

1682. January 31.

NAYSMITH *against* NAYSMITHS.

SIR MICHAEL NAYSMITH having, after expiring of an apprising against him, granted bonds of provision to his children, who, in a pursuit again young Posso the apparent heir, in whose person the said apprising was come, craved allowance to redeem the same for the sums truly paid for it by the defender, conform to the act of Parliament ;

Alleged for the defender ; That the children's bonds, granted after the father's legal was expired, could not afford the benefit of the act of Parliament ; ' which allegiance in favours of the apparent heir, the LORDS sustained.'

Fol. Dic. v. I. p. 359. Harcarse, (CONTRACTS OF MARRIAGE.) No 340. p. 82.

*** Sir P. Home reports the same case :

MICHAEL NAYSMITH of Posso, his Creditors and Children, to whom he had granted bonds of provision, having pursued a reduction against James Naysmith his eldest son, of an apprising led at the instance of ——— Burnet of Crimont, against Sir Michael Naysmith ; whereunto the defender did acquire right, as also the gift that he had obtained of his father's single and liferent escheat, upon these grounds, that the apprising being acquired by the apparent heir ; it was provided be the act of Parliament in their favour, 1661, anent debtor and creditor, That if the apparent heir should acquire right to an expired apprising, the right should be redeemable from the apparent heir within ten years after acquiring thereof, upon payment of the sums given out for acquiring of the said right, at least so much thereof as should be found resting unsatisfied by the apparent heir's intromission. But so it is, that the defender is more than satisfied of any sums that he had paid out for acquiring of that right, by intromission with the rents of the lands and stock and other moveables belonging to his father ; as also that the defender being entrusted by his father to uplift the rents, dispose of the moveables, and manage his estate, and so being *negotiorum gestor* when he acquired a right to that comprising, the benefit thereof must accresce to his father, who is his constituent, especially seeing he having intromitted with the rents of his estate several years before he acquired the right, and so must be presumed to have acquired the same by the father's means, he having no means nor estate of his own out of which he might have acquired the same ; and albeit he had acquired the right by his own means, yet he being the father's *negotiorum gestor*, and *in familia* with his father, the benefit must accresce to him, as is clear by Inst. L. 2. Tit. 9. § 2 ; *pater et filius* in law being reputed to be *eadem persona*, it must be presumed that, when the creditor disposed the right to the son, it was equivalent, as if he had disposed it to the father ; as also, this is clear in the case of tutors and curators, and their administrators, Instit. L. 3. Tit.

No 60.

A party granted bonds of provision to his children, after the expiring of an adjudication upon his estate. The adjudication purchased by the apparent heir was found not redeemable by the children.

No 60.

