(REDEMPTION.)

1794. *March* 7.

JAMES CAMPBELL *against* JOHN SCOTLAND and ALEXANDER JACK.

No 6.
A declarator of expiry of the legal is neceſſary in order to cut off the right of reverſion.

Effect of a decree of declarator.

GEORGE GIB, in 1757, adjudged a tenement of houſes for a debt nearly equal to their value. He entered into poſſeſſion, and ſoon after ſold the ſubject in different parts. No declarator of expiry of the legal was ever raiſed.

In 1790, James Campbell, in right of the reverſer, brought a reduction againſt John Scotland and Alexander Jack, who, about ten years before, had acquired right to a part of the ſubject by adjudication, from the heirs of the purchaſers from Gib.

The purſuer ſtated ſeveral objections to the original adjudication, and likewiſe contended, that the debts on which it proceeded, were extinguiſhed by the intromiſſions of the defenders and their authors.

THE LORD ORDINARY took the cauſe to report; and the Court, before determining the particular objections, ordered a hearing in preſence, on the general queſtion, how far, where the adjudication is liable to no objection, and the debt is not extinguiſhed by intromiſſions within the legal, a decree of declarator is neceſſary, in order to cut off the debtor's right of reverſion.

The purſuer *pleaded:* The common law of Scotland gave the creditor a right to attach, and to ſell irredeemably a part of his debtor's eſtate, ſufficient to extinguiſh his debt. In this ſtate of the law, as there was no good reaſon for giving a right of reverſion, that privilege, which was introduced by 1469, c. 36. might have been conſidered as unfavourable. But when, in conſequence of a ſlovenly practice, unauthoriſed by law, general appriſings were introduced, whereby a valuable eſtate might be carried away for a ſmall debt, the expiry of the legal became highly penal againſt the debtor. Prior to the act 1621, c. 6. which indirectly recogniſed general appriſings, the Court, if any caſe had occurred, would probably have reſtricted the right of the creditor to a ſecurity, and given the debtor an unlimited right of redemption; and although afterwards they gave effect to the expiry of the legal, they canvaſſed appriſings ſo ſtrictly, that in almoſt every caſe it was opened up. *See* the DICTIONARIES, *v.* Appriſing.

The act 1672, c. 19. which was framed by Lord Stair, was intended to put an end to the hardſhips attending the former practice; but it failed in its object, by allowing a general adjudication, wherever the debtor refuſed to aſſign over a part of his eſtate, one fifth greater in value than the ſum due by him. General adjudications, being equally penal to the debtor, are therefore liable to the ſame reſtrictions with general appriſings.

Now, it is a general rule, that penal irritancies, introduced by law, do not take effect without declarator. This holds in the caſe of the irritancy *ob non ſolutum canonem*; and in that for omitting to inſert the limitations of an entail, in terms of the act 1685. For the ſame reaſon, a declarator of expiry is neceſſary,

No 6. and particularly where the adjudger enters into poſſeſſion, as the debt may have been extinguiſhed by intromiſſions within the legal. By this meaſure the debtor is warned of his danger, and, in practice, a ſtate of the adjudger's intromiſſions are inſerted in the libel and decree of expiry, for his information. Accordingly, the mere expiry of the legal has been in no caſe found ſufficient to deprive the debtor of his right of reverſion; and, in the following caſes, the Court have gone upon the ſuppoſition, that a proceſs of declarator was neceſſary; 5th March 1766 Chalmers againſt Oliphant; Fac. Col. No 34. p. 58. *See* GROUNDS and WARRENTS. 7th March 1769, Caitcheon againſt Fleeming*; 3d March 1758, Anderſon againſt Naſmyth, Fac. Col. No 105, p. 186, *See* PRESCRIPTION, (NEGATIVE.)

Beſides, the only plauſible reaſon for allowing an expiry of the legal to take place at all, was, that the creditor might be indemnified for being obliged to take land inſtead of money. This inconveniency, however, was removed by the acts 1681, c. 17. and 1690, c. 20, which allowed any one creditor of a bankrupt, either before or after the legal was expired, to bring the lands to judicial ſale. Indeed, it may be doubted whether theſe ſtatutes did not operate as a virtual repeal of the former ones relating to the expiry of the legal, the admiſſion of the competency of a judicial ſale after that period, ſhewing, that adjudgers are conſidered even then not as proprietors, but as creditors.

