

No. 14. The Lords, upon advising a reclaiming petition, with answers, adhered to the interlocutor of the Lord Ordinary.

Lord Ordinary, *Polkemmet.*

Act. *Cathcart.*

Agent, *Wm. Ballantine, W. S.*

Alt. *Macfarlan.*

Agent, *Geo. Tod.*

Clerk, *Mackenzie.*

J.

*Fac. Coll. No. 231. p. 523.*

\* \* See Campbell and others *against* Common Agent for Postponed Creditors in the Ranking of M'Lean of Kinlochaline, 24th November 1801, APPENDIX, PART I. *voce* BANKRUPT.

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1806. January 21. MACLELLAN *against* MACREE.

No. 15.  
Debtor re-  
poned against  
a decree of  
expiry of le-  
gal, obtained  
in absence.

ROBERT MACLELLAN granted a bond to William Macree, for £45. In 1791, Macree led an adjudication upon a long lease of a piece of property of his debtor, in the neighbourhood of Stranraer, and obtained a decree of adjudication, declaring the tack to belong to him, in satisfaction of the principal sum due in the bond, interest and penalty.

In 1803, a partial payment was made by Maclellan; but as a balance of the debt still remained due, William Macree, the heir of the original creditor, raised an action of declarator of expiry of the legal, concluding for decree in common form. The summons was personally executed against Maclellan, who transmitted instructions to an agent in Edinburgh to attend to his interest. This agent, however, happened to be employed for the other party, and consequently declined the business. Decree was pronounced in absence in the month of July 1804. The lease was afterward exposed to public sale, when it was bought by Charles Wither, at the price of £71. Maclellan protested against the sale, and afterward instituted an action of reduction of the decree of expiry of the legal.

The Lord Ordinary assolizied the defender. Upon this Maclellan presented a petition; and

Pleaded: The doctrine, that the lapse of the legal *ipso facto* renders an adjudged subject the absolute property of the creditor, has been long abandoned. For that purpose, a decree of declarator is necessary; Campbell *against* Scotland, March 7, 1794, No. 6. p. 321. There is no reason for holding, that a process of expiry of the legal is to be governed by different rules from other actions of a similar nature. A decree in absence, pronounced in such a process, cannot have any greater effect than a decree in absence in other cases, against which a defender is entitled to be reponed; Landale *against* Carmichael, November 25, 1794, No. 16. p. 305. Young *against* Thomson, February 5, 1799, No. 70. p. 7012. The pursuer is ready to shew, that the debt is nearly extinguished; and it was entirely owing to the accident of the agent whom he employed, being engaged for the other party, that decree in the declarator was pronounced.

Answered : The necessity of a decree of expiry of the legal, to transfer the property to the creditor, is an innovation on our original law, introduced for the benefit of the debtor. This declarator, however, is not of the nature of a petitory action. It is enough for the creditor to shew that the debt is not paid, to entitle him to a decree. It is not denied, that a balance of this debt remained due when the decree under reduction was pronounced. There could not, therefore, have been any relevant defence, even if compearance had been made.

A pursuer has no mode by which he can oblige a defender to appear and to obtain a decree *in foro*. All he can do is, to cite him to appear. But if a decree in absence might be opened up at any time within the period of prescription, it would be the interest of every debtor who had not the means of immediate payment, to allow such a decree to go out against him. He would thus have an alternative of paying the debt, or relinquishing the property, while the adjudger had no alternative, being obliged to hold the estate as full payment. This doctrine would, in effect, protract the legal for forty years from the date of the declarator, besides deductions on account of minority, which might extend it still further, and would place adjudging creditors in a state of great uncertainty. And it is clearly repugnant to legal authorities ; Erskine, B. 2. Tit. 12. § 19. ; Livingston against Goodlet, February 22d, 1704, No. 14. p. 73. The cases quoted by the pursuer, occurred where there had been a *pluris petitio* in the adjudication, which is not alleged in the present case, as the creditor has barely recovered a sum equal to the balance of the debt, with the necessary expenses.

The Lords adhered to the interlocutor of the Lord Ordinary, found the petitioner entitled to be reponed against the decree of declarator of expiry of the legal, and remitted to the Lord Ordinary to proceed accordingly.

Several of the Judges, however, expressed their opinion against opening up this decree, in a case where it was not alleged that the adjudging creditor had, in any particular, transgressed the law, or omitted the regular steps necessary for attaching the property in payment of his debt.

Lord Ordinary, *Justice-Clerk*.  
Alt. *Macfarlan*.

Act. *Robinson*.  
Agent, *Geo. Tod*.

Agents, *Macritchie & Little*.  
Clerk, *Pringle*.

J.

*Fac. Coll. No. 393. p. 527.*

1808. January 19.

ROBERT CRAIGIE and JAMES HORNE, Trustees of SIR JAMES NORCLIFFE INNES KER, against SIR JAMES NORCLIFFE INNES KER, and against GENERAL WALTER KER, and JOHN BELLENDEN KER.

THE report of the case Sir James Norcliffe, &c. 23d June 1807, APPENDIX, PART I. *voce* TAILZIE, must be read as the narrative of this case.

Sir James Norcliffe Innes having obtained the last interlocutor mentioned in that report, which is there dated the 7th July 1807, on the day following at-

No. 15.

No. 16.

An alleged heir may, for the purpose of making up a title, grant