

No 50.

The power of redemption from the apparent heir purchasing in expired appraisings, competent by act 1661, cap. 62. to the posterior appraisers, was extended also in favour of the personal creditors. See No 56. p. 5313.

Apparent heirs are bound to assign to creditors, appraisings purchased by them, whether within the legal or after it.

1671. July 11. SIR GEORGE MAXWELL *against* MAXWELL of Kirkonnel.

SIR GEORGE MAXWELL of Nether Pollock, pursues Maxwell of Kirkonnel, for payment of a debt of his father's, as behaving himself as heir by intromission with the mails and duties of his father's lands of Kirkonnel. The defender *alleged* absolvitor; because his father was denuded, and an appriser infest, and so could have no heir in these lands. It was *replied*, That notwithstanding of the apprising, the same remained redeemable, and the defunct remained in possession; and the defender, his apparent heir, did continue his possession, and so has behaved as heir; and, though he had had a right or warrant from the appriser, yet during the legal it is *immistio*, having no other cause nor title. It must be presumed to be granted to him as apparent heir, much more where he hath no warrant from the appraisers. *2dly*, It is offered to be proven the appraisers were satisfied by intromission, and what is wanting, the pursuer offers to satisfy the same at the bar; for, by the act of Parliament 1661, betwixt debtor and creditor, appraisings acquired by apparent heirs may be satisfied by the defunct's creditors, for the sums they truly paid out by the space of ten years; so that the defender ought to condescend and depone what he gave out, and to count for his intromission, and what is wanting the pursuer will pay. The defender *answered*, That behaving as heir, being an odious, universal, and passive title, any colourable ground is sufficient to restrict it to the value intromitted with; and, as to the offer to satisfy the defender of the apprising to which he has right, it is not competent *hoc ordine*; for by the act it is only introduced in favours of other-apprisers, and the pursuer is a mere personal creditor without any apprising. It was *answered*, That the narrative of that part of the act, bears it expressly to be in favours of creditors; and though the subsumption is only applied to appraisers, yet it is not exclusive; and, by the common custom, satisfaction of appraisings by intromission or present payment, is ever received by exception or reply.

THE LORDS found, that behaving as heir is sufficiently elided by any right or warrant from the appraisers, as to intromission thereafter; or that if the defunct died not in possession, but that the appraisers had then, or thereafter attained possession before the intromission; but found, that the apparent heir's continuing in the defunct's possession without a warrant, did infer behaviour; and, that the offer to purge the apprising at the bar, was competent *hoc ordine*, without burdening the creditors with the expenses of apprising, to make the apparent heir liable for what he intromitted with; and that the apparent heir should assign the apprising, whereupon the creditor might continue possession till he were satisfied of the sums now paid out.

July 21.—IN this pursuit related the 11th of July instant, it was further *alleged* for the defender, That the pursuer cannot purge his apprising, as now

being in the person of the apparent heir, by the act of Parliament 1661 betwixt debtor and creditor, by payment of what truly the apparent heir paid, because the express provision in that act is, that wherever the apparent heir of the debtor shall acquire right to expired apprisings hereafter, which cannot extend to this case, because the right to this apprising was acquired before that act, and because it was not an expired apprising, but the legal then running. It was *answered*, That albeit the disposition of the apprising granted to the apparent heir was prior to the act, yet the right was purchased posterior to the act, for the disposition could not give right, but only the infeftment following thereupon; for if, after that disposition, any other had been infeft upon apprising or disposition by the defender's author, that posterior infeftment would carry the right, so that the author cannot be said to be divested, or the apparent heir invested, or stated in the right, till his infeftment, which is after the act of Parliament. To the *second*, the pursuer *answered*, That the defender's apprising, albeit it was redeemable when he acquired right thereto, yet, it becoming now irredeemable in his person, it cannot be denied but he has acquired right to an irredeemable apprising; albeit it was not irredeemable when he acquired the right, yet he hath acquired right to that apprising that now is irredeemable; for, the extinction of the legal reversion, *cursu temporis*, is a right accreting to him, and acquired by him, and no heritage to him; and, seeing the words of the act are capable of this interpretation, there can be no doubt of the legislator's mind, or that it should be thus interpreted; because otherwise, that excellent provision would be evacuated, for the apparent heir would always acquire right to an apprising before the legal were expired, though he should pay the appriser the full sum, and would make no use of it till the legal were expired, and thereby carry the right of the whole estate, though it were of twenty times more value; but, the only motive of that act of Parliament being, that albeit the law gives apprisers the right of all that they apprise at random, if they be not redeemed within the legal, yet the appriser is ashamed to take so great legal advantage, and therefore ordinarily compones with the apparent heir, who being favourable, makes no bones to bruik the whole estate of his predecessor, excluding all his other creditors; and therefore this remedy is introduced, which will be evacuated if the act of Parliament be not thus interpreted; and that interpretation should be ever followed which is according to equity, and whereby the statute may stand and not be eluded. The defender *answered*, That this statute being correctory of the common law, is strictly to be interpreted and not to be extended; and the acquisition of rights being ever interpreted from the disposition, and not from the infeftment thereon, *multo magis*, should it be so interpreted in this case; and as to that part thereof anent the expiring of the apprising, the pursuer's interpretation is not only constrained but inconsistent with justice, for *ubi subest remedium ordinarium non est recurrendum ad remedium extraordinarium*; for, if the apparent heir acquire right to an apprising unexpired, the reason and motive of the statute cease; for both

No 50.

the debtor and co-creditors may redeem from the apparent heir, and can pretend no necessity of extraordinary remedy, especially if the apparent heir's right be not latent, but public by infeftment.

