1793.

WM. GILLESPIE and MATTHEW REID, *Appellants;*
ADELIZA HUSSEY or BOGLE, and Husband, *Respondents.*

GILLESPIE, &c.
v.
BOGLE, &c.

House of Lords, 3d May 1793.

ADJUDICATION—EXPIRY OF LEGAL—IRREDEEMABLE RIGHT—POSITIVE PRESCRIPTION—A creditor had adjudged, and, upon expiry of the legal of the adjudication, had obtained possession of the lands, which possession continued for more than 40 years, but no charter or infeftment had followed on the adjudication; and upon this the creditor pleaded a prescriptive and irredeemable right: Held, in an action raised by a co-adjudging creditor, that the first adjudging creditor was still bound to account, and that prescriptive possession on adjudication, of which the legal was declared to be expired, did not give an absolute right of property without charter and infeftment.

John Wallace, merchant in Glasgow, being indebted to the appellant Reid, by heritable bond, the latter, in consequence of not being able to obtain payment, adjudged the lands over which his heritable security extended. The lands were then on lease to Johnston, at a rent of £11. 13s. 4d., which expired in 1724; and further to secure himself, he obtained a reversionary lease to commence in 1724, at the same rent, £11. 13s. 4d.; and by virtue of this lease, and also, as was alleged by the appellants, though denied by the respondents, by virtue of his adjudication, he entered into possession of these lands in 1724. No charter or infeftment was taken on the adjudication, but he continued to possess until 1733, when he raised a decree of expiry of the legal of the adjudication, in which decree was obtained, declaring the lands to belong to him *heritably and irredeemably*. The lands remained thus possessed by Reid until 1787, when they were sold to the other appellant, Gillespie, for £800.

1724.

1733.

1787.

Thereafter an action of reduction and declarator was raised by parties who were in right of other adjudging creditors of Wallace, who had led adjudications at the same time, concluding that it should be declared that the debts and sums of money for which the lands were adjudged by Reid, were now extinguished and paid, and that the defenders should account for the intromissions had by themselves and their predecessors, and for the rents of the said lands since the year 1718. In defence, it was stated, that having possessed so long

1793.

GILLESPIE, &c. v. BOGLE, &c.

upon an adjudication, in which decree of expiry of the legal was obtained, declaring the lands irredeemable, the title to the same was absolute, and beyond all question in the appellant, and they were not now liable to account to creditors incumbrancers, or to be disturbed in the same.

The question then resolved into one of abstract law:—Whether an adjudication, upon which possession, but no sasine followed, gives, after a decree of expiry of the legal is obtained, an absolute and irredeemable right of property to the creditor, so as completely to cut off the debtor's right to redeem, and also other adjudging creditors' right to call for an accounting?

For the respondents it was maintained, that the statutes, in declaring the property adjudged to belong to the adjudger, after the expiry of the legal, implies the condition that steps will follow for vesting the subjects by charter and infeftment following on the adjudication, and this not having been done in this case, their redeemable right was not complete.

For the appellant, it was contended, that the statutes respecting adjudications, do not contain a single expression importing that the right shall not become irredeemable unless followed by charter and sasine. The want of infeftment is not made a bar to the right becoming irredeemable. The right to redeem is cut off by the statutes themselves, when ten years have elapsed; and these statutes declare, that the right then is an irredeemable right. Both by prescription, and second, by the legal having expired, and decree obtained of expiry of that legal, the right to the irredeemable property of the land was absolute in the appellants. This the more especially when there is no colourable pretext for saying that the debt had been extinguished by the intromissions with the rent, which never paid the annual interest on the bonds.

June 3, 1790.
Nov. 24, ——
Dec. 10, ——
Dec. 24, ——
Jan. 28, 1791.
Feb. 12, ——
June 28, ——
July 5, ——
Dec. 8, ——

By several interlocutors the Lord Ordinary, and finally the Court, it was found that the defenders (appellants) were "bound to account; and in consequence of several interlocutors ordering them to give in an account of their intromissions with the rents being disobeyed, they decerned "in terms of the libel."*

---

* Opinions of Judges:

LORD PRESIDENT CAMPBELL.—"Decree of expiry of the legal in absence against the common debtor, without calling the co-adjudgers,

Pleaded for the Appellant.—Originally apprisings were of the nature of a proper sale, without any power of redemption. Latterly, the act 1469, c. 37, declared such apprisings redeemable within 7 years by the owner. The act 1621, c. 6 and 7, extended the legal or equity of redemption in the case of minors only; and the next statute, 1661, c. 62, extended the seven years to 10. Thus the law stood until the act 1672, c. 19, which abolished apprisings, and introduced special and general adjudications; and this act declares, in the case of special adjudications, the lands shall remain heritably and irredeemably with the creditor if not redeemed in five years. In the case of general adjudications in ten. By the whole of these acts, as well as by the statute 1690, c. 10, it was clearly the intention of the legislature to give no redemption after the expiry of the legal, and, consequently, both by their words and spirit, such redemption is now foreclosed, and the lands absolute and irredeemable in the appellants. The whole authorities concur in stating this to be the law laid down by the statutes. The last writer (Ersk. b. 2, § 12, § 22), says, " the right to the lands after elapsing " of the legal reversion is carried irredeemably to the ap-

---

will have little effect against them. These adjudgers appear to be prior in point of time; and it is upon the personal obligation in an heritable bond that the adjudication is led. There is a *pari passu* preference. It is not an adjudication upon a *debitum fundi*, but upon the personal obligation. No prescription, positive or negative, but decree of expiry for many years elapsed. (Case of Gordon.) On the other hand, the question is with co-adjudgers, and this is a more favourable case for opening the legal, than where the question is with the common debtor alone.

