

1666. *January 19.* GILBERT HAY *against* GEORGE FLEMING.

GILBERT Hay, being infest in an annualrent, effeiring to the principal of 1000 merks, forth of the lands of Cambo, in December 1650, and having obtained decret for poinding of the ground *in anno* 1657; the decret is suspended, and compearance is made for George Fleming, who apprised the said lands, and stands publicly infest, and craves to be preferred, because Gilbert Hay his infestment is base, and not clad with possession; and any decret for poinding of the ground, [is] obtained after the apprising, at least after the denunciation; which cannot make the base infestment public, there being no possession nor diligence [done] before denunciation nor apprising.

To which it is ANSWERED, That, notwithstanding of the said apprising and infestment following thereupon, the infestment of annualrent ought to be preferred; because the base infestment being long anterior to the apprising, and he having, upon his said infestment of annualrent, obtained decret for poinding of the ground, in October 1651, after there was but one term's annualrent due, and which decret was a year prior to any infestment following upon the said apprising, which being a legal diligence before the said apprising was confirmed by infestment; which made his base infestment, clad with civil possession a year before the appriser was infest, sufficient to make the anterior base infestment preferable; especially seeing there was but one term's annualrent due, and the decret was recovered before the apprising was confirmed. And albeit that the common debtor, doing any voluntary deed, after the denunciation of his lands, will not prejudge the appriser's diligence; yet that denunciation or apprising is not an impediment to any lawful creditor to do diligence upon prior infestment, or rights to make their infestments, that were base, preferable, before the consummation of the appriser's right.

The Lords preferred the annualrenter to the appriser.

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1666. *January 20.* GEORGE CLAPPERTOUNE *against* The LAIRD of TORSONCE.

THERE being an apprising deduced in January 1645, at the instance of Torsonce, against Ramsay of Bewick, of the lands of Wylliecleugh and Kippielaw; there was a second apprising of the said lands, within fourteen days thereafter, at the instance of Mr Alexander Kinneir, against the said Ramsay; whereunto George Clappertoune has right by progress: who having used an order of redemption of the first apprising against Torsonce and the apparent heir of Ramsay of Bewick, and others, and that before Whitsunday 1664,—to which time the expiration of the legal of comprisings which were not expired in January 1652, are prorogated; and craved that the order might be declared, and that the first comprising might be found satisfied; in so far as he offered him to prove that the first apprising was satisfied within the year of the legal, as the same was prorogated by the late Act of Parliament, either by disposition made by the first comprising of some of the lands appraised, whereof the worth doth far exceed the sum due by the first appriser, or by the sums of money received by

the first compriser from those to whom he hath disposed the lands, and by his and their intromissions with the rents and duties of the lands within the years of the legal as it is now prorogated.

To which it was ANSWERED for Torsonce, the first appriser, That there can be no declarator upon the grounds foresaid, except it was alleged that the apprising was satisfied within seven years after deducing thereof; for, by the law then standing, after expiration of the legal, he might have lawfully sold or given away the lands, or any part thereof, for any price he pleased: likeas he disposed the lands of Wylcleugh to the apparent heirs of Bewick, for whom they were appraised for 11,000 merks, and retained the lands of Kippielaw for making up what he wanted of the sums due by the apprising. And the effect of the late Act of Parliament is only for redemption of lands comprised from the persons who have them now, but noways to strike against nor oblige the first appriser, who has the same from the heir. *2do.* Any intromission with the rents, after [expiring] of the first seven years of the apprising, which was then the legal thereof, cannot be [ascribed] in payment and satisfaction of the apprising; because the appriser, and those who had right from him, intromitted *bona fide* therewith as their own; they having, by the laws then standing, an irredeemable comprising: So that there can be no declarator, except the pursuer would allege that the first apprising was satisfied by the price of the lands really received, or by intromission with the rents within the first seven years.

The Lords repelled the allegiance, and sustained the declarator, in respect of the reply founded upon the Act of Parliament 1664, betwixt debtor and creditor; and found, That the hail lands, right of wadset, teinds, and other rights contained in the first apprising, were redeemable from the defenders at Whitsunday 1664, and still are redeemable, by virtue of the order of redemption libelled: the pursuer always refunding to the heirs, or others having right from the deceased ——— Ramsay, the sum of 11,000 merks, payable by him for the lands of Wyllicleugh and others to the Laird of Torsonce, who disposed the same to him; and that before they shall be holden to renounce their right to the said lands of Wyllicleugh. And found, that the sum of 11,000 merks, and maills and duties of the said [hail] lands, since the Laird of Torsonce and others having right from him entered to the possession thereof, till Whitsunday 1664, ought to be imputed to the payment of the sums due to him, by virtue of his said apprising, in hail or in part; the annualrents always of the said sum of 11,000 merks being deduced out of the maills and duties of the said lands of Wyllicleugh, and allowed the said ——— Ramsay, and others having right from him. This being reported and found, as said is, the act was stopped upon a petition from the defenders; but thereafter, upon the 20th of February, extracted, as is above set down.

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1666. January 24. IRVINE of KINKAUSSIE *against* KERR.

In a general declarator of escheat, pursued at the instance of Irvine of Kinkaussie, against ——— Kerr,—