

prising could not be redeemed till after his father's death. *2do*, The right of apprising being acquired *ex dono*, it fell not under the act of Parliament; both which allegiances the Lords repelled.

It was further *alleged* against the apprising, That it did not extend to some lands, being restricted by Mr William Dundas Advocate, who stood in the right of the apprising, before it came in the apparent heir's person.

*Answered*; That such a restriction being only personal, it cannot prejudice a singular successor in the real right.

'THE LORDS found, that if infeftment had followed upon the apprising, before restriction, the restriction was but personal; but if it preceded infeftment, it did affect and regulate the apprising against the singular successor; because, till infeftment, the apprising was transmissible by assignation.' It was controverted among the Lords, if a charge against the superior, or the expiring of the apprising before restriction, had the same effect as an infeftment, seeing these could not be a title of removing. See PERSONAL and REAL.

*Fol. Dic. v. 1. p. 359. Harcarse, (COMPRISINGS.) No 310. p. 76.*

1685. February 26. CAMPBELL *aganst* CAMPBELL.

THE LORDS decided the point between Campbell of Silvercraig and Sir Duncan Campbell of Auchinbreck, *viz.* whether or not an apparent heir buying in a comprising within the legal, before it is expired, can be obliged, on the 62d act of Parliament 1661, to take the money he gave for it. It was *alleged*, The act took only place in the case where the comprising bought in was expired, because, if it was current, the other creditors had an ordinary remedy extant, *viz.* to redeem within the legal; and that act 62d being correctory, is an extraordinary remedy, *et strictissime* to be interpreted; *non enim est recurrendum ad extraordinarium remedium, quamdiu extat ordinarium.* Yet the LORDS, for securing creditors, justly found it all one case, whether the apparent heir bought it within the legal or after. Which point was not formerly decided.

*Fol. Dic. v. 1. p. 359. Fountainball, v. 1. p. 344.*

1686. March.

BAILLIE of Torwoodhead *against* The REPRESENTATIVE of EDWARD RUTHVEN, and HUGH WALLACE Cash-keeper.

IN a declarator at the instance of William Baillie of Torwoodhead, nephew and heir of tailzie to James Lord Forrester, against Mr Ruthven his son and

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that an apprising purchased by an apparent heir during his father's life was redeemable by creditors.

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Altho' the act of Parliament mentions only expired apprisings, yet those acquired by an heir apparent within the legal were redeemable.

No 64.

An apprising of a defunct's estate, purchased in by the heir of

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line, was  
found re-  
deemable by  
the heir of en-  
tail, who suc-  
ceeded to the  
lands, though  
it was plead-  
ed that the  
act concerns  
only appris-  
ings of lands  
to which the  
purchaser  
may succeed  
as heir; and  
that the act  
is in favour of  
creditors  
only.

heir of line, for redeeming some apprisings against the said Lord Forrester, acquired by the defender, upon payment of the sums he truly gave for them;

*Answered* for the defender; The act of Parliament making apprisings redeemable from apparent heirs, concerns only apprisings of lands to which they might succeed as heir; whereas the lands in the apprisings, acquired by the defender, are tailzied, and such as he, the heir of line, is absolutely stranger to. 2. The heir of tailzie is not properly a creditor of the defunct, and so has no interest to redeem the apprisings acquired by his apparent heir of line, who cannot be considered an heir *quoad* these, more than intromission with the defunct's writs of the tailzied lands, would infer the passive title of behaviour against him.

*Answered*; The design of the act of Parliament is to secure creditors against the carrying away of their debtor's estate by acquisitions made by his children and representatives; and if it were sustained only as to the redemption of apprisings of lands to which the acquirer was *alioqui successurus*, then he might easily be eluded by the heir of line's purchasing apprisings of the tailzied estate, and the heir of tailzie's acquiring apprisings of what is untailzied, whereby the defunct's creditors would find themselves utterly defrauded. 2. The pursuer must be considered as a creditor to impugn every thing that may carry away the tailzied lands from him. And the parallel does not hold between the passive title of *gestio pro hærede*, which makes an universal representation, and the effect of the foresaid act of Parliament, which only precludes apparent heirs *à lucro captando*, and allows them full satisfaction of what they truly paid out.

'THE LORDS found the heir of line liable to denude in favours of the heir of tailzie, conform to the act of Parliament.'

In this process the LORDS found apprisings acquired by the apparent heir's factor, to be in the same case as if they had been taken in the constituent's name, then a pupil. 2. Found it relevant, that an apprising was in the defunct's charter-chest, either blank, or with a right thereto, although it was filled up with the name of Hugh Wallace the factor, and now in his custody; and he offered to prove that it was in his hands at the debtor's decease; yet the Lords would not prefer him to the probation, but allowed a conjunct probation upon this speciality, that the charter-chest having come in the possession of the curators and his factor, he might have had access to the apprising, and taken it out.

*Fol. Dic. v. 1. p. 360. Harcarse, (COMPRISINGS.) No 319. p. 78.*

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1637. February. FISS and LIVINGSTON *against* CUNNINGHAM.

AN apparent heir having acquired a disposition of his predecessor's lands from one having right thereto by an expired apprising; the LORDS found the