

ceeded, seeing the heritor, who was debtor, being denuded lawfully of his right to the land before the term, by the said comprising and sasine, he had thereby right to the duties of the terms subsequent after his sasine, after the said term was come; and, as the debtor from whom he comprised could not seek that term's duty, no more could the arrester, who could not seek the same, but as the farm or duty owing to his debtor, who ceased to be heritor, he being denuded of his right by comprising before the term at which he might have craved the duty: For albeit the creditor might lawfully arrest before the term of payment came; yet the arrestment affected not the same to the arrester, so that he might seek the same when the term came, except at that term, the right thereof then subsisted with him, for whose debt it was arrested; as if the term's duty of lands, liferented by any, were arrested for the liferenter's debt, and that the liferenter should die before the term of payment of the arrested duty came, *quo casu* the arrester would get nothing, because the debtor's right became extinct; even so in this case, albeit there be great difference in these cases, yet so it was found, and for the same reason, another creditor claiming the same duty, by virtue of an assignation made to him by the debtor, divers years before the term controverted, and before all the other parties rights, in and to the duty of these lands, of certain years preceding that term, and divers years to run after that term, which assignation was intimate long before their rights; and also the assignee divers years in possession thereof before the term controverted, and done for satisfying his just debt; yet the compriser was preferred, for the assignation was not found a valid right against a singular successor: And it was found, that an assignation to the duty of a tack, set by the heritor, made to his creditor, would not work against a singular successor, in and to the setter's heritable right; but that either the compriser, or other acquirer thereof, or buyer, would have right to the tack-duty, notwithstanding of the preceding assignation, clad with possession.

Act. Craig.

Alt. Lawtie.

Clerk, Hay.

Fol. Dic. v. 1. p. 179. Durie, p. 408.

1667. July 2. WILLIAM LITSTER against AITOUN and SLEICH.

WILLIAM LITSTER having arrested his debtor's rent on the 5th of April 1665, he thereupon obtained decret for making furthcoming in July 1666; which being suspended, compearance is made for Sleich, who had right to several apprisings of the lands, which were deduced before the terms of payment of the rent; and craved preference to the arrester, because his arrestment was before the term, and the time of the arrestment there was nothing due; and also before the term the debtor was denuded by an apprising, whereupon infestment followed in December thereafter, and must be drawn back, *ad suam causam*, to

No 12.

No 13.

Arrestment laid on *currente termino*, affects the next ensuing terms rent. Such was preferred to an apprising deduced also before the term, though after

No 13.
arrestment,
whereupon
infestment
followed after
the term.

the apprising. The arrester *answered*, That his arrestment was valid, being laid on *currente termino* for the next ensuing term, at least as hath been oft-times decided by the LORDS, and is now their constant practice: And as for the apprising before infestment, albeit it will carry the mails and duties, yet it is an incomplete right, and hath only the effect of a judicial assignation or disposition; so that the competition being betwixt an assignee, viz. an appriser and the arrester, the arrestment being prior, is preferable to any assignation. Neither can the infestment on the apprising, after the term, give any right to the rent prior to the infestment, but the right thereto is by the apprising, which is but a naked assignation.

THE LORDS preferred the arrester.

Fol. Dic. v. 1. p. 179. Stair, v. 1. p. 467.

1671. February 23. LORD JUSTICE CLERK *against* MR JOHN FAIRHOLM.

No 14.
A decree of
apprising is a
complete dili-
gence, as to
mails and du-
ties, being a
legal assigna-
tion, and
needing no
intimation;
so that there
can be no *mo-
ra*. On this
principle, in
opposition to
No 9. p.
2763. an ap-
priser of an
infestment of
annualrent
was preferred
to a posterior
arrester, tho'
the competi-
tion was nine
years after the
decree, and
the appriser
had done no
diligence.

THE Earl of Leven being debtor to Lamberton in 40,000 merks, and having infest him in an annualrent out of his lands in security thereof, Mr John Fairholm did, upon a debt due by Lamberton, apprise the foresaid heritable bond and annualrent, which was holden of the Earl of Leven himself, who was charged upon the apprising, but unwarrantably, to infest Fairholm in the lands, whereas the annualrent only was appraised, and the charge should have been to infest Fairholm in the annualrent; thereafter Fairholm did arrest the bygone annualrents in the Earl of Leven's hands, and after all did, upon a decret against Lamberton, arrest the bygone rents in Leven's hands; and Lamberton's liferent of the annualrent having fallen, by his being year and day at the horn, the Justice Clerk, as donatar to the liferent, and as arrester competing with Fairholm, did allege that Fairholm's apprising being an incomplete diligence, and no infestment nor valid charge thereon, and having lain over so many years, the arrester must be preferred; for which he adduced a practise observed by Durie, 14th February 1623, Saltcoats *contra* Brown, No 9. p. 2763. where it was so found; and albeit Fairholm be the prior arrester, yet he hath done no diligence upon his arrestment, whereas the Justice Clerk hath obtained decret; and, as donatar to the liferent escheat, he is preferable for years after the rebellion; because the liferent escheat falling before any infestment, or charge on the apprising, which was not used within year and day, the liferent excludes the appriser.

THE LORDS found the apprising preferable to the posterior arrestment, though no legal diligence was done thereon for the space of nine years thereafter, in respect the apprising, being a judicial assignation, required no intimation, and being prior, it is preferable; and they did not respect that single practise, the constant custom being contrary; but found the liferent escheat preferable to