

did seclude all others, unless they were reduced, as the law, before that Act of Parliament, did provide.

To this it was ANSWERED, That the Act of Parliament being express and special, as to all comprisings within year and day, making them as valid and sufficient as if they all had been contained in the first effectual comprising, which undoubtedly, in law, is preferable to an infestment of annualrent posterior thereto, that benefit and right cannot be taken from them upon a pretence of inconvenience ; unless there had been a particular exception of annualrent granted after the first comprising, but before subsequent and posterior : whereas there is no such exception ; but, on the contrary, the Act bears only, that it shall be but prejudice of annualrents, which were prior to the first comprising by infestment ; and that the annualrent not being paid until after the comprising, they should not be prejudged thereof, but that they might be drawn back *ad suam causam*, and the lands comprised therefor ; or a poinding of the ground might be gotten, according to the laws standing before the Act of Parliament.

The Lords, having much reasoned among themselves as to this case, being full of inconveniences on both hands, did at last find, That the two first comprisers, prior to the annualrenter, should be preferred as to the maills and duties effeiring to the sums, contained in their comprisings ; and, in the next place, the annualrenter ; and all posterior comprisers within year and day, should come in *pari passu* as if the annualrenter were a compriser : upon this reason, —that the first comprising could not be prejudged by a posterior annualrenter ; and, that the bond whereupon the infestment of the annualrent followed, was prior to the first comprisings ; so that the great inconvenience of prejudging posterior comprisers by a voluntary deed of the common debtors, could not be here alleged. And yet this decision seems to be against the express Act of Parliament, ordaining all comprisings, within year and day, to come in *pari passu* with the first : whereas if the first comprisings were for great sums, and the annualrenters effeiring thereto should absorb the most part of the duties, the posterior comprisings, having the annualrenter joined with them, might receive little or no satisfaction, contrary to the intent and express will and meaning of the Act of Parliament. Likeas it seems strange to make an annualrenter to be considered as he were a compriser, their rights being so distinct and different in their own natures. So that the decision seems hard, and, in reason, the case was such as the Parliament could only have decided, *et egebat constitutione imperatoria*.

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1673. February 5. GREERSON of CAPENOCH *against* The APPARENT HEIRS of JOHN CRIGHTON of CRAWFORDSTOUN.

IN a pursuit at Capenoch's instance against the daughters and apparent heirs of Crawfordstoun, for payment of the sum of five thousand merks due by the father, to which he was assigned ;—It was ALLEGED by the defenders, That the assignation was to the behoof of Brown of Inglistoun, who was heir of tailie to Crawfordstoun ; and, by the tailie, was expressly obliged to relieve the defenders of all the father's debts ; so that, he being heir of tailie, and obliged to relieve, as said is, could not pursue the heirs of line, either for payment, or

to renounce, that he might adjudge the lands, *quia confusione tollitur obligatio*, he being both creditor and debtor; and this pursuit being an indirect way to burden the lands, in prejudice of the heir of tailyie, substituted to him, by an adjudication or comprising, ought not to be sustained.

It was REPLIED, That Brown of Inglistoun, albeit he was nominated heir of tailyie, yet he had never accepted thereof, by taking infestment or possession; and, being a lawful creditor, ought to have the benefit of law against apparent heirs, either to cause them make payment, or to renounce, until he should enter heir; after which they might pursue for their relief.

The Lords did sustain the pursuit, notwithstanding of the defence, in respect that Inglistoun was never entered heir; but withal declared, that if ever he or his heirs should be heirs of tailyie to the said estate, that then the comprising or adjudication upon this debt should be burdened with the whole provisions of the tailyie; so that any other heir-substitute in the tailyie should enjoy the lands free of the adjudication or comprising for this debt.

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1673. February 11. The LAIRD of ROWALLAN *against* LAWSONE of KERMURE, The EARL MORTON, and OTHERS.

IN the forementioned action, the 22d November 1671, in obedience of the Lords' ordinance therein mentioned, that Rowallan should produce such adminicles as might fortify the executions of the summons of improbation, he did produce his father's and goodsire's infestments of the lands controverted, *in anno* 1630, with these several summonses of improbation, raised and signeted within six days after his father's service: as likewise an assignation made by his father to him of the said action of reduction and improbation, bearing expressly the said summons and executions thereof; and offered to make faith, that he truly received the same as they are now made use of in process; by all which he urged, that seeing, by the act of prescription, all diligence as to preceding actions did prescribe *in anno* 1630, and that the said summons could only have been raised and executed to prevent the hazard of prescription, and that the executions were applicable to these summonses; therefore, that the arguments adduced against them being but presumptions, could not be regarded to take from him the benefit of this action.

It was ANSWERED, That the executions not being special, as was before alleged, and being on a schedule apart, and the messengers and witnesses being all dead, these adminicles were not sufficient; especially seeing the summons libelled was against the Earl of Morton, and all others having interest; whereas the executions did not bear any other persons to have been cited.

The Lords did sustain the adminicles to fortify that the executions were applicable to the summons alleged, upon Rowallan giving his oath that he truly received the same, with the assignation from his father; and that he never knew or heard that the same was made up; unless that the defenders could allege and prove, that there were other actions intended or summons, executed at old Rowallan's instance against the Earl of Morton, to which the execution in question might be applicable.

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