Anſwered: It appears, not only from all the ſtatutes relating to adjudications, (1469, c. 36.; 1661, c. 62,; 1672, c. 19.), but alſo from thoſe reſpecting other matters, that the mere lapſe of the legal, without any declaratory proceſs, was intended to make the ſubject adjudged, the abſolute property of the adjudger. It was upon this account, that the act 1681, c. 21. gives adjudgers, after the expiry of the legal, a right to vote at elections; although it was intended that perſons veſted with an abſolute right of property, ſhould alone have that privilege. For the ſame reaſon, when by 1690, c. 10. annuities ariſing from debts, real or perſonal, were ſubjected to certain aſſeſſments, creditors, poſſeſſing upon adjudica-

---

* The particulars of this caſe, which has not been collected, are theſe:—In 1708, two heritable bonds were granted to Edward Baillie, over a ſubject in the Cowgate of Edinburgh, the property of Alexander Hunter.—Baillie entered into poſſeſſion. After Baillie's death, one of his creditors, in 1728, led an adjudication for payment of a debt of L. 4512 Scots. Patrick Tod acquired right to this adjudication, and obtained a charter. He was infeft in 1751. In 1753, he ſold it to Fleming.

Caitchen, the heir of Alexander Hunter, the original proprietor, made up titles, by charter and infeftment, from the Magiſtrates of Edinburgh, and brought an action againſt Tod and Fleming, of reduction of the titles in their perſons, and of count and reckoning for the intromiſſions of themſelves and their authors, with the rents of the ſubjects. It appeared in the action, that the heritable debts had been extinguiſhed by intromiſſion in 1741; but the defenders pleaded expiry of the legal.

This plea was repelled; and Lord Kennet, Ordinary, found them liable for the whole rents poſterior to 1741. Upon a repreſentation, he limited their accounting to the rents, from that time, actually received.—His judgment was affirmed by the Court.

tions, whereof the legal was expired, are exempted. It is upon this principle alſo, that the creditor is not obliged to account for his intromiſſions after the legal; 1621, c. 6.; Bankt. b. 3. tit. 2. § 4. para. 65. 73.; Principles of Equity, vol. 1. p. 381. Indeed, the ſummons of declarator itſelf, according to common ſtyle, ſtates, that the lands have, ever ſince the expiry of the legal, belonged to the purſuer. This proceſs is not ſo much as mentioned, either by Stair or M'Kenzie; and that it is not neceſſary, was found; Fount. 22d February 1704, Livingſton againſt Goodlet, p. 73. v. 1. of this Dictionary; July 1783, Gordon of Carnfield.* *See* alſo, Erſk. b. 2. tit. 12. §§ 22. 26.; Bank. b. 3. tit. 2. § 4. para. 49.; Stair, 18th June 1675, Laird of Leys againſt Forbes, p. 286, v. 1. of this Dictionary. No 6.

The act 1681, c. 17. does not apply to this caſe. Its object was to force the debtor to give up his land; and it leaves all queſtions with co-creditors to be ſettled in the ranking; or perhaps it may have meant to take away the right of adjudgers, in caſe of the inſolvency of the debtor.

The Court conſidered ſeparately the neceſſity of a decree of declarator, and its effects. On the firſt point it was

Obſerved: The acts 1681 and 1690 do not affect the preſent queſtion. Formerly the eſtate of a bankrupt was divided among his creditors, and they had no way of getting payment of their debts in money. The ſole object of theſe ſtatutes was to remedy this defect, and not otherwiſe to regulate the intereſts of debtor and creditor.

It ſeems to have been the idea of the Legiſlature, when the acts 1661 and 1672 were paſſed, that an expired legal ſhould operate *ipſo jure*. But for a long time back, the rigour of the law has, in this reſpect, been mitigated; and even the principle of the act of ſederunt, 27th November 1592, with regard to conventional irritancies, has not been ſtrictly adhered to. A more equitable practice has now ſucceeded, by which parties are allowed to take as little advantage of one another as poſſible; and a reaſonable time has in general been indulged, for doing away the effect of penal irritancies. The general adjudication now in uſe, is evidently not a ſale under reverſion; but a mere *pignus prætorium;* and to convert it into an abſolute right of property, by the mere lapſe of ten years, would be a ſtrong and very unjuſt operation of the law, and not agreeable to its analogy or ſpirit in other inſtances. The creditor is not obliged, at the expiry of the term, to take the eſtate, *in ſolutum* of his debt; and as little ought the debtor to be foreclosed without ſome further judicial act, if the eſtate be large, in proportion to the debt. In the caſe of Gordon of Cairnfield, the Court went upon ſpecialties; and it may be doubted whether it was a good deciſion.

As to the effect of a decree, when obtained, the Court were agreed, that where appearance was ſeriouſly made for the debtor, all objections would be diſ-

* Not collected.

