

It was ALLEGED, That no infestment followed upon Mr William Douglas's apprising until that year that the pursuer had led his apprising; and, by the late Act of Parliament anent debtor and creditor, it being declared, That the first effectual comprising being that whereupon infestment follows, and that all comprising, within year and day thereof, shall come in *pari passu*, as if they were one comprising, the said Mr William's comprising must be calculated from the date of his infestment, and not from the date of the comprising.

The Lords, having considered the Act of Parliament, and the several arguments and inconveniences adduced, did find, That, by that Act of Parliament, ordaining all comprising to be alike, within year and day of the first effectual comprising, whereupon infestment followed, could not be extended to comprising which were long prior to all these within year and day, or whereof the legals were expired; which was noways the meaning of the Act of Parliament, that case not being at all expressed: neither did the reason of the Act quadrate therewith, which bears only, that, within year and day, creditors, who live at a distance, may be ignorant of the diligence done by others; therefore, if they shall do diligence within year and day, they shall come in *pari passu*: but, where comprising were several years before, and whereof the legals being expired, albeit no infestment followed thereupon, the law did not at all take from them the benefit of their comprising of old; neither did the late Act of Parliament innovate the same.

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1671. July 5. JEAN JOHNSTOUN, Relict of IRVING of BRUCKLAW, *against* ALEXANDER KEITH of MIDBELTY.

IN the action before mentioned, at Keith's instance, against the tenants of Overaltrie, liferented by the said Jean;—it being ALLEGED, That Keith, being a wadsetter of the lands of Brucklaw, and for security of the monies lent upon the wadset, conform to the power given him in the contract, having comprised the liferent lands long before the lady's infestment, and she being paid of the back-tack duties for many years before the liferent right, he had good interest, upon his comprising, to pursue for the maills and duties of the liferent lands for the whole years of the back-tack duty that he wanted.

It was ALLEGED, That the comprising could be no title, albeit prior to the liferent; because the Lords, having already found, that the comprising was only for farther security, and on warrandice in case of eviction of the principal lands, or that the rental was deficient, that could be no ground to quarrel the liferent given by the granter of the wadset to his wife; in respect that the right of the wadset of Brucklaw was never questioned nor taken away: and the wadsetter, suffering his author to possess, could not prejudge the liferenter, it being the wadsetter's fault: especially seeing, by a mutual condescence, he had agreed that the liferenter should possess that part of the lands whereof he had been in possession.

The Lords did sustain the defence, and found, That, albeit the wadset and comprising were prior to the liferent right, they could not prejudge the same, there being no eviction; and that, having subscribed such a condescency, he could never quarrel her right.

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