

No 60. the defender, upon their bonds of provision granted to them by their father, those bonds being granted after the expiring of the legal of the apprising.

*Sir P. Home, MS. v. 1. p. 3.*

No 61.

Found that the ten years allowed for redeeming apprising purchased by apparent heirs, commence from the time of completing his acquisition by infestment, or some other public deed, by which it becomes notour.

1683. November 13. MOLLE against CRAW.

IN a cause between Mr Patrick Craw of Heugh-head and Molle of Maynes, it fell to be debated from what time the ten years allowed for redeeming an apprising purchased and acquired in by an apparent heir ought to commence; whether from the date of his disposition, or his own and predecessor's creditors their knowledge of his acquisition of it; or, *3tio*, If at least from the date of his infestment registered, after which they may know it? For the 62d act of Parliament in 1661, seems to incline to the date of his right; yet if that hold, then he has no more to do but to conceal and keep up his disposition latent till the ten years be elapsed; and remedies introduced for eviting of fraud must be effectual; like as the time of all the small statutory prescriptions is *tempus utile et non continuum*, and so runs only *a die notitiæ*.—THE LORDS ordained this to be heard in their own presence.

1683. November 20.—Molle of Maynes his case with Craw of Heugh-head (mentioned 13th current,) is heard in presence; and the words of the act of Parliament being urged, that they must run from the date of the right; it was answered, They must be understood *in terminis habilibus*, viz. after his purchasing the right can be known. 'THE LORDS found the meaning of this act (though the words do not go along) to be from the completing this acquisition by taking infestment, charging the superior to enter him, or some other solemn and public deed to make it notour.' Which extension of the act was approved of by all as just and equitable.

*Fol. Dic. v. 1. p. 360. Fountainball, v. 1. p. 242. & 243.*

\*\*\* P. Falconer reports the same case :

IN an action pursued by Molle of Mains *contra* Mr Patrick Craw, wherein Mr Patrick was convened, as representing his father, by possessing his estate, it was *alleged* for the defender, That any intromission he had with the foresaid estate, was by virtue of an apprising whereto he had right, and ten years being elapsed since his acquisition thereof, was not now redeemable from him as apparent heir, by his father's creditors, upon payment of the sums he truly paid therefor. It was *replied*, That the foresaid comprising was redeemable, notwithstanding that there were ten years elapsed since the date of the defender's

disposition; because the act of Parliament bears it to be redeemable within ten years after the apparent heir's acquisition, and the acquisition behaved to be understood a habile conveyance; so that if there was infeftment upon the comprising in the author's person, the right was not completely acquired till the apparent heir was infeft upon his author's disposition; or if there was no infeftment upon the comprising, then the right was not fully established by the disposition, until intimation thereof was made by action for mails and duties, or some other way; and that if the ten years were counted from the date of a latent disposition made to the apparent heir, the intent of the act of Parliament should be evacuated, seeing the apparent heir might continue the father's possession and conceal his right to the comprising until the ten years were elapsed. THE LORDS found, That the act of Parliament was to be understood, that the ten years should commence from the apparent heir's being infeft upon the right of the apprising, if his author was infeft, or if there was no infeftment upon the comprising, from the time that the apparent heir's right thereto was made public by action for mails and duties, or such other public deed, whereby the creditor might know, that the apparent heir did ascribe his possession thereto.

*P. Falconer, No 67. p. 44.*

\* \* \* This case is also reported by Sir P. Home:

ALEXANDER MOLLE of Mains having pursued Mr Patrick Craw of Heugh-head for payment of a debt due by his father, as behaving himself as heir, by intromitting with the rents of his father's land; *alleged* for the defender, Any intromission he had was by virtue of an expired apprising, and so could not be liable as behaving himself as heir. *Answered*; That the act of Parliament anent debtor and creditor, for obviating the frequent and fraudulent practices of apparent heirs of debtors, who are in use to acquire rights to expired apprisings, and by virtue thereof to enjoy and possess their predecessor's land and estate, to the prejudice and defrauding of other creditors, provides, That in case the apparent heir of any debtor, or any other confident person to his behoof, shall acquire the right of any expired apprising, it shall be redeemable from the apparent heir or confident person, within the space of ten years after acquiring the right, by the posterior apprisers, upon payment allenary of the sums truly given out for buying and acquiring the said right, at least so much thereof as shall be resting unpaid for the same by the intromission of the apparent heir or of the confident person; so that however the defender is not liable as behaving as heir, he having intromitted by virtue of the said apprising; yet it is redeemable from him conform to the act of Parliament; and it is offered to be proven, that he is actually satisfied and paid of the sums that he paid out for the same, by his intromission with the rents of the lands; so that the defender must be accountable to the pursuer for what he has received more than paid that sum, and the estate must be laid open to be affected by the pursuer's debts. *Replied,*

No 61. That the comprising is not redeemable from the defender, seeing it was not redeemed within ten years after he acquired a right thereto conform to the act of Parliament. *Duplied*, That the ten years cannot be computed from the date of the disposition whereby he acquired the said apprising, but from the date of his infeftment following thereupon, or that he had done some other deed, such as the intending action for mails and duties, or the like, by which it had been made public that the defender had acquired the right. For otherways the apparent heir might acquire a right to an expired apprising, and continue his predecessor's possession and keep the right latent, so that it should not be known to other creditors before the ten years were elapsed, which would absolutely elide the design of the act of Parliament, which was introduced for obviating the fraudulent practices of apparent heirs in acquiring such rights to their predecessors' estates. THE LORDS found that these words in the act, bearing apprisings acquired by apparent heirs to be redeemable within ten years after the apparent heir's acquiring of the right, are to be understood of a complete acquisition, either by infeftment where the nature of the right required the same, or by some diligence done by the apparent heir, whereby his acquisition of the right might be made known to the creditors, where either the nature of the right did not require infeftment, or the comprising or adjudication was not perfected by infeftment. The pursuer insisted likewise against the defender as intromitter with the rents of the lands of Coldinghame which were not contained in the apprising. *Answered*, That his father was never infeft in these lands, and he has right thereto as heir served to his goodsire. *Replied*, That the father being at least apparent heir in an heritable right, and having died in possession of the lands, the defender having entered and continued in his father's possession of the same for several years before his service as heir to his goodsire, it is sufficient to infer that passive title of behaviour as heir against him. THE LORDS found, that the defender continuing in the possession of the lands whereof the father died in possession, being not infeft therein, does not infer a passive title against the defender.

THE LORDS, in this process, found likewise, that the benefit to redeem a right of an expired apprising acquired by an apparent heir was not only competent to posterior comprisers, but also to a personal creditor, albeit the act of Parliament mentions only posterior apprisers.

*Sir P. Home, MS. v. 1. No 526.*

No 62. 1685. *January.* SINCLAIR of Southstone *against* SINCLAIR of Stanestone.

Found in conformity with Burnet against Naysmith, No 48. p. 5302.

AN apparent heir, who acquired an apprising in his father's lifetime, being pursued upon the act of Parliament, in a declarator of redemption within ten years after it came in his person, it was *alleged* for the defender, *imo*, The ap-