

No 52.

The act 1661
not extended
against the
husband of
the apparent
heir.
See No 54.
p. 5312. and
No 64. p.
5327.

1673. February 21.

RICHARDSON *against* LAMONT.

THERE being an apprising led at the instance of — Ferguson against Christian Palmer, as heir to her father, upon her father's debt; William Richardson, as having right to a posterior apprising against her for her father's debt, pursues a declarator against Colin Lamont her husband, and Skeen of Hall-yards, that it may be declared that the right of Ferguson's apprising being in the person of Hall-yards, to the behoof of Colin Lamont, who at the time of the acquiring of this right, was husband to the said Christian Palmer the apparent heir, that the same should be redeemable from the husband for the sums truly paid out, in the same way as it would have been redeemable from the apparent heir his wife by the act of Parliament 1661, betwixt debtor and creditor; and that because the express reason of that law reacheth this case, viz. that expired apprisings not being answerable to the value of the lands appraised, do ordinarily return to the apparent heirs of the debtor, and exclude other creditors; and there is no doubt the same motive hath induced Fergusson after his apprising was expired, to dispoise it to the apparent heir's husband. It was *answered*, That statutes are *stricti juris*, and parity of reason cannot extend them to like cases; for that were to give a legislative authority to the Lords; so that the letter of the statute being incapable of such an interpretation, it bearing only that apprisings returned to apparent heirs, which can never be extended to reach to their husbands, or to limit their freedom of acquiring.

THE LORDS found not the declarator relevant, unless it were proven by the husband's oath or writ, that the apprising was truly to the behoof of the wife the apparent heir as fiar, and to her heirs, and that it was only similitely taken in the name of the husband, and his heirs to her behoof.

Eol. Dic. v. 1. p. 360. Stvir, v. 2. p. 178.

* * * Gosford reports the same case :

IN a declarator at the instance of William Richardson against Christian Palmer and her Husband, to hear and see it found, that he had right, by virtue of the late act of Parliament, to redeem a comprising which was prior to the pursuer's, at the instance of one Ferguson against the said Christian as apparent heir to her father, which she and her husband had purchased for a small sum of money, which the pursuer was willing to deliver them; it was *alleged* for the husband, That he having purchased the right of that comprising with his own means, and taken the right to himself and his wife in liferent only, and the fee to the heirs of the marriage; which failing, to the husband, his heirs; his right did not fall within the act of Parliament; but, as *quilibet*, he might purchase the right of that comprising as said is. It was *replied*, The said right did fall within the act of Parliament notwithstanding, because if such convey-

ances were allowed, the act of Parliament should be altogether frustrated, where the debtor should die leaving only heirs female, who, being married to husbands, might easily purchase from comprisers in their husbands name, and to the heirs of the marriage, which failing to the husband's heirs, to which they might be easily induced upon supposition that they have no heirs of their own; and the right in question being of that nature and condition, cannot be looked upon as acquired by a stranger; for it would thereby undoubtedly follow, that all creditors who should have to do with the heirs female, (would have no remedy), which is contrary to the meaning of the act of Parliament, which makes no such distinction. THE LORDS did repel the defence in respect of the reply, and found that the acquiring of the comprising by the husband being after the marriage, and that the fee of the land was provided to the heirs of the marriage who would have been heirs by progress to the wife's father, to whom the lands belonged; that the husband was not *tanquam quilibet*, but the purchase of the comprising ought chiefly to be looked to as done upon the wife's interest, and her heirs, and that if it should be otherways found it would make the act of Parliament elusory, wherever creditors had to do with heirs female, albeit that act was made to obviate fraud and circumvention.

Gosford, MS. No 578. p. 321.

1673. July 9.

CAMPBELL against CAMPBELL.

IN an action for mails and duties of the lands of Straquhair pursued at Kilpount's instance, as compriser of the said lands, compearance was made for the Laird of Arkinlaws, who *alleged* he had a prior comprising, and so ought to be preferred. It was *replied*, That he was denuded in favours of Straquhair's eldest son and apparent heir, and so his right fell under the late act of Parliament, whereby a lawful creditor might redeem from him, for payment of the true sums of money that he gave for his right. It was *replied*, That the right made by Arkinlaws to the son was *pura donatio*, and for no sums of money, and so fell not within the act of Parliament, which was only against the apparent heirs who did acquire rights to comprising led against the father. THE LORDS having considered the act of Parliament, did find, that if the right made by Arkinlaws to the son was *pura donatio*, and for no sums of money, it did not fall within the compass thereof, and cannot be redeemed but by payment of the whole sums contained in the comprising; but it being *alleged* that there was no probability of any such gift, and that it appeared to be but a contrivance, the LORDS, before answer, ordained Arkinlaws and the old and young Lairds of Straquhair to be examined upon oath, if Arkinlaws got any sums of money or any good deeds from the father or son for the right made by him.

Fol. Dic. v. 1. p. 359. Gosford, MS. No 619. p. 358.

No 52.

No 53.

Found, that an apprising, which had been gifted to the heir apparent, could not be redeemed from him, without payment of the full amount contained in it. See No 51. P. 5309.