

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

No 64.

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

No 65.

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.

No 64.

pediment, all the posterior apprisings would be hindered to come in with the first, or which were more inconsistent, the posterior apprisings would come in with the first, and take off the far greatest part of the effect of it; and yet an intervening annualrenter being preferred to the posterior apprisers, might carry all from them which they carried from the first apprising, and so the annualrent, though long posterior to the first apprising, would even be preferred in a great part to the first apprising itself; as if the price of the lands apprised were 4000 merks, and the first apprising were for 4000 merks, and two posterior apprisings, each for 6000 merks, these three coming in *pari passu*, making in all 16000 merks, the first apprising being but for four, would have only a fourth part of the price, which is 1000 merks, and the other two posterior apprisings would carry 3000 merks; now suppose there were an infestment of annualrent for security of 3000 merks after the first apprising, and before the two posterior apprisings, if it were preferred to them, it would carry the whole 3000 merks from them, so they should have nothing, but the annualrenter should be preferred to the first appriser long anterior to it as to three quarters of the sum, which were most absurd; but it is clear by the statute, that the first apprising, and the charge, or infestment thereon, is communicate to the posterior apprisers, so that the first appriser cannot cancel or renounce the same; and though it were satisfied, it will stand good for an infestment or charge to the posterior apprisers within the year, who need no other infestment or charge to exclude any other right; neither is there any inconsistency that the debtor should be stopped from granting voluntary deeds for a year, nor any thing of such inconvenience, as if he might frustrate the statute, and elude all posterior apprisers. It was *duplicated* for the annualrenter, That this statute being new and doubtful, never cleared by any determination as to that point, he having secured himself by an infestment of annualrent, ought not to be totally excluded, but as he had a bond containing a precept of sasine before the first apprising, and shortly thereafter having taken sasine clad with possession, as he might have apprised at that time, so at least his infestment must stand valid as if it were an apprising to bring him in *pari passu* with the apprisings, which hath no inconvenience, but is much cheaper than the apprising, especially seeing the statute hath an exception not only of the apprisings led upon annualrents, but of the annualrents themselves.

THE LORDS found that this intervening annualrent could not hinder the posterior apprisings to come in with the first; but that the annualrent should bring in the sum whereupon it was granted, as if an apprising had been led thereupon; the statute being new and dubious.

*Fol. Dic. v. 1. p. 182. Stair, v. 2. p. 166.*