THE LORDS found that the apparent heir's right being only become real by infeftment after the act of Parliament, that it was then to be understood to be acquired when the author was denuded and the apparent heir invested, so that no posterior right from his author could exclude him; and found also, that albeit the apparent heir's right were during the legal, yet if it stood in his person till the legal were expired, that the same fell within the act of Parliament, and found it redeemable by what the apparent heir truly paid within ten years, to be counted from the date of the acquiring of the right, conform to the words of the act, and not from the time the apprising became expired thereafter. See PASSIVE TITLE.

Fol. Dic. v. 1. p. 359. Stair, v. 1. p. 751. & 763.

* * * Gosford reports the same case :

SIR GEORGE MAXWELL pursuing Kirkconnell, as representing his father, for payment of 1200 merks, and *insisting* against him as behaving himself as heir, by intromission with the mails and duties of the lands of Kirkconnell; it was *alleged first*, That his father was denuded by an apprising led at his good-dame's instance; to which it being *replied*, That notwithstanding thereof, the father remained in possession until his death, and immediately thereafter, the defender entered to the possession, the LORDS did sustain the same as behaviour. It was further *alleged*, That the defender had right from the compriser before he entered to the possession, which ought to defend him against that passive title of behaviour as heir. It was *replied*, That by the late act of Parliament, creditors have the benefit to redeem from the apparent heirs, who should acquire rights to expired comprisings of their father's estate, for payment of the sums of money paid out for the same; likeas, the pursuer had libelled upon the said act of Parliament, and offered to satisfy the sums. It was *duplied*, That the act of Parliament did only extend *ad futura*, whereas the defender's right was prior to the act of Parliament. It was *triplied*, That the defender's right, before the act of Parliament, being but a naked disposition, which was but a latent deed, and whereupon no infeftment followed till after the act of Parliament anent debtor and creditor, it did fall within the same, and gave right to the pursuers, as lawful creditors, to redeem. THE LORDS having considered this as a general case, found, that the pursuer, by the act of Parliament, had right to redeem; and, that a naked disposition, or an assignation by the good-dame to the grand child, did not denude her as having right to the comprising whereupon she was infeft, and that the right not being established in his person by infeftment until after the act of Parliament, it did fall within the same; but, if the good-dame had never been infeft, it had altered

the case. It was likewise *alleged*, That the pursuer being but a personal creditor, and never having comprised by the act of Parliament, could have no right to redeem. THE LORDS did also repell this defence, in respect that the act of Parliament was conceived as to all lawful creditors, without requiring that they should comprise the debtor's lands, or the reversion of prior comprisings, which could not be the meaning of the act of Parliament, seeing it gave them right to redeem where the legal of comprisings was expired.

Gosford, MS. No 385. p. 192.

No 50.

1673. February 13.

MAXWEL against MAXWEL.

SIR GEORGE MAXWEL of Pollock having pursued Maxwel of Tinwal as representing his father, upon all the passive titles; he proponed a defence of payment, and a term being assigned for proving, he produced a discharge; and the pursuer at that same time held him as confest upon the passive titles, except as behaving as heir by intromission with the rents of the lands of Tinwal; as to which litiscontestation was made on this point, that he intromitted as having right to an apprising led against his father by his grandmother, whereunto he was assigned by her; and it being *alleged*, That by the act of Parliament 1661, betwixt debtor and creditor, apprisings returning to the apparent heir were redeemable within ten years for what they truly paid; the defender *deponed*, That he had got the assignation from his grandmother out of her affection *gratis*; whereupon it arose to the Lords consideration, whether such an apprising returning to the apparent heir was void without any satisfaction, or if it were redeemable from the heir for ten years after his right for the true sums therein contained.

THE LORDS inclined to think it redeemable for the full sums for ten years after the apparent heir's right, but not that it should be void without satisfaction, the assignation being without collusion upon so evident a cause as the affection of a grandmother, which would never have been done if it could not have profited the grandchild, but accresced to his creditors for nothing.

The defender, upon some objections against the discharges, offered to take it up, and to remit to the pursuer to prove the passive titles, and offered to compare presently, and depone thereupon; which the Lords refused, and found that any party pursued to represent proponing payment, did liberate the pursuer from proving the passive titles, and after litiscontestation, could not pass from the defence.

Fol. Dic. v. 1. p. 359. Stair, v. 2. p. 172.

29 Z 2

No 51.

Apprisings acquired by apparent heirs gratuitously, are redeemable from them within the ten years, for the full sums contained in them. See No 53. P. 5311.