

sums they truly paid. It was *answered, non relevat*, because the defender acquired the apprising when he was not apparent heir, having then an elder brother living. It was *replied*, That the elder brother was out of the country, and that the appriser did dispoise the apprising for small sums to the second brother, upon account of his blood and relation; and there is like reason to prevent fraud in this case, as if the defender had been immediate apparent heir.

THE LORDS found that the act of Parliament could not be extended to this case.

Fol. Dic. v. 1. p. 360. Stair. v. 2. p. 324.

* * * Gosford reports the same case :

IN a pursuit at ——— instance against ——— representing his brother, for payment of his debts, upon that passive title that he had intromitted with rents of lands wherein his brother died infest, as apparent heir; it was *alleged* for the defender, That he could not be liable upon that passive title, because he had acquired a right to a comprising of his brother's estate, in his brother's lifetime, and so could not be apparent heir, which is only sustained against those which are *in linea decendente*, but not of collateral line. This allegiance being sustained, it was then craved that the pursuer, being a lawful creditor, might have the benefit of the act of Parliament anent debtor and creditor, that he might redeem from the defender for that sum he paid for the right of the comprising, seeing by the death of the brother without heirs, he is now apparent heir. THE LORDS having considered the act of Parliament, did find that the defender's right did not fall within the same, nor could be redeemed by a creditor, because he was not, nor could be, interpreted an apparent heir, having acquired that right during his brother's lifetime, who might have had other heirs of his own body, and the act of Parliament can only be interpreted of such apparent heirs who necessarily may succeed.

Gosford, MS. No 749. p. 462.

1677. January 9.

HAY against GREGORIE and Others.

HAY of Moldovat being infest in an annual rent out of certain lands of the estate of Frendraught, pursues the tenants thereupon for payment, who have raised a double poinding against David Gregorie, the Lord Frendraught, Ogilvie and others; who compear and *allege*, That their right to the lands in question is by expired apprisings and infestments, prior to the pursuer's infestment.—It was *answered*, That these apprisings were now come in the person of Lord Frendraught, who is apparent heir, and therefore may be taken off by any creditor within ten years of the acquisition, conform to the act of Parliament 1661 betwixt debtor and creditor.—It was *replied*, That this act gives only the benefit unto the posterior apprisers.—It was *duplicated* for the pursuer, That as to this clause of the act, the *ratio legis* expressed in the narrative is general, ' the

No 55.
while he was
only a se-
cond brother,
and not appa-
rent heir.

No 56.
The right
of redemp-
tion from the
apparent heir,
of expired
apprisings
purchased
by him, ex-
tended in fa-
vour of credi-
tors, who had
not apprised.
See No 50.
P 5306.

No 56. 'prejudice of the creditors;' and though in the subsumption it mentions only appraisers, that is not exclusive, but this, or any creditor who may apprise, may declare the apparent heir's right satisfied, or satisfiable by such a sum; and therefore the Lords have in many cases sustained the same in favour of creditors, though not having appraised; for it cannot be doubted, but adjudgers would have the same benefit, though they be not in the subsumption.

THE LORDS found, That this pursuer being a creditor infest in an annualrent, and being excluded by a prior apprising expired, come in the person of the apparent heir, that he hath good interest to found upon the act of Parliament for satisfying the apprising, that his right may be effectual notwithstanding of the expired apprising.

Fol. Dic. v. 1. p. 359. Stair, v. 2. p. 488.

* * * Gosford reports the same case :

IN a suspension at the instance of the tenants of Halkheid-herell and Woodhead of Fren draught, of a decret obtained against them at the instance of Hay of Muldavit, upon a reason of double poinding, compearance was made for David Gregorie, who was infest as heir to his brother Alexander, who was heir to Mr John Gregorie, who had comprised the said lands, and thereupon craved preference as having a public right; whereas Muldavit had only a base right, flowing from the Viscount of Fren draught, who was common debtor, and by virtue thereof had been in possession.—It was *answered* and *alleged* for Muldavit, That the said David Gregorie being only infest as heir to his brother, could never quarrel his right, because the same being granted by contract of marriage betwixt him and the Viscount's sister, for security of three chalders of victual, or 300 merks out of the lands, by postscript subjoined to the contract, the said Mr John had ratified and consented to his right.—It was *replied*, That any such postscript or consent was conditional, and did expressly bear that he only consented in case, by an agreement betwixt the Viscount and him, he should be satisfied of his interest due by his comprising out of the estate; so that Muldavit should only have right to three chalders of victual, or 300 merks of money out of the superplus estate; which agreement never took effect, the Viscount dying without performing his part, or disposing any lands for his satisfaction.—It was *duplicated*, That this Viscount of Fren draught having performed the conditions by disposing to the said Alexander as much of the estate as did satisfy his debts, and taking a right to the whole comprising in the person of George Morison for his behoof, Gregorie could have no interest to propone upon his right, nor the Laird of Boyn who had right from him; seeing Muldavit being a true creditor by infestment, had a just action against the Viscount upon the late act of Parliament to redeem his right of comprising, which he had acquired within ten years after his acquiring thereof, which was not yet expired, and that by payment of the true sums of money paid to the compriser; where-

as here the Viscount was fully satisfied by the sale of lands, the price whereof did exceed all the money paid to Gregorie.—It was *duplied*, That the Viscount did never sell any lands as heir to his father, but as a singular successor, by acquiring Gregorie's comprising, who had only ratified for himself, but never had obliged his heirs; so that he dying, his brother David had a full right to the comprising as being served heir; and the conditions of the ratification never being fulfilled in his brother's time, could not oblige him; and as to the Viscount, he could never be overtaken upon the act of Parliament; seeing it did only give a power to redeem from apparent heirs, buying in the first comprisings, to posterior creditors who should comprise their reversions; whereas Muldavit was not at all a compriser, but had only a base infestment, and so could not crave the benefit of the act of Parliament; and whensoever he shall obtain a decret, and thereupon comprise, he shall have an answer; and albeit he had comprised, yet he could never crave the redemption of these bonds, because Frendraught had comprised this right of Gregorie's, not only by the sale of some lands, but by payment of L. 20,000 out of his own means and estate, which he never had from his father.—THE LORDS having considered the postscript and ratification of the contract of marriage, found, That it bearing no special time, and Gregorie being fully satisfied, and the condition specified fulfilled by rights made to him of as many lands as satisfied his interest, he could never quarrel the ratification made by Mr George Gregorie, to whom he was heir by progress; and as to the act of Parliament whereupon this Viscount alleged, they found, That albeit it did only bear a reversion in favour of true creditors, yet by several practiques the Lords had found, that they having a real infestment in the estate, they need not apprise from apparent heirs the reversions of prior comprisings, which were only to multiply charges and expenses; but had a good title to pursue the apparent heirs who bought in comprisings, to dispoise as much of the estate as would effer to their sums, he being fully satisfied of the true sums given out by him for acquiring these comprisings. But as to this case, they found that point not necessary to be decided; it being alleged and found relevant, that the agreement with Mr John Gregorie was specific, fulfilled by this Viscount of Frendraught, who was apparent heir, not by his own means, but by the lands and true estate of the last Viscount, which they only found obligatory by Gregorie's heirs.

Gosford, MS. No 933. p. 611.

1678. *January 15.* M'DOUGAL *against* GUTHRIE and his SPOUSE.

ANDREW M'DOUGAL pursues ——— Urquhart as heir to ——— Urquhart of Dunleughs his debtor, and Sir Henry Guthrie for his interest; and insists against her as intromitter by herself and her husband with the rents of the lands wherein her father died infest.—The defender *alleged* absolvitor, because any intro-