

tion, yet none of them could be looked upon as the judge and the pronouncer of the sentence, who ought to subscribe the same, but the messenger that did actually sit as judge, and, upon the verdict of the inquest, did decern and adjudge.

Fol. Dic. v. 1. p. 5. Dirleton, p. 112.

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1704. February 22.

LIVINGSTON *against* GOODLET.

ANNA LIVINGSTON, and James Edmonston of Broich, her husband, pursue for mails and duties, on a comprising of the lands of Gairdoch; Goodlet of Abbots-haugh compares, and craves to be preferred, as having apprised these lands long before, and you are neither within year and day, nor did you use an order of redemption within the legal, so my apprising being expired, I am proprietor, and you cannot compete with me. *Alleged*, Your apprising is null for want of a previous charge of horning, to make the debt moveable; and which was sustained as a nullity, 20th July 1622, Cranston *against* the Laird of Eastnisbet, (See APPRISING, No 2.) and this should be the rather sufficient to open the legal, to make it current, and your apprising redeemable, that the lands are ten times above the value of the sums apprised for; and it were very hard to carry away a great estate for a small sum, and by an odious expiration to ruin debtors, and to exclude all other lawful creditors; and here the nullity is pleaded to no other intent, but to prevent an exorbitant unjust advantage, for she will pay him his whole principal sum, annual-rents, penalties, and accumulations, with the interest thereof since the disbursing, and all expence he can crave; so no more is intended, but to get access, as a posterior creditor, to the remanent part of the debtor's estate, after he is satisfied *cum omni causa*. *Answered*, The old decisions did seem to require a charge previous to the leading a comprising; but since the year 1627, (now 70 years back), the decisions have clearly run in the contrary, as appears from the practiques cited by Stair, book 3. tit. 2., and which is become so firm and uncontroverted, that it is now looked upon as a principle; and though a comprising be led for never so small a sum, if within the legal it be not wholly paid, but some part of it is still resting, there is no remedy; it carries the property, if you be not within year and day, to come in *pari passu* with it; or if you have neglected to use an order of redemption, within the legal, to stop its running; or, *3tio*, If you cannot subsume and prove he is satisfied and paid by intromission, or otherwise, within the legal; then, if there were never so small a part of it resting, that carries the property of the whole lands apprised *ob penam negligentia*, whatever the disproportion be betwixt the sum and lands; and upon this bottom, of expired comprisings, stands the security of most of the estates of Scotland, which, like a corner-stone, is *non tangendum, non movendum*.—THE LORDS repelled the nullity for the want of a charge; seeing that has been omitted to be done past memory; and, as to the advantage taken of carrying away the estate by an apprising for a small sum, the LORDS found that it was not in their power to remedy: they have, in-

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The want of a charge which had formerly induced a nullity in apprisings, now in disuetude.

The Court have no power to prorogate legals.

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deed, in such odious cases modified exorbitant penalties, to hinder estates from being swallowed up by such apprisings; but if that will not do the turn, they have no power to prorogate legals, and keep them open, else they might be the arbiters and disposers of all mens estates: and therefore the LORDS preferred Goodlet, and sustained his comprising to carry the right of the lands, and refused Livingston's offer to pay him *cum omni causa*.

Fol. Dic. v. 1. p. 5. Fount. v. 2. p. 226.

ADJUDICATION UPON THE ACT 1672.

* * * THE *import* of the act is as follows:—Considering how much comprisings have departed from the original design of the legislature, which never meant that great estates should be carried away for inconsiderable debts; nor that messengers, or ignorant persons, should judge in matters of so great importance: And, considering the great prejudice to trade and commerce, proceeding from the length of the legal reversion, during which, the creditor cannot command his money, and both debtor and creditor neglect the improvement of the lands; and, that even after the legal is expired, comprisings become the foundation of much fraud; the right thereof being sometimes acquired by the apparent heir of the debtor, who thereby secluded lawful creditors: And as, by the ignorance of notaries and messengers, and in consequence of many unnecessary solemnities, nullities have often happened in the diligences, and at all times they have been most expensive, by means of penalties and sheriff fees: In order to secure equally the interests of debtors and creditors, it is enacted, That in place of apprisings, the Lords of Session shall, at the instance of any creditor against his debtor, principal or cautioner, adjudge and decern to the creditor, in satisfaction of his debt, as constituted, such a portion of the debtor's estate, consisting in lands and other rights, which were in use to be apprifed, as shall be worth the sum, principal and interest, then due, and a fifth part more, in compensation of the want of the use of the money, and the necessity of taking land in lieu of it; and these over and above the composition to the superior, and the expences of the infestment. The adjudication shall be made according to the rates of the lands and other rights in the neighbourhood, and proof shall be taken by the Lords, on the part of the creditor, and likewise of the debtor, (if he shall desire it,) of the yearly rent and value of the lands and rights, and what they have yielded for five years preceding, and what they may pay, and the rates and prices at which such lands and rights are usually sold in the neighbourhood; with power to the Lords to determine what warrandice the debtor shall be liable in to the creditor, of the lands and rights so adjudged. Upon the decret of