

1637. *July 11.*ROBERTSON *against* BROWN.

No 64.
Decided in
conformity
with No 59.
p. 2818.

ONE Robertson being infeft in a tenement in Perth, in March 1637, by resignation made by James Brown, which James was infeft therein upon the 4th of July 1631, conform to a preceding disposition of that land, made to him by Gilbert Brown heritor of the land, dated February 1st 1631, pursues removing against Patrick Brown, who was infeft in that same tenement, upon the 5th of July 1631, a day or two after the sasine taken by the said James Brown, the pursuer's author, the defender's sasine depending upon a comprising, deduced against the said Gilbert Brown at his instance; the denunciation of which comprising was in June before the sasine given, and taken by James Brown, upon his right made to him by Gilbert; albeit the comprising and sasine was not perfected, but within a day or two of James Brown's sasine, yet he contended he had sufficient right to bruik the lands, in respect of his foresaid exact diligence done legally, and that he had served inhibition upon the 2d February 1631, against the said Gilbert, whose voluntary disposition, done only one day before his inhibition, ought to prejudge the defender; seeing the said Gilbert Brown, common author, and James Brown receiver of the disposition, were, and are, both bankrupts, the disponent still continuing in possession, and there being nothing to qualify any real debt, owing to him by the said James Brown: so that he *alleged*, that his sasine upon his comprising, albeit a day or two only expedite after the said James his sasine, ought to be drawn back to the time of his denunciation, and ought to defend him in his possessory judgment, seeing he offered to prove, that the common author retained possession of the land, notwithstanding of the disposition made by him, continually while the excipient removed him by order of law, viz. in October 1632, at which time the excipient became in possession, wherein he was continued ever since unto the time of this plea. And the pursuer *replying*, that his right ought to be preferred in respect of his sasine, preceding this defender's sasine; which prior sasine of his depends upon a disposition preceding the excipient's denunciation; and albeit both receiver and disponent were bankrupts, yet that ought not to prejudge this pursuer, who for most onerous causes had acquired the right, and knows nothing of what proceeded betwixt his said authors. THE LORDS repelled the exception, and preferred the pursuer, in respect of his author's first sasine and first disposition, and found the denunciation of the comprising, was no impediment to the acquirers of the disposition, to take a sasine conform to the said disposition which preceded the denunciation, and also the inhibition, or even after the said denunciation, the same depending upon a preceding cause; neither respected the LORDS that both the disponent and acquirer were bankrupts, seeing this pursuer who had acquired this right, albeit lately, yet the same was for an onerous cause, and he was never qualified, nor alleged to be partaker of any fraud with his authors; and the possession was not respected, seeing it was but a possession of five years, which is not receivable to retaine any right in itself, nor suffi-

cient against the pursuer's right, wherefore the pursuer was preferred, as said is. See BANKRUPT.

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Act. Hepburn.

Alt. Oliphant.

Clerk, Hay.

Fol. Dic. v. 1. p. 182. Durie, p. 850.

1673. February 6. BROWN of Colstoun against NICOLAS.

THE lands of Thorntoun, Loch, and others, being appraised, first by Young and thereafter by Nicolas, and several other appraisers, within year and day, from the Laird of Dunglass, who did also grant an infestment of annualrent to Brown of Colstoun, and he was infest after the first appraising, and before all the rest, and his annualrent clad with possession within the year; the Lord Gosford having bought the lands from Dunglass, raiseth a double pointing against the appraisers and annualrenter, all being redeemable, that they might dispute their right and preference to the price of the lands. There was no debate amongst the appraisers, who had appraised within year and day of Young's appraising, which was the first effectual appraising. But it was *alleged* for Colstoun the annualrenter, That he ought to be preferred to all the appraisers, except Young, because his annualrent was constitute by infestment, and clad with possession before the date of their appraisings. It was *answered* for the appraisers, That by the act of Parliament 1661, anent Debtor and Creditor, it is statute, That all appraisings since January 1652, that are led within year and day of the first effectual comprising, shall come in therewith *pari passu*, as if one appraising had been led for all; by which statute these posterior appraisers being within a year, are *fictidne juris* drawn back to the date of the first appraising, as if they had been comprehended in it, or led the same days with it, in which case all of them would have been anterior and preferable to this annualrent. It was *answered* for the annualrenter, That the meaning of the statute can only be in the case where there is no competition, but of appraisings amongst themselves, which will come in *pari passu nisi sit medium impedimentum*; but here there is a mid impediment, viz. this infestment of annualrent; and it cannot be supposed that the first appraising should disable the debtor to secure his creditors, or dispose of any part of the lands appraised for year and day, which would be the necessary consequence, if all appraisings within the year were drawn back to the first, and would be of great inconvenience. It was *replied* for the appraisers, That this statute being so clear and express, that all appraisers within the year, shall be as if the first appraising were led for all, there is no warrant for any limitation; but on the contrary, the special intent express in the act, being, that creditors be not frustrate, but may have a time to appraise for their security, it would be altogether evacute, if the debtor might dispose of the lands appraised, or burden the same; for then upon pretence of that mid

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An infestment of annualrent being after the first appraising but before the second, all three were brought in *pari passu*, being within year and day, the statute 1661 being new and dubious.