

(The LEGAL.)

1677. June 20. WILLIAM ORROCK of Balram *against* DAVID MORICE.

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The principal sum, whole annualrents, and necessary deburments being paid by intromission within the legal; it was found this sfoot the expiring of it, although the penalties, and sheriff-fees, contained in the comprising, were not satisfied.

THERE being mutual declarators, one at William Orrock's instance against David Morice, to hear and see it found that a comprising to which David Morice had right, was lawfully redeemed by his intromission; and another, at the said David's instance, to hear and see it found and declared, that he had now an irredeemable right, not being satisfied within the years of the legal, which was expired, there being a count and reckoning.—It was *alleged* for Orrock, That he being instantly ready to make out full payment of the principal sum, whole bygone annualrents, and all the expences bestowed upon leading the comprising, and obtaining infestment, and all other deburments in pursuing upon his right, that it could not be declared an irredeemable right for not payment of the penalties and sherriff-fees, but it ought to be declared that the reversion is not yet expired.—It was *replied*, That the whole years of the legal being now run out, unless payment were made of the whole sums contained in the bonds of principal and annualrents, penalties and sheriff-fees, with the annualrents thereof, which are all made up into one principal sum, as the true ground of the apprising, and not satisfied within the legal, by our law and constant practice, the comprising becomes an irredeemable right.—THE LORDS, by their interlocutor, did find that they had power to declare the reversion not to be expired, payment being made of the principal sum in the bond, whole annualrents, and necessary deburments, to be modified upon this ground, that the expiring of legal reversions being odious, and to take away a considerable estate for less than its worth, *ex bono et equo*, they have power to hinder the same; but many were of a contrary opinion, whereof I was one, that a comprising being led for not payment of a just debt, and by our constant custom and practice, the sheriff-fees and penalties being all deduced as the grounds thereof, the failzie could never be purged, but by payment, or using an order within the legal; and, if it were otherwise, it would open a door to infinite pleas to take away expired comprising, which have always been looked upon as absolute and irredeemable rights after the expiring of the legals, for which our law allows no remedy, by restriction of the sums contained in the apprising.

Fol. Dic. v. 1. p. 21. Gasford, MS. No 977.

1675. June 18. LAIRD OF LEYS *against* FORBES.

No 6.

If the appriser continue to possess after expiry of the legal; the debt is

THE Lord Forbes having granted two several Wadfets to Alexander Burnet elder and younger; after the death of Alexander Burnet elder, Leys apprises the right of both wadfets, and some other lands from Alexander Burnet younger, and was thereupon infest. The laird of Pluscardin having acquired the right of

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reversion from the Lord Forbes, premonishes Alexander Burnet younger, after his father's death, and obtains decret of declarator of redemption; but because then there was a liferenter, and several arresters, the Lords ordained the consigned sums to be put in the hands of Forbes of Corfindae, who had bought the redeemed lands from Plufcardin, and ordained him, to give bond to make payment of the sums to the Laird of Leys at Martinmas 1643, to be made forthcoming to all parties having interest; Leys, before payment, always obtaining a renunciation of the wadsets to Corfindae; and accordingly, Corfindae gives bond, whereupon Leys charges for payment; Corfindae suspends upon double pointing, as being distressed both by Leys and Forbes of Blacktoun, who had obtained a right from the heir of Alexander Burnet elder, and also upon the condition in his obligation of obtaining a renunciation.—It was *alleged* for Burnet of Leys, that he ought to be preferred, because the sums having been ordained to be paid by Corfindae to him, to be made forthcoming to all parties having best right; he hath best right himself, in so far as old Burnet, to whom their wadsets belonged, was debtor to Leys in a greater sum, and thereupon he had right of compensation, or retention against Alexander Burnet's heir, or Blacktoun her assignee, seeing compensation is relevant against the assignee, upon debts due by the cedent before intimation; and neither could the heir, or Blacktoun her assignee, pretend any right to the consigned sum, because it is moveable, and belongs to the wadsetter's executors, and not to his heirs. For, when sums are assigned by debtors for purging wadsets of their lands, the debtor remains proprietor of the money, and may uplift the same, and pass from the order at any time before the same be accepted by the creditor, or before decret of declarator, whereby the property of the consigned sum is transmitted to the creditor; and if the creditor die, the consigned sum, if it be not lifted by the debtor, belongs to the creditor's executors after declarator, for the body of money is unquestionably moveable; and there can be no pretence upon the heritable right of wadset, because, by the declarator it is extinct; so that this consigned sum cannot belong to the heir of old Burnet, but to his executors; and albeit there cannot be a formal compensation by Leys, not having the sum in his hands, yet the same being payable to him, it is equivalent as if it were in his hand, and therefore he must have retention or preference to the one, who hath no right, nor her assignee. For clearing of this, the Lords remembered of a decision the 21st of January 1673,* Nicol against Lowrie, where it was found, That before declarator, the debtor who had consigned, or his heir, had right to the sums consigned, and might pass from the order.—It was *answered* for Blacktoun, That albeit consignation only, doth not transmit the property of the consigned sum, yet decret of declarator stateth the only right in the creditor wadsetter, and denudeth the

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thereby extinguished, and the apprising turned into an absolute right of property. This was found, though the apprising proved ineffectual as to great part of the lands, the remainder being equivalent to the debt apprifed for.

