

1672. *June 11.* The Creditors of SINCLAR of Hirdmeston, Competing.

AFTER the lands of Harmiston were appraised at the instance of a creditor, there is an infeftment of annualrent given forth of these same lands to another party; then comes a second creditor, and he leads an apprising within year and day of the first, and in the multiplepointing, at the tenants' instance, he craves to be preferred in the mails and duties to the annualrenter, because, though he be posterior to the said annualrenter, yet the first appriser is preferable thereto; and so he must have preference too, in regard of the act of Parliament in 1661, appointing all comprisings led within year and day of the first effectual comprising to come *in pari passu*, as if one only comprising had been deduced and obtained for the whole respective sums contained in the foresaid apprisings; which act draws him back to the date of the first apprising and makes his but a part of it, and so he must exclude the annualrenter.

To this it was ANSWERED,—That the act of Parliament must be understood *cum aliquo temperamento*, (*verba enim non sunt captanda, nec sensus absurdus iis assignandus*;) that they shall all be reputed one apprising *nisi medium aliquod impedimentum interveniat, ut duo extrema inter se conjungi nequeant*: but here the annualrent becomes a middle stop why retroaction can take no place: * and though the act be silent [as to] this and bears generally, that they shall all be reputed as one apprising, and mentions not what shall be done where voluntary rights intervene, yet in laws *quæ exorbitant a jure communi*, (of which this is one,) whatsoever is not expressly decided and touched is presumed to be left in the decision and channel of the antecedent law corrected; now if our case had needed a decision before the said act of Parliament, it is beyond all limits of debate but the annualrenter would have been preferred to such an appriser. And can there be any thing imaginable more unjust, [than] that after I have done the utmost diligence for securing my money, and found only one inconsiderable apprising on the lands, by reason whereof I judged myself *in tuto* to take a right of annualrent, the land affording more than would pay us both, yet that twenty creditors may afterwards apprise, and all upon a fiction of law (which ought to be consonant to nature, and so to natural equity,) exclude me, that I shall fall nothing? And thus the law shall be miserably defective, not knowing how to secure one from after-facts.

The Lords ordained the annualrenter and second appriser to have the duties of the lands, in satisfaction of their annualrents, *pro rata*, divided amongst them, *pro hac vice*; and as for their preference anent their principal sums, they would advise it in another process wherein it would fall to be debated.

Advocates' MS. No. 336, folio 133.

* Just as *subsequens matrimonium* cannot be drawn back to legitimate bairns, where there are children got of a lawful marriage between; though we decided otherways in King Robert the Second's case.