

ing by progress, in the place of the Earl of Crawford, in the right of the lands of Moorhouse, wherein certification being craved *contra non producta* :

It was ALLEGED for the Lord Balmerino, That there could be no certification ; because he had produced an infestment of the property, granted to him by one Lovell, his author, to be holden of himself, by virtue whereof he had been in possession past forty years ; and so his right was prescribed. And as to the superiority, they had produced a charter, flowing from the Earl of Crawford, to the Laird of Pourie Ogilvie, of whom Lovell held the said lands.

It was REPLIED, That the pursuer being infest in the said lands, the writs produced could not hinder certification, seeing there was no seisine following upon Pourie Ogilvie's right ; and forty years' possession of the property could not defend against the improbation.

The Lords did sustain the allegiance as to the right of property ; but, as to the superiority, did grant certification against all rights flowing from Lovell's superior, or from the king ; seeing it was acknowledged that the Earl of Crawford was superior, and it was not instructed that he was fully denuded.

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1673. February 5. BROWN of COALSTOUN *against* EDWARD NICOLLAS.

IN a pursuit, for maills and duties, of the Lands of Dunglass, at the instance of Edward Nicollas, as being infest upon a comprising in August 1668 ; compearance was made for several other comprisers who had comprised the said lands, whereof Alexander Young was the first compriiser ; who ALLEGED,—That, by the late Act of Parliament anent debtor and creditor, they ought to come all in *pari passu*, and the rents divided equally amongst them. Compearance was made for Brown of Coalstoun, who was infest in an annualrent effeiring to ten thousand merks, out of the said lands, and in possession of a term's annualrent, before all the comprisers, except Alexander Young and Nicollas ; and ALLEGED, That he ought to be preferred as to his annualrents, because he was infest and in possession, before all the comprisers except these two ; and as to these two prior comprisers, albeit by the late Act of Parliament they could be in no better condition than those comprised within year and day, yet, as to the annualrent, he ought to be preferred *in solidum*, seeing the Act of Parliament is only made as to comprisers within year and day : but, as to annualrenters, they are not at all prejudged thereby, but must be in that same condition they were before the Act of Parliament. And the law, giving them preference after the date of their infestments and possession, to all other creditors who had done no diligence by inhibitions nor comprising, which were not *in rerum natura*, when they lent their money, they were *in bona fide* to contract upon an infestment of annual rent with the common debtor : otherwise no creditor could be secured, or take a wadset disposition, or any other real right of the debtor's lands, until year and day should pass after the first comprising ; which were to obstruct all commerce amongst the subjects, and render the fundamental law, as to securities, void and elusory ; which was never the meaning of the Act of Parliament, the only reason thereof being, to obviate the prejudice that many creditors might suffer, being at a great distance, by the diligence of others, who, by a prior comprising,

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 tailyie to Crawfordstoun ; and, by the tailyie, was expressly obliged to relieve the defenders of all the father's debts ; so that, he being heir of tailyie, and obliged to relieve, as said is, could not pursue the heirs of line, either for payment, or