721, with "this variation, that it be proved by the reſpondent's oath, whe-"ther his poſſeſſion was by virtue of the aforeſaid appriſing." And the appellants having reclaimed, the Court, on the 18th of February, "adhered to their former interlocutors of the 11th of "January and 7th of February 1721."

The appellants were then directed to produce the deeds, and acts for the firſt and 2d term were pronounced, and they produced certain of the deeds called for; but not having made a complete progreſs of writs, the Court, on the 27th of December 1721, "granted certification againſt the appellants, and reduced "and improved the writs called for, and that for not production "and decerned."

The appellants againſt this interlocutor preſented two petitions, one of them ſtating that certain witneſſes had not been examined, and craving further time for that purpoſe; the other ſtating that the Earl of Breadalbane was in England, and there had been no opportunity to ſearch his repoſitories, and praying that extract might be ſtopped till the 1ſt of June next. The Court, after anſwers for the reſpondent, on the 31ſt of January 1722, "ſtopt "extracting the decree of certification till the 15th of February "thereafter."

Entered, 12 Feb. 1721-2.

The appeal was brought from "ſeveral interlocutory ſentences "of the Lords of Seſſion of the 4th of January, the 7th and 18th "of February 1721, the 27th of December 1721, and 31ſt of "January 1722."

Heads of the Appellants' Argument.

A bare ſuppoſitition that the reſpondent's title might not be preſcribed, was not a ſufficient reaſon to decree the appellants to produce the ſeveral titles under which they claimed. It had been much more juſt, when this objection was ſtated, to have conſidered that point firſt; for if it was with the appellants, there was then an end of the action; and to what purpoſe ſhould the appellants be obliged to enter into an expenſive action, and to produce their title deeds, when probably it may be found that the reſpondent, the purſuer, has no title at all. And though the interlocutors finding the appellants muſt take a term to produce their rights, proceed on the ſuppoſition that the reſpondent was before the ſame term to prove interruptions; yet the decree of certification is pronounced againſt the appellants without the reſpondent's having proved any of theſe ſuppoſed interruptions.

There is the leſs reaſon to indulge the reſpondent in this caſe, becauſe he is the heir of the original debtor, and refuſes to enter heir to him, and be ſubjected to his debts; but has purchaſed for a ſmall ſum this old dormant appriſing, and would, under colour of that, defeat the appellants and others, who are juſt and lawful creditors of his predeceſſors: great care ought, then, to have been taken,

taken, that the title under which he claims ſhould be clear and ſubject to no exception; becauſe, if the appellants ſhould be obliged to produce their title deeds, and that to a perſon who has no right, it may afford an opportunity to the heir to look into all the appellants' title deeds, which being appriſings, conſiſt of many different particulars, and if, through the injury of time, or any other accident, any of them ſhould be wanting, it may afford him a handle to overturn the moſt ancient ſettlements, and diſappoint the payment of juſt creditors. As heir at law, he is not entitled to this, without ſubjecting himſelf to the payment of his predeceſſors' debts; if, therefore, an heir at law in the ſhape of a creditor make this demand, it ought firſt to be aſcertained, that he is a really a true creditor, before he has this fruit by his action (*a*).

The appellants ought either to have been let into a proof of the reſpondent's poſſeſſion, and receipt of the rents and profits of part of the lands mentioned in his appriſing, in order to extinguiſh his demand, or otherwiſe he ought to have made oath upon that ſingle point.

Nor can it alter the caſe, that the reſpondent pretended to have other titles, to the ſatisfaction of which he could impute his receipt of the rents; for theſe titles ought certainly to have been produced in order to ſatisfy the Court that they were of validity. Nor could it be ſufficient for the reſpondent to make oath, that he had other titles, without obliging him to condeſcend upon and produce them, for that is admitting him to be judge for himſelf; and probably theſe other titles may be void too; and it is ſufficient for the appellants to retain the poſſeſſion they have, and likewiſe their deeds, till once the reſpondent ſhew, that he has a title to call theirs in queſtion; and it is impoſſible to determine that before they be produced.

It would be hard that the appellants, Sir James and John Sinclair, becauſe the other appellant the earl, from whom they purchaſed, was neceſſarily out of the kingdom, whereby they could not have an opportunity of ſearching for the papers that were wanting, ſhould be for ever debarred from producing or making uſe of theſe deeds, which was the effect of the decree of certification, by which means the rights which they have as honeſt and juſt creditors, might be entirely fruſtrated.

Heads of the Reſpondent's Argument.

The preſcription alleged by the appellants was interrupted, both by his minority and by ſeveral proceſſes, which he immediately made appear in part by writings produced in this ſuit, and offered to bring a further proof, if neceſſary, againſt the time the appellants ſhould produce their titles.

The objection made by the appellants, that the appriſing was ſatisfied by receipt of rents, could not in form be proponed or

(*a*) The appellants alſo ſtate the grounds on which they contended that the decree of appriſing was uſurious, and therefore null: the reſpondent gives a counter ſtatement; but nothing can be given diſtinctly upon this point; theſe ſtatements are therefore omitted.

insisted upon before the appellants produced their titles. The respondent was ready to make oath, if the appellants would be determined by his oath, whether or not the sums in the apprising were paid; but the objection, in the form it was proponed by the appellants, was insufficient in law; for although he should acknowledge he had possessed lands contained in the apprising, the profits of which, since his possession, might exceed the sums thereby decreed, yet that would be no proof that these sums were paid in satisfaction of that apprising, because he might and did possess those other lands by other titles than this apprising, which titles he would produce at a proper time, after the appellants had produced theirs. And after the interlocutors directing that this fact should be proved by the respondent's oath, at a calling of the cause on the 24th of February 1721, his counsel represented, that he was ready and willing to make oath upon the points referred to his oath; but the counsel for the appellants, who insisted to have his oath only to protract the suit, *declared they did pass from his oath in that state of the process.*

Judgment, 30 March 1723-4.

After hearing counsel, *It is ordered and adjudged, that the several interlocutory sentences complained of in the said appeal, except so much of the interlocutor of the 4th of January* 1721, *as relates to the objection made by the appellants to the apprising, under which the respondent claims upon pretence of its being usurious, and allowing too much interest, be reversed: and it is further ordered, that the Lords of Session, in the further progress of the cause, do not oblige the appellants to take a term for production, until the respondent, the pursuer below, shall have made out his title upon which he founds his suit.*

For Appellants, *Rob. Raymond. Dun. Forbes. Will. Hamilton.*
For Respondent, *Ro. Dundas. C. Talbot.*

The question upon the first appeal between Sir Hew Dalrymple and the Hon. Mrs. Fullarton, relative to the estate of Bargeny, 18 Dec. 1797, was upon a point very much like the present; and the judgment then pronounced was of the same import as that in the present case.

A similar judgment to this is given in a reduction improbation brought by an heir, Duff of Braco and others *v.* Earl of Buchan, on appeal, 15 April 1725.