20. § 4. and 19. and ———, thereupon, and D. 45. T. 1. l. 38. § 17. and the lawyers thereupon. And the gift of escheat cannot be made use of against the pursuer, because albeit it be taken in the defenders name, yet it was communed and agreed at the passing thereof, that it should be taken in the defender's name for his father's security, lest another should have taken the gift; as also the pursuer had used an order of redemption of the comprising, so that it could not expire against him; and the defender is much more than satisfied by his intromissions. *Answered*, That this action, in so far as it was at the father's instance, could not be sustained; because, by the law, it was only competent to creditors who were posterior apprisers, and albeit the practiques have extended to personal creditors, in respect comprisers and other creditors are mentioned in the narrative of the act, yet that benefit cannot be extended to the debtor, against whom the comprising was led; and as to the creditors, they are either decest or do not concur, and the action cannot be sustained at the instance of the children, upon their bonds of provision; because, however they may oblige the granter, yet they are never sustained against a creditor, and those bonds are not only posterior to the apprising and expiration of the legal thereof, but are posterior to the acquiring of the right by the defender. And as posterior creditors could not have the benefit of this act of Parliament to redeem the right from the apparent heir, much less the children upon the bonds of provision. And it is denied that the defender was the father's *negotiorum gestor*, or that he acquired the right by the father's means, but by his own means and credit, for the Laird of Dawick and others of his friends engaged as cautioners for him, when he borrowed the money to acquire the right; and it cannot be otherwise proven, but by writ or oath of party; neither did he acquire the gift of escheat for his father's security but for his own, in respect he had undertaken more debt that was due upon the estate than it was worth; yet notwithstanding he had allowed his father 1000 merks yearly for his entertainment. And no respect ought to be had to the order of redemption, because there was no procuratory produced the time the using of the order; but being called for, the pretended procurator declared he had none, as appears by an instrument taken thereupon; neither was there any money consigned, and the defender had never any design to prejudice his father; but all that ever he aimed at was to preserve the memory of the estate which was exhausted by debts. And if his father will refund him the sums that he has paid out for acquiring of the rights, and relieving him of the debts he is engaged into, he is content to renounce his right. *Replied*, That the father, in this case, has the benefit of redemption of the right from the son his apparent heir, as well as a creditor; and as the Lords did extend the act of Parliament in the case of an apparent heir acquiring a right, even albeit his father was in life, in the case of Carlops against the Defender, No 48. p. 5302; so by that same reason, the act ought to be extended in this case, to allow the father the benefit of the redemption of the right within ten years, seeing the

son has no prejudice, he being satisfied and paid by his intromissions; and the son was creditor to the father, in so far as he had intromitted with more than would pay any sums due to him, and albeit he was not creditor *ex contractu*, he was creditor *ex delicto vel quasi delicto*, in respect he was *in pessima fide*, having intromission with the father's estate, and having acquired the right by the father's means, at least must so be presumed in law, to have taken the right in his own name, but should have taken it to the father; and albeit the creditors do not concur, yet the children being creditors by their bonds of provision, gives them a sufficient interest to pursue this action; and albeit the bonds of the provision be after expiring of the legal of the apprising and the defender's acquiring of the right, yet that does not alter the case, seeing the law makes no distinction. But on the contrary, the benefit of redemption is expressly allowed to posterior comprisers and creditors, which must be understood of creditors whose debts are contracted as well after as before the expiring of the legal of the comprising, the reason of the act of Parliament being the same; that creditors may not be defrauded of their just debts, by the apparent heir's acquiring such comprising; and the defender has no prejudice, he being paid of the sums that he has given out for acquiring a right to the same. And however children's provisions are not sustained in prejudice of other anterior lawful creditors, yet they are held creditors *in suo genere*, which is sufficient to give them the benefit of redemption of the right from the apparent heir. And that the defender was the father's *negotiorum gestor* and administrator is probable by witnesses, That he uplifted the rents and managed the estate in his father's name, and upon his account; which being such acts as clearly declare his mind and intention, such acts are as relevant to be proven by witnesses to clear *quo animo* he did intromit, as the acts of behaving as heir; and that the gift was acquired in the defender's name, and to the father's behoof and security, is offered to be proven by the Bishop of St Andrews, with whose means the gift was acquired, and other famous witnesses; and as to the order of redemption, seeing the instrument bears, that the procuratory was sufficiently known to the notary, it is sufficient albeit it was not produced, and more faith is to be had to the instrument affirming there was a procuratory, than the defender's procurator, that there was no procuratory, seeing *plus creditur uni affirmanti quam mille negantibus*; and is sufficient to stop the odious expiration of the legal of a comprising; and the pursuer needs not prove, that the money was consigned, if either it be offered at the bar, or if the compriser *intus habebat*, or is satisfied by his intromissions; and if the defender has undertaken debts which he was not obliged to do, *sibi imputet*, but that cannot preclude the pursuer of the benefit of the law. THE LORDS found the order of redemption null, in respect the procuratory called for was not produced, and that the procurator that compared for the compriser the time of the using of the order took instruments that there was no procuratory procured; and found, that it was not competent for the children to insist in the reduction and declarator for annulling of the comprising against

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