

No 47.

in pari passu with them, would more than counter-balance any advantage which they might otherwise derive from the measure.

A petition, containing these objections, was appointed to be answered in the end of February 1795, but hopes being entertained that the lands would soon be sold, the Court delayed advising the cause till 29th January 1796; when the prospect of a sale being still at some distance, it was

Observed on the Bench; In general, an action of sale at the instance of an heir apparent, renders adjudications by individual creditors unnecessary. But, in the present case, the adjudications ought to be allowed to proceed, that the pursuers may have the penalties and accumulations as a compensation for the delay in payment of their interest.

Some of the Judges even doubted, if the Court ought to interpose in any case to stop an adjudication.

THE LORDS unanimously 'allowed the adjudication to proceed.'

Act. *Hope.*Alt. *G. Fergusson.*Clerk, *Home.**D. D.**Fac. Col. No 197. p. 475.*

S E C T. VII.

Redemption of Apprisings from Apparent Heirs.

1668. *June 19.*BURNET *against* NASMYTH.

No 48.
It is competent to creditors to redeem from apparent heirs apprisings purchased in by them during the life of their predecessors.

ALEXANDER BURNET of Carlops, being creditor to Sir Michael Nasmyth of Posso, pursues a declarator against James Nasmyth his eldest son, to hear and see it found and declared, that an expired apprising of the estate of Posso, now standing in the person of the said James, is redeemable by the pursuer as a creditor from the said James, as appearing heir of the party, against whom it was deduced within ten years after the apparent heir's right, upon payment of the sums that the apparent heir truly gave out, conform to the act of Parliament betwixt debtor and creditor*. The defender *alleged*, Absolvitor; because the act of Parliament could not extend as to his case, because the act bears, 'where apparent heirs take right to apprising of their predecessor's lands;' but the defender's father being living, cannot be said to be his predecessor, or that the defender is his apparent heir, and statutes are *stricti juris* not to be extended to like cases. It was *answered*, That reason of the law, given in that part of the statute, being the same, and rather more in this case, where there may be collusion betwixt the father and the son, there is no ground to accept the same

* Act 1661, c. 62.

from the act of Parliament, the words whereof do bear this case ; for, in the ordinary stile, it uses to be thus exprest, such a person to be his eldest son, and apparent heir to his father ; and albeit his father be not dead, he may well be said to be his predecessor, not only in regard of his age, but as being his predecessor in the right of these lands, whereunto the son is a successor, albeit he be a singular successor:

THE LORDS found the clause of the act of Parliament to comprehend rights acquired by apparent heirs, in their predecessor's life, and therefore declared.

Fol. Dic. v. 1. p. 359. Stair, v. 1. p. 540.

* * * Gosford reports the same case :

BROWN of Snype as principal, and Sir Michael Nasmyth of Posso and Mr Alexander Burnet of Carlops as cautioners for him, having borrowed from my Lord Crimont the sum of 500 merks ; Snype the principal, for relief of Posso and the other cautioners, did dispoise to Posso his lands of Snype, and some tenements in Edinburgh ; and Posso, by his back-bond, became obliged to pay the said debt by the sale of the lands, and to relieve his cautioners ; notwithstanding whereof, he suffers his own and Carlop's estate to be comprised for the said debt ; the legal of which comprising being expired, James Nasmyth, eldest son and apparent heir to Sir Michael, did purchase from Dr Burnet, my Lord Crimont's heir, a right to the said apprisings ; whereupon there was an action intented against him at the instance of Carlops heir to the con-cautioner, and his curators to hear and see it found, that Posso's estate should be liable for the debt, it being purchased by the eldest son, he being in family with his father, and having no estate of his own ; and that, conform to the late act of Parliament anent debtor and creditor, upon repayment of the sum paid to the Dr Burnet, the pursuers should have right to redeem that comprising. This action was sustained, and the pursuer found to have the benefit of the act of debtor and creditor, notwithstanding it was *alleged*, that the defender's father being yet alive, he could not be called the apparent heir, which could only be interpreted where their fathers or predecessors, to whom they were apparent heirs, were dead ;—the act of Parliament being *stricti juris*, and making mention of no other apparent heirs. Yet the LORDS found otherways, considering that the reason of that clause of the act of Parliament being as strong in this case as the other ; and that, if it were not so interpreted, a door would be opened to frustrate all lawful creditors, and the act would be made elusory.

Gosford, MS. No. 1. p. 1.