

(THE LEGAL.)

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.

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No 7. satisfaction; and took in the declarator *incidenter* in this process, that thereby the pursuer might redeem from the defender, by payment of what was resting after intromissions. (See HEIR APPARENT.)

Fol. Dic. v. 1. p. 20. Stair, v. 2. p. 531.

1686. December 17. LORD BARGENY *against* LIN of Largo.

No 8.

Taking annualrent after expiry, found not to prorogate the legal.

THE case of Lord Bargeny against Lin of Largo was reported.—THE LORDS found, That Bargeny's taking the annualrent of the sum of his comprising from the debtor, after the legal was expired, was not a formal prorogating of the legal, though it seemed to dispense therewith *tacite*; however, the LORDS superfeded to declare the expiration of the legal till Whitsunday, that if the debtor pleased to redeem betwixt and that time, he might.

Fol. Dic. v. 1. p. 21. Fount. v. 1. p. 438.

1699. July 6.

HAY *against* HAYS.

No 9.

An adjudication was led, for several debts, contracted, some prior, some posterior, to inhibition by another creditor. The adjudication expired, without intromission or payment within the legal. Found, That the legal conveyed the whole right to the lands adjudged, without respect to the sums contracted after inhibition, or though part of them had been paid within the legal.

IN the competition between John Hay of Alderstone, and the Children of Hay of Aberlady, this new point came to be decided. Alderston's adjudication was led for fundry sums due by Stuart of Kettlestone, whereof some were prior to the inhibition served by Aberlady, and others posterior. The adjudication was expired, neither was there any intromission, or any other payment made to the adjudger within the legal; but Aberlady's heirs *contended*, the lands adjudged could only be affected with the sums prior to the inhibition proportionally with the sums posterior; and so the debts contracted after the inhibition being swept of by the reduction, a proportional part of the lands adjudged fell in consequence, and so must be carried by the children's adjudication; which, though it cannot compete with Alderston's adjudication (being without year and day) in so far as extends to the sums prior to the inhibition, yet must be preferred to it *quoad* a proportion of the lands and subject adjudged, effecting to the sums contracted after the said inhibition; and this was under the Lords view and consideration in the decision 10th February 1674, Doctor Blyth against the creditors of Dairie*.—Against this it was *alleged* for Alderston, That his adjudication being expired, it was the same thing in law whether it expired as to the hail sums, or only *quoad* a part; for though it were all paid to 100 merks, yet, if that be resting at the elapsing of the legal, it carries the entire property of the lands, as much as if the whole had been standing out unpaid, seeing a debtor *fibi imputet*

* Stair, v. 2. p. 263. See COMPETITION.