* Stair, v. 2. p. 152. See RIGHT IN SECURITY.

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debtor configner; and in this case there is a decret of declarator, so that the fums cannot belong to Burnet the creditor's heir, or to Blacktoun her assignee.— It was *replied*, That where declarator is obtained against a party, having right to the wadset, and being infest, the fums will belong to the creditor; and if he uplift them not, to his executors; and his heir will be obliged to renounce though he get not the fums, because the creditor's mind is there evident, that he doth not lift and re-employ the fums to his heir, but leaves them moveable; but moveable fums will sometimes belong to the heir, as if executors be secluded, which is frequent; and in this case, the fums cannot belong to an executor, because the order was used, and declarator obtained long after the death of Burnet elder, so that at the time of his death the wadset continued a real right; neither can it belong to the executors of Burnet younger, against whom the order and declarator was used, because he died uninfest in the wadset, and so had never right himself, which therefore cannot descend to his executors; so that the singularity of this case must only state the right of the fums in the person of the heir of Burnet elder, who died infest in the wadset.

THE LORDS found, That in regard of the specialty, the consigned fums belonged not to any executor, but to the heir of Burnet elder, and Blacktoun her assignee.

It was further *alleged* for Leys, That albeit the sum should be found due to the heir of Burnet elder; yet, *imo*, If the heir were competing she would unquestionably be excluded by Leys as a creditor to Burnet elder, whereby she being heir to him, did immediately become Leys' debtor, and could not crave up this sum, which was appointed to be paid to him, but would be excluded by compensation or retention; seeing the fums being payable to Leys himself, he could not arrest his own fums; and therefore all persons intrusted, have, by the trust, the same interest as they could by legal diligence, because they could not use the same against themselves.—It was *answered* for Blacktoun, *imo*, That there was no compensation in the case, because this sum was never in Leys' hands, but by the decret of declarator, was immediately put in the hands of Corfindae, payable to Leys. *2do*, Though there could be compensation, yet not upon Leys' fums alleged upon, because he apprised this wadset, and several other lands for these fums; and so, being heritable by a real right and infestment, he cannot compensate a moveable liquid debt. *3tio*, Leys' infestment is expired, and he and his assignees are in possession of the apprised lands, whereby the fums are extinct, and he cannot compensate therewith; and albeit this wadset, which was a part of the apprised lands, is not reached by the apprising, in respect it was led against Burnet younger, who is neither infest nor charged to enter heir, yet it is offered to be proven, that the rest of the lands yet bruiked, do exceed in worth the fums apprised for.—It was *answered* for Leys, That albeit heritable fums by wadset, which require a course of time after requisition, cannot be compensated before the time of requisition be run, yet fums apprised upon requiring no such order,

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may be summarily made use of by arrestment or compensation; and albeit Leys' apprising be expired, and possession thereby, which would have extinguished the debt, if the apprisings had been fully effectual, yet here it is but effectual in part; and therefore such proportion of the sum apprifed for, may be made use of by compensation or arrestment, as effeirs to the proportion of the lands apprifed, as to which the apprising proves not effectual.

THE LORDS found compensation competent upon sums, though apprisings were led thereupon; but found, That the apprising being expired and possessed thereby, did satisfy the sums whereupon it proceeded, albeit it proved not effectual as to the whole lands, if it proved effectual as to as much as was equivalent to the whole sums apprifed for.

And this occurred to the Lords, that Blacktoun the assignee, in so far as his right proceeded upon an onerous cause, was in better condition than the heir, and preferred him *pro tanto*; but in so far as his right was gratuitous, found that he was in no better case than the heir, and that Leys the creditor was preferable to him, if he did not bruik lands equivalent to his sums, and ordained Blacktoun to depon upon what sums he truly paid to the heir.

Fol. Dic. v. 1. p. 21. Stair, v. 2. p. 330.

1677. June 26.

KINCAID against GORDON.

MR JOHN KINCAID having right, by his contract of marriage, to a sum due by umquhile Gordon of Abergeldy, pursued his son as representing him, and insisted on that title, That he uplifted the rents of the lands of Abergeldy, wherein his father died infest in fee.—The defender having alleged, That his intromission was by right of an expired comprising, deduced against his father:—The pursuer alleged, That this apprising, coming now in the person of the apparent heir, by the act of Parliament 1661, betwixt Debtor and Creditor, is satisfiable by payment of what the apparent heir truly paid out at any time within ten years after the apparent heir's right: And within the ten years the pursuer raised a declarator, craving therein count and reckoning for the defender's intromission, and offering payment of the surplus; which declarator is produced.—It was answered, That the said act doth only declare such apprisings redeemable within ten years, of what is resting after his intromission: But here there was no redemption, nor any order; and this being a new statute, it is *strictissimi juris*.—It was replied, That by the daily practice, the legals of apprisings are preserved from expiring, and prorogated by such declarators, in respect they cannot know what to consign, till the apprifer's intromission be determined by account.

THE LORDS sustained the declarator to prorogate this legal of ten years *ad hunc effectum*, to make the apparent heir liable to the pursuer for his intromission after

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An apprising, brought by the apparent heir, is redeemable within ten years by the creditor; and this legal was found prorogated, by a declarator, raised within the ten years, craving reckoning for apparent heir's intromissions, and offering payment of the surplus.