lent to the debt, and satisfied it. The defender *answered*, That that which was here acquired was only a fee for service, which is alimentary, and the fee will not be due, unless the defender serve in suitable condition, effeiring to his place; and, therefore, it cannot be made forthcoming to any other use. No 62.

THE LORDS found, that a fee, in so far as was necessary for the servant's aliment, conform to his condition of service, could not be reached by his creditors, to whom he had made *cessionem bonorum*, except as to the superplus, more than what was necessary; and they found no superplus in this case.

Stair, v. 1. p. 550.

1671. *July* 20. LINDSAY of Mount *against* MAXWELL of Kirkconnel.

No 63.
The power given to debtors, by act 62. parl. 1661, to restrict appriseers to their annualrents is purely personal, and not extended to any coming in place of the debtor by diligence.

LINDSAY of Mount being donatar to the ward of the estate of Kirkconnel, by the death of the late Laird, and minority of this Laird, pursues the tenants for mails and duties. Compearance is made for the apparent heir, as having right by disposition from his grandmother to an apprising, led at her instance against her son, and *alleged*, That there could be no ward; because Kirkconnel, the King's vassal, was denuded before his death, and his mother, as appriser, was infeft. It was *answered*, 1*mo*, That this apprising was upon a bond granted by the defunct to his own mother, for the behoof of his son and apparent heir, without any onerous cause, and so was null and simulate, and a fraudulent contrivance, in prejudice of the King as superior, of his casualty of ward; and that it was found in the case of the Lord Colvil, No 30. p. 8529. that a vassal having married his apparent heir *in lecto*, it was found a fraudulent precipitation, in defraud of the ward. It was *answered*, That the allegeance was not relevant; because, there was nothing to hinder the defunct to have resigned in favour of his apparent heir, without any cause onerous, or to grant him a bond, that he might be infeft upon apprising, or to grant such a bond to any person to the heir's behoof, he being in *liege poustie*; and there can be no presumption of fraud, seeing he might have obtained his son infeft directly, which the King refuses in no case, when the granter is in *liege poustie*.

THE LORDS repelled the allegeance for the donatar, and sustained the apprising.

The donatar further *alleged*, That, by the act of Parliament 1661, betwixt debtor and creditor, it is provided, that the debtor may cause the appriser restrict himself to as much as will pay his annualrent, and the debtor may bruik the rest during the legal; and now the donatar is in place of the debtor; so that, what superplus there is more than will pay the appriser's annualrent, must belong to the donatar. It was *answered*, That this clause is peculiar, and personal to debtors, and cannot be extended to donatars, who are not men-

No 63.

tioned therein; because debtors, when they crave restriction, they are presumed as provident men, to uplift the rest for satisfying the apprising, or their other debts, or for their subsistence; and so being introduced wholly in their favour, it cannot be extended in favour of the donatar to their prejudice: For if the appriser possess all, the superplus will satisfy the apprising; whereas, if the donatar uplift the superplus, the debtor will be hugely prejudged, neither the apprising, nor any other debt of his being satisfied thereby, nor his heir entertained therewith.

THE LORDS found, that this clause could not be extended to a donatar; and that there could not be a waird, both by the decease of the appriser and debtor.

The donatar further *alleged*, That the apprising was satisfied by intromission within the legal, which did extinguish the apprising, as to all effects and purposes, as if it had never been, and all parties return to their rights, as they were before the apprising; and so, consequently, the superior and his donatar have the ward-duties, during the apparent heir's minority, after the apprising is extinct; for the apprising being but a collateral security, like an infeftment for relief, it is *jus resolubile*, and doth not fully divest the debtor, who needs not be reseased, as he would be in the case of a wadset holden public; but the debtor's own infeftment revives and stands valid, and the apparent heir must be infeft as heir to the defunct, which cannot be till he be *legitimæ ætatis*, after the ward. It was *answered*, That the allegeance is not relevant, unless the apprising had been satisfied in the defunct's life, for then his infeftment would have revived; but if any thing remained due, the apparent heir hath the right of reversion, as apparent heir, and intromission thereafter cannot revive the defunct's infeftment.

THE LORDS found, that, so soon as the apprising was extinct, whether before the defunct's death or after, the ward took effect, and the donatar had right.

Fol. Dic. v. 2. *p.* 78. *Stair, v.* 1. *p.* 761.

*** A similar decision was pronounced, Murray against Earl of Southesk, No 7. p. 3477. *voce* DILIGENCE.

1672. *January* 3. LADY BINNIE *against* HUGH SINCLAIR.

No 64.
Found, that a tack, with power to subset, could not be assigned, assignees not being mentioned in it.

THE Lady Binnie having set a tack of her liferent lands to Hugh Sinclair, pursues to find caution for the mails and duties, or else to remove; it was *alleged*, That the libel was not relevant, unless it had been libelled, that, at least two terms of the tack-duty had been unpaid the time of the citation; but there is neither law nor custom obliging every tacksman to find caution, in case of his poverty, or to forefault his tack. It was *answered*, That the only ground