

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 practique 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 practique, the constant custom being contrary; but found the liferent escheat preferable to

the anterior apprising, being without infestment or charge as to the years after the rebellion, and preferred the appriser as to years preceding. No 14.

Fol. Dic. v. 1. p. 179. Stair, v. 1. p. 727.

1705. June 26. STEWART of Pardovan *against* STEWART of Torrence.

IN the competition of the creditors of George Dundas, Pardovan produces an adjudication of a bond granted by Bonhard to George Dundas, his heirs and executors, containing a precept of sasine, and craves to be preferred to Torrence, who produced an arrestment in Bonhard's hands, and a decret of furthcoming, upon this ground, because his citation in the adjudication was before the arrestment, and his decret before the furthcoming.

It was *alleged* for Torrence ; That the sum was moveable, and an adjudication was no competent nor habile diligence, because no infestment had followed upon the bond, neither was the first term's payment of annualrent, nor the term of payment of the principal sum past, when Pardovan raised and executed his adjudication ; and sums heritable by destination were always reckoned moveable till the first term's payment of the annualrent.

It was *answered* ; *1mo*, The question is not here betwixt an heir and an executor, but betwixt competing creditors. *2do*, This bond, containing a precept of sasine, and bearing annualrent from a term preceding the citation, was heritable from the beginning ; and the 32d act, Parliament 1661, declares such bonds to be heritable.

It was *replied* ; The case is to be considered in the same way as if the question were betwixt the heir and the executor. Sums moveable fall to the executor, and cannot be adjudged, because they are moveable. *2do*, As to the act of Parliament 1661, it does declare such bonds to be heritable ; but that is only to distinguish them from bonds bearing annualrent, which by that act are declared moveable, even after the term of payment, which antiently were heritable, yet were esteemed moveable before the term of payment : as to which, there is nothing enacted by that law, and therefore it has been frequently decided, that bonds heritable after the term of payment, are moveable before ; as *penult*. of June 1624, Smith *contra* Anderson's relict, *voce* HERITABLE and MOVEABLE.

It was *duplicated* ; Decisions in this case favour Pardovan, as well as the positive statute, as Bairns of Colonel Henderson *against* Murray, *voce* HERITABLE and MOVEABLE ; where the Colonel having taken a bond bearing annualrent from Whitsunday, payable at Martinmas, and he dying in August, the bond was found heritable ; the like the last of July 1666, Gray *contra* Gordon, *IBIDEM*, *et voce* ESCHEAT, where a bond bearing the term of payment to be diverse years after granting the same, and annualrent to be paid yearly and termly in the interim, was found to be heritable, though the creditor deceased before the term of payment ; Anderson *contra* Anderson, *voce* HERITABLE and MOVEABLE. And,

No 15.

In a competition betwixt an adjudger and arresster, the subject being an heritable bond, the citation on the adjudication being prior to the arrestment, and the decret of adjudication also prior to that of the furthcoming, the adjudger was preferred.