

1671. February 18.

Sir DAVID DUNBAR of Baldoun *against* HUGH MAXWELL, Brother to the Laird of Orchardtoun, JAMES THOMSON, and DAVID DICK.

No 49.

An apprising led both against principal and cautioner, purchased in by the apparent heir of the principal debtor, was found redeemable by the creditors of the cautioner, so far as it respected the cautioner's estate, for sums paid therefor, tho' it was not in the precise terms of the act, 'an apprising of his predecessor's estate.'

IN a pursuit for mails and duties of the lands and barony and Bombie, wherein Baldoun was infest upon a comprising led at his instance against the Lord Kirkcudbright; compearance was made for Hugh Maxwell and James Thomson, as having right to a comprising of the said lands, led within year and day of Baldoun's comprising, and so craved to come in *pari passu* with him, conform to the late act of Parliament anent debtor and creditor. It was *alleged* for Baldoun, That he ought to be preferred to the whole mails and duties, notwithstanding of that interest; because the right of that comprising was acquired to the behoof of Sir Robert Maxwell of Orchardtoun, and if he were pursuing his interest it could not be sustained, because the comprising at Dick's instance, from whom he derives his right, was upon a bond for sums of money, wherein Orchardtoun's father was principal, and the Lord Kirkcudbright only cautioner for him; and therefore Sir Robert Maxwell, now of Orchardtoun, having acquired the said right to the comprising, comprehending his father's estate, and the cautioners', the whole comprising is redeemable by the late act of Parliament, by any true creditor either of his father's or Lord Kirkcudbright's, by payment of such sums of money as he truly gave out for the same, and which sums Baldoun hath required him to accept, and thereupon hath intented a declarator. It was *answered* for Orchardtoun, That after the right to Dick's apprising was in his own name, yet as to the lands of Bombie, belonging to the Lord Kirkcudbright, it did not fall within the compass of the act of Parliament, which is only as to such lands as belonged to the apparent heir's predecessors, to which he might have been served heir; whereas these lands, which are now the subject of the debate, did never belong to the Laird of Orchardtoun, but only to the Lord Kirkcudbright, to whom Orchardtoun cannot be said to be apparent heir. It was *replied* for Baldoun, That his allegiance stood relevant, notwithstanding of the answer, because the reversion introduced in favour of creditors did truly belong to Baldoun; in this case, where Orchardtoun had a right of comprising standing in his person, not only of his own lands, whereof he was apparent heir, but of Kirkcudbright's estate, who was cautioner for his father, the interest whereof was now in the person of Baldoun, by a comprising against Kirkcudbright, who, by the clause of relief in the bond, was a true creditor of Orchardtoun's, and so had right to redeem his own estate from the apparent heir of the principal's, which benefit did now belong to Baldoun; and the act of Parliament being expressly made to obviate the fraud and circumvention of apparent heirs, by carrying away their predecessors' estates upon comprising for inconsiderable sums, to the prejudice of lawful creditors; it were most absurd and unjust that Orchardtoun should have the benefit of the Lord Kirk-

cudbright's estate, which was only comprised for Orchardtoun's debt, both their lands being in one and the same comprising, and so redeemable by the act of Parliament, upon payment of the sums of money truly paid out by the apparent heir for his right, which cannot divide the ground of his interest, being wholly satisfied, viz. the sums of money paid out by him; otherways if it were sustained that his right should stand good as to the lands of the cautioner, it would open a door to far greater injustice and fraud than that expressed in the act of Parliament.—THE LORDS having well considered the act of Parliament, and true meaning thereof, which was to obviate all fraud and circumvention of the true and lawful creditors of apparent heirs' predecessors; and that Kirkcudbright was a true and lawful creditor, from whom Baldoun had comprised, and so came in his place; and that this case was more favourable than that expressed in the act of Parliament, and did fall within the compass thereof, and the reason of this act, which is *anima legis*; and that if it were not sustained, the act should be made elusory; therefore they preferred Baldoun, and found, that he had right to the reversion contained in the act of Parliament, and did extend the same to him *in causa maxime favorabili*.

Fal. Dic. v. 1. p. 359. Gosford, MS. No 339. p. 159.

* * * Stair reports the same case :

BALDOUN pursues the Tenants of Bombie for mails and duties; compearance is made for David Dick, who produced an apprising of the said lands against the Lord Kirkcudbright, within year and day of the pursuer's apprising, and craves to come in *pari passu* with the pursuer, conform to the act 1661, anent creditor and debtor. It was *answered*, That by the same act it is provided, that where comprisings are acquired by the apparent heir, or to his behoof, that the same should be satisfiable for such sums as the apparent heir paid, and offers to satisfy the same. It was *answered*, That albeit the act doth so provide, as to the estate that might belong to the apparent heir, it can extend no further; but this apprising is not only of the estate of Orchardtown, but of the estate of Kirkcudbright, wherein Sir Robert Maxwell, apparent heir of Orchardtown, hath no interest, the apprising must be valid as to that. It was *answered*, That Kirkcudbright was but cautioner for Orchardtown, and that the act bears, that such apprisings shall be satisfied by what the apparent heir paid; and such apprisings being satisfied, it is simply extinct and can have no effect.

Which the LORDS found relevant; and seeing David Dick's apprising is assigned to Sir Robert's own brother, the Lords allowed witnesses, *ex officio*, to be adduced for proving that it was for Sir Robert's behoof.

Stair, v. 1. p. 726.