

(REDEMPTION.)

this order ought to be taken in these, and the like cases, viz. That a precognition and action ought to be intended by the compriser, for trial taking of the estate, of the ground and houses thereon; principal dwelling-house, byres, barns, &c. wherein they were at the time of the comprising; and what the danger and prejudice is, that may result there-through, if they be not repaired; and if it be necessary and profitable to the heritor, from whom the lands were comprised, to repair the same; that after this trial taken, the Lords may interpone their authority, after they have tried, and found the reparation necessary and useful: After which sentence the compriser may deburse the expences, necessary to the said reparation, in these particulars, which has been so tried to be necessary, for beiting; which being beited and repaired, he may intent his action to hear and see it be tried, that he has bestowed such particular expences, condescended on, upon the said reparation; and that to the said reparation, the said debursements were necessary, and could not be uttered without the same; and that these expences should accresse to the reversion; which expences, by trial and cognition, taken by the Lords, being found to be truly and necessarily debursed, their sentence is interposed thereto, *ut supra*.

A&T. Hope.

Alt. absens.

Clerk Hay.

Fol. Dic. v. 1. p. 22. Durie, p. 402.

1669. January 19.

GEORGE JOHNSTOUN *against* SIR CHARLES ERSKINE, Lord Lyon.

UMQUHILE Richard Irwing having died infeft in the ten-merk land of Knockhill, his son, had a son, and four daughters; his son being his apparent heir, and being indebted a sum to Mr James Alexander, he charged him to enter heir in special to Richard, his grandfather, and apprised the lands from him, whereunto Sir Charles Erskine has now right; the said son being now dead, and never infeft, Mr George Johnstoun takes right from the four female grandchildren, and serves them heirs to their grandfather; but before they were infeft, there was an infeftment or charge upon the apprising, at the instance of Mr James Alexander; and in a former competition, Sir Charles was preferred upon Mr James Alexander's right, as denuding the male grandchild, apparent heir for the time, in the same manner as if he had been infeft; now, Mr George Johnstoun, upon the females right, raises a declarator, to hear and see it found and declared, that Mr James Alexander's apprising, was satisfied, and extinct by intromission, before the legal was expired. It was alleged that the pursuers, as heirs served and entered to Richard their grandfather, had no interest to redeem the apprising, led against Robert their brother, unless they were also entered heirs to their brother; which Robert, if he were alive, might redeem the apprising against himself; so that the legal reversion being in his person, cannot belong to his grandfather's heirs, but to his

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An apprising led against an apparent heir, lawfully charged to enter, was found redeemable after the apparent heir's death, by the heir of the person last infeft, though he did not represent the apparent heir.

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own heirs ; and, as he, or his heirs, could only redeem, so can they only declare the apprising to be satisfied by intromission ; neither can the reversion belong to two, both to the heirs of Robert, who was charged to enter heir, and to the heirs of the grandfather who died last infeft.—It was *answered*, That Robert never having in his person any real right, as never being infeft, albeit *fictione juris*, the act of Parliament gives the creditors like right upon his disobedience to enter, being charged, as if he had entered ; yet that is a mere passive title, and could give no active title to Robert, or any representing him, either to redeem, or to call the appriser to an account, till they were entered heirs to the person last infeft ; for albeit the creditor appriser has a real right, yet the disobedient apparent heir has none ; and albeit the Lords might suffer the disobedient apparent heir, or his heirs, to redeem the apprising ; because the appriser had no interest to oppose the same, being satisfied ; much less can the appriser now oppose the pursuers, who being infeft as heirs to Richard, have the real right of fee in their person, and consequently the right of the reversion of the apprising led against Richard's apparent heir ; which being a minor right, is implied and included in the property :

Which the Lords sustained, and found that the heirs of the person last infeft, being infeft, might redeem, or declare against an appriser, who apprifed from an apparent heir, lawfully charged, albeit they were not of that apparent heir.

Fol. Dic. v. 1. p. 22. Stair, v 1. p. 584.

* * The same case is reported by Gosford. See HEIR APPARENT.

1676. July 18.

GORDON against WATSON.

No 4
Competition of
orders of re-
demption.

WATSON having apprifed the estate of Irving of Hiltoun, in *anno* 1662, John Moor, in *anno* 1672, apprifes Federat's estate and Hiltoun's, for a sum wherein Federat was principal, and Hiltoun cautioner ; and shortly after, within the legal, Moor uses an order of redemption of Watson's apprising, whereunto Gordon of Seatoun hath now right, and pursues declarator against Watson, for declaring, that the order was lawfully used within the legal ; and that Watson, the appriser, after the order, entered in possession of Hiltoun's estate, and continued to possess till this time, whereby he is satisfied of the sums contained in his apprising by his intromission ; and that there is no necessity to produce or deliver the sum assigned for redemption of the apprising. It was *alleged* for Watson the defender, That the order used by Moor could not be declared ; because there were two orders of redemption used against Moor's comprising ; one by Federat, and another by Gilbert Collison, who apprifed Federat's estate, in *anno* 1671 ; which apprising Federat hath confirmed ; and, for Collison's further security, hath infeft him in an annualrent out of the miln of Federat : Likewise Watson hath right from