No 6. cuſſed; and that, if they were not ſuſtained, and the irritancy not removed, the lands, in conſequence of the decree, would become the abſolute property of the creditor: But it was thought more difficult to determine what ſhould be the effect of a decree of declarator in abſence. On the one hand, it was obſerved by ſome of the Judges, that though the debtor might be reſtored againſt ſuch a decree, upon ſhewing objections to the adjudication, or upon proving that the debt had been extinguiſhed within the legal, the mere inequality between the extent of the debt and the value of the lands adjudged, ought to be no ground for ſetting it aſide. Other Judges thought, that the effect of ſuch a decree would depend upon the whole circumſtances of the caſe; and that the value of the lands, compared with the extent of the debt, muſt be taken into the account; and that it would be neceſſary, in every caſe, to inquire what time had elapſed ſince the expiry of the legal; whether improvements had been made upon the faith of the right being abſolute; or whether matters were ſtill entire; and in general, that it would be incumbent upon the reverſer to ſhow good cauſe why he ſhould ſtill be reſtored againſt the decree of declarator, which he could not be, without making full ſatisfaction to the other party.

THE LORDS almoſt unanimouſly found, 'That the expiry of the legal does not 'veſt the eſtate in the adjudger *ipſo jure*.'

Lord Reporter, *Dreghorn.* Act. *Solicitor-General Blair, Geo. Fergusſon, John Buchan Hepburn.* Alt. *Dean of Faculty Erskine, Cullen, Tait.* Clerk, *Sir James Colquhoun.*

Fol. Dic. v. 3. *p.* 18. *Fac. Col. No* 112. *p.* 246.

Douglas.

See the Tenants of Morton *againſt* Earl of Queenſberry, p. 264. v. 1. of this Dictionary; where a ſecond appriſer having uſed an order of redemption againſt a firſt, the ſame was found effectual to the third appriſer, redeeming the ſecond within the legal; and it was found, that the order could not be paſt from in his prejudice.

Fol. Dic. v. 1. *p.* 22.

See Baillie *againſt* Watſon of Saughton, p. 88. v. 1. of this Dictionary.

ADJUDICATION a Summary Proceſs.
See SUMMAR PROCESS.

YEARS Rent payable to the SUPERIOR.
See SUPERIOR and VASSAL.

WHEN Requiſition, or a Charge, is neceſſary upon Heritable Bonds, in order to lead Adjudication.

See LEGAL DILIGENCE.

IF ADJUDICATION may be led upon a Debt *in diem*, conditional, &c.

See LEGAL DILIGENCE.

ADJUDICATION led upon a Debt, of which the foundation is defective, or where the debt is not fully eſtabliſhed in the creditor's perſon, how far it vitiates the diligence.

See Quod ab initio vitioſum.

ADJUDICATION, where it can be ſtopt upon the ground of a General Truſt for Creditors.

See BANKRUPT, Diſpoſition in favour of Creditors.

APPRISING or ADJUDICATION carries not a right to the fruits, as it does to the ſubject itſelf; giving only a power or faculty to intromit.

See RIGHT in SECURITY.

DILIGENCE required of Appriſers and Adjudgers.

See DILIGENCE.

APPRISING and ADJUDICATION make the Subject Litigious.

See LITIGIOUS.

EXECUTIONS of ADJUDICATIONS and APPRISINGS.

See EXECUTION.

See Inducia Legales.

RECORDING of ADJUDICATIONS and APPRISINGS.

See REGISTRATION.

IF one ADJUDGER can remove a tenant without concourſe of the other ADJUDGERS.

See COMMON INTEREST.

PAYMENT or INTROMISSION, if good againſt a Singular Succeſſor, in an APPRISING or ADJUDICATION.

See PERSONAL and REAL.

METHOD of Obtaining Infeftment by APPRISERS.

See INFEFTMENT.

REDEMPTION of Appriſings from Apparent Heirs.
See HEIR APPARENT.

Compare " What Subjects are carried by Appriſing and Adjudication," with PERSONAL and TRANSMISSIBLE.

See COMPETITION.—Arreſters with Appriſers.—Aſſignees with Appriſers.—Appriſings with Voluntary Rights.—Between Adjudgers, Inhibiters, &c.

See PRESCRIPTION.—CITATION.—ESCHEAT.—GROUNDS and WARRANTS.—*Jus Superveneiens.*—*Jus Tertii.*—PAYMENT.—PENALTY.—TACK.—TENOR.—TITLE to PURSUE.—VASSAL.—WARRANDICE.—MINOR.—PROCESS.—*Bona Fide* CONSUMPTION.

*** There are caſes, falling under each of theſe heads, of which Adjudication or Appriſing are the ſubject.

As this important branch of the Law, happens to be among the firſt in the alphabetical order of this Work, while a place has not yet been precifely aſſigned, to *every* caſe, manuſcript or printed, which has been reported;—the Editor intends to ſupply, by an APPENDIX, what may be wanting to render the head ADJUDICATION and APPRISINGS complete.