

decision is not applicable to the present case. The supposition, too, of any parallel between voluntary and legal trusts, is equally erroneous.

No 46.

Were an action of sale by an apparent heir supposed to be equivalent to an action of adjudication for the creditors at large, it must still be observed, that it is not the date of the summons in either case, but that of the decree, which regulates the preference. Besides, the cases are in no respect similar. An apparent heir bringing his ancestor's estate to sale, is so far held to be a trustee for the creditors, that every thing he does equally redounds to their advantage as to his own. But although, in this manner, the creditors reap the benefit of what the heir does, it does not follow that the heir, for their benefit, should be held to have done what he has omitted to do.

As to the maxim *pendente lite*, the effect of it is to prevent the granting of voluntary rights, and not to tie up the hands of competing creditors, 12th July 1785, *Massie contra Smith, voce LITIGIOUS*.

This question being reported on informations,

THE LORDS unanimously found, that, in the circumstances of this case, the creditors were preferable according to the diligences used by them respectively.

Lord Reporter, *Hales*. For Palmer, *W. Craig*. Alt. *Abercromby*. Clerk, *Sinclair*.
C. *Fol. Dic. v. 3. p. 259. Fac. Col. No 189. p. 394.*

1796. January 29.

JAMES CHEAPE and JAMES LINDSAY *against* DONALD CAMPBELL and his Father's CREDITORS.

CAPTAIN DONALD CAMPBELL, as heir apparent to his father, brought a sale of the lands of Barbreck and others, in terms of the act 1695, c. 24.

During its dependence, James Cheape and James Lindsay, heritable creditors of his father, obtained decrees of constitution *cognitionis causa* against him, and in order to accumulate their debts, upon which no interest had been paid since Martinmas 1792, they raised adjudications, which the Lord Ordinary ordered to be intimated in common form.

Captain Campbell and the other creditors

Objected; Actions of sale at the instance of the heir apparent, are, in reality, brought for behoof of the creditors at large. The decree of sale has the same effect with a decree of adjudication at their instance, and on that account supersedes the necessity of adjudications by particular creditors, 10th June 1747, Maxwell, *voce RANKING and SALE*; act of sederunt, 11th July 1794. Although the pursuers should succeed in their attempt, it would not improve their security for the principal and interest due to them; and the expense arising from the number of adjudications which would necessarily be led, in order to come

No 47.

The creditors of the ancestor are entitled to lead adjudications during the dependence of an action of sale, at the instance of the heir apparent, where there is no immediate prospect of the estate being sold, and where the interest of the debts is not regularly paid.

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.'

D. D.

Act. *Hope.*

Alt. *G. Fergusson.*

Clerk, *Home.*

Fac. Col. No 197. p. 475.

SECT. 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.