" The adjudication was rigorous when used, as little arrear was then due. No loss of interest:—See Notes on case of Weekes, Session Papers, V. 59. No. 13.—Suppose they were not *pari passu*, but postponed adjudging creditors, the argument would be the same as to the interest of the parties. But if they be *pari passu*, the question is at an end, as the foreclosure cannot operate more in favour of the one than the other. See Erskine, p. 393, and act 1661, c. 62. As to adjudications upon *debita fundi*, see Erskine, p. 326; Stair, New edit.: p. 668, &c. They are much the same with the old apprisings, and legal is only seven years," Stair, p. 633.

LORD JUSTICE CLERK.—" An adjudication upon a *debitum fundi* is different. This is an adjudication upon the personal obligation in an heritable bond." Adhere.

Vide President Campbell's Session Papers, vol. 62.

1793.

GILLESPIE, &c. v. BOGLE, &c.

" priser, who possesses from that period without account, " not as a creditor in a debt, *but as proprietor of the subject* " *apprised.*" The same law is laid down by other writers. Mr. Erskine further says, " To prevent the legal of apprising " from expiring, and thereby preserve the right of reversion " either to the debtor or *posterior appriser*, it behoves them, " while the legal is yet current, to make premonition or in- " timation to the first appriser, that he may recover his " debt, and to consign the sums due under form of instru- " ment." So that it is quite obvious from all this, that after the legal is expired, the lands are irredeemable—that *within* the legal the proprietor, or even his *posterior creditors*, might have redeemed. But neither having done this at the proper time, it is too late now, after *sixty years possession*, to attempt carrying off the property, because it has risen very much in value. Nor is it law to hold, that notwithstanding the expiry of the legal, the Court, in irritancies of this kind, out of considerations of equity, interpose, and allow of an accounting not only to the debtor, but to the other creditors, because, where the statutes are positive, and no advantage taken, or informality in the adjudication itself, no discretion can be exercised in the Court. And the doctrine that infeftment is necessary to complete the irredeemable nature of the right, goes in direct teeth of the statutes. Charter and infeftment are only necessary to complete the feudal right, but the right, by the expiry of the legal, is by the statutes declared to be irredeemable.

Pleaded for the Respondents.—Reid first entered into possession of these lands under a lease from Wallace, his debtor; and this possession, after the expiry of that lease, was only continued as creditor for the purpose of obtaining payment of his debt. After that debt was paid, they had no longer any right to retain possession, and therefore bound to account for the rents received after payment of their debt. It is no answer to this to say, that the appellant is secured by prescription; and, 2. That the expiry of the legal being duly declared, the lands are now irredeemable. Because, 1st, The positive prescription cannot apply under the act 1617, c. 12, where no infeftment exists to which to ascribe prescriptive possession; besides, that possession commenced as lessee of the lands, and was merely continued after the expiry of the lease, at best but as a creditor; and, 2d, Before the expiry of the legal makes the right irredeemable, it is necessary to be infeft in order to divest

the debtor. Bankton, vol. ii. p. 222, says, "If the debtor "was infeft, the adjudication does not denude him without "a charter thereon, and an infeftment in the adjudger's "person." Here no charter of adjudication and infeftment followed; and until this took place the right of the appriser was not complete as an irredeemable right. This being the case, and the plea regarding the expiry of the legal being always an equitable consideration disregarded by the Court, in the present case there ought to be less hesitation in so dealing with it, when it is considered the adjudication, as first resorted to, was unnecessary—the creditors being already secured by heritable bond over the subjects, and also, when the appellants are only called on to account by co-adjudging creditors.

After hearing counsel, it was

Ordered and adjudged that the appeal be dismissed, and the interlocutors complained of be affirmed, without prejudice to any question which may arise, whether the debt of the respondents, or any and what part of it, had been paid.

For Appellants, *Jas. Boswell, W. Grant.*
For Respondents, *Adam Rolland, Wm. Adam.*

NOTE.—Unreported in Court of Session.

[Bell's Cases, 202; More's Stair, Note clxxxvi.]

ROBERT KERR of Chatto, Esq., . *Appellant;*
WILLIAM REDHEAD, . . *Respondent.*

House of Lords, 5th Feb. 1794.

LEASE—POSSESSION—INFORMAL WRITING.—A jotting or agreement was gone into with the tenant while his former lease was not yet expired, for 38 years' lease of the farm after the cxpiry of the old. The landlord in the meantime died. Held that the heir was not bound by this lease.

The question was, Whether the nature of a tenant's possession of the farm was sufficient to cure the defects of a writing, informal and unstamped, but signed by the landlord and tenant, agreeing to a lease after the expiry of the lease then current; and, whether a succeeding heir was bound to grant a formal lease in terms of he obligation in that writing?