

(The LEGAL.)

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.

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that he did not redeem; neither does law consider the right of the adjudication, either with respect to any part of the sums extinguished by payment, as long as there be other sums unpaid for which it was led; nor does it regard any proportion of the adjudged lands as unaffected, seeing it is a *jus individuum* which resides in the sums prior to the inhibition, or the sums yet resting unpaid, though all the rest be cut off; and the foresaid case of Blyth only reserved that point, but noways decided it; and an inhibition is only a prohibitory diligence, and gives no positive right, neither can it bring in their adjudication to compete with Alderston.—It was likewise *urged*, if it had been led for the anterior sums alienably, and expired, then it would have carried the property of the lands; and why shall it be in a worse case by having sums posterior to the inhibition; for *utile per inutile non vitiatur*?—THE LORDS found the sums adjudged for in Alderston's adjudication, prior to Aberlady's inhibition, being still resting unpaid when the adjudication expired; the legal conveyed the right of the whole lands adjudged, without respect to the sums contracted after the inhibition, or though part of them had been paid within the legal. This new decision was reckoned conform to the analogy of law; though some pleaded for equity, to cut off sheriff-fees or exorbitant penalties, if there was only a small part of the sums resting at the expiring of the legal. (See INHIBITION.)

*Fol. Dic. v. 1. p. 21. Fount. v. 2. p. 57.*

1712. November 26.

Colonel JOHN ERSKINE of Carnock, *against* Sir GEORGE HAMILTON.

IN the competition betwixt Colonel Erskine and Sir George Hamilton, for the lands of Tulliallan, Sir George having founded on an adjudication thereof in the year 1680, led by Sir Robert Mill, for 30 years bygone annuities of an infeftment of annualrent, granted by Sir John Blackadder, then heritor, effecting to 5000 merks, in favours of Thomas and Richard Blackburns; to which adjudication Sir George having right from Sir Robert Mill, pretended the legal was expired.—THE LORDS found the adjudication could only subsist as a security for the sums truly owing, and could not have the benefit of an expired legal; in respect it was led for the whole bygone annualrents since the year 1649; whereas Sir Robert Mill had only right to the half, viz. Thomas Blackburn's share, till the year 1675.

Albeit it was *alleged* for Sir George Hamilton, That his adjudication being *articulatus libellus*, and one of the articles, viz. half of the annualrents, which the adjudger had right to from Thomas, being a good debt; the adjudication for that article must expire, and carry off the whole subject. No informality as to Richard's share, can prejudice the other, according to the rule, *utile per inutile non*

No 9.

No 10.

The benefit of expiry of the legal, is not allowed, where there is a *pluris petitio*.

Interlocutor.