

No 2.  
*mariti*, for the rents of houses possessed by herself, for her aliment, as to years preceding the intending the cause.

the liferent-right of Isobel Robertson his wife, *jure mariti*, pursue the said Isobel for payment of the mails and duties that she had uplifted, and of a part of the tenement that she dwelt in herself. She *alleged, imo*, That her husband's *jus mariti* could not carry her liferent, seeing immediately after the marriage he went out of the country, and was never heard of since, and she had obtained decret of adherence against him, and was going on in a divorce for malicious deserting.

THE LORDS repelled the allegiance, seeing the divorce was not complete, and this was four years anterior.

The said Isobel further *alleged* absolvitor for the rents of her dwelling-house for bygones, and for what she had uplifted, because she had done it *bona fide cum titulo*, viz. her husband's obligation to aliment her as his wife, *et bona fide possessor facit fructus consumptos suos*;

Which the LORDS found relevant, and that albeit her husband would be liable for these rents, which alimented his wife, yet not she.

*Fol. Dic. v. 2. p. 253. Stair, v. 1. p. 323.*

1675. July 17.

BOYD *against* JUSTICE.

No 3.

THOUGH apprisings led within year and day come in all *pari passu*, yet the appriser who enters into possession has the sole benefit of his own intromissions, because an appriser may chuse to possess and intromit or not as he pleases, and if he insist not for possession he has no claim.

*Fol. Dic. v. 2. p. 353. Stair.*

\* \* \* This case is No 50. p. 10651., *voce* POSSESSORY JUDGMENT.

A similar decision was pronounced, 4th January 1695, Wallace *against* Campbell, No 53. p. 10653., *voce* IBIDEM.

No 4.  
 A debtor, after his lands had been appraised, uplifted, and sold his farm meal, and assigned the bond for the price. The appriser was found to have no right to the bond.

1675: July 29.

The Earl of PANMUIR *against* COLLISON.

THE LAIRD of Drum having sold 1600 bolls of victual to merchants in Edinburgh, and the same being delivered, the merchants gave in a bill of suspension and double poiding; which being appointed to be discussed upon the bill, compearance is made for the Earl of Panmuir and the other creditors of the Laird of Drum, who produced an assignation granted by Drum to George Johnston, bearing expressly to be to the behoof of these creditors. There is also compearance for Gilbert Collison, who craves to be preferred, because he having appraised the lands out of which the farms were paid, which are sold by

By Drum, his apprising, though without infestment, hath the effect of an assignation intimated, and so must prefer him to the posterior assignation granted by Drum who was denuded; *2do*, This late assignation is collusive, granted by Drum the common debtor, in favour of Johnston his own chamberlain; and though it bears expressly, to be to the behoof of Panmuir and other creditors, yet it remained an undelivered writ in Drum's hands, at least in his factor's hands, and was never delivered to the creditors; and therefore Collison, who had not only an apprising, but an arrestment in the merchant's hands, ought to be preferred. It was *answered*, That the assignation is no ways collusive, being granted in favour of true creditors, who instruct their debts; nor can it be esteemed as an undelivered writ, because not only it is delivered to the factor expressly in name of the creditors, but the assignee hath intimated the same to the merchants, and taken instruments thereupon produced. And as to Collison's apprising, it was led seven years ago, without any infestment, diligence, or possession; and whatever effect it might have had against the tenants, if the rents were in their hands, it can have no effect against the merchants, as to the price of the victual; for the tenants are discharged, and their debt extinct, and the merchants' obligation is wholly a several new obligation; and as for the arrestment, it doth not proceed upon apprising, but upon a personal debt, and is posterior to the intimation of the assignation. It was *replied* for Collison, That albeit the rents be discharged, yet the sum due by merchants coming in place of the farms, is *surrogatum, et sapit naturam surrogati*, and so must belong to the appriser to whom the farms would have belonged; *2do*, All masters of the ground have an hypothec of the fruits for that year's rent they grow, by which the merchants who have got the fruits are liable, unless they had made payment *bona fide*, which they have not done; but the price is yet in their hands. It was *duplicated* for the assignee, That hypothecation competent to the master of the ground, cannot be extended to an appriser, without infestment; for he is no ways *dominus fundi*; and though his apprising be a judicial assignation, valid without intimation, and would be preferred against the tenants, yet it hath no benefit of hypothecation, to reach the merchants; and for the brocard of surrogation, whatever it might operate where there was no several right, it hath no effect as to the price of farms, which are expressly assigned in favour of other creditors.

THE LORDS found that the farms being uplifted and satisfied, the appriser having neither infestment nor possession, nor having used any diligence for possession, hath not the benefit of the hypothecation competent to the master of the ground, and that he hath no right to the sums due by the merchants by his apprising; and thereby preferred the assignee to the appriser, and also to the posterior arrestment, in respect the same was not only delivered to the factor, but by him intimated to the merchants before the arrestment, which intimation hindered the cedent and his factor to recall the assignation, but the

No 4. creditors might compel them to produce the same, as their evident conceived expressly in their favour, and delivered for their use.

*Fol. Dic. v. 2. p. 352. Stair, v. 2. p. 362.*

\* \* \* Gosford reports this case :

IN a double pointing, raised at the instance of Pilton, and several other merchants in Edinburgh, who had bought from the Laird of Drum a great bargain of victual, extending to L. 10,000, being distressed by several creditors, compearance was made by some who had arrested, and pursued to make forthcoming, and craved to be preferred to the Earl of Panmuir and others, as having right by assignation, because the said assignation was made by the Laird of Drum to his own chamberlain, for the behoof of the creditors, without their knowledge; so that there being no translation made to them, nor intimation before the arrestment made by other creditors, they ought to be preferred. It was *alleged* for the creditors who were assignees, that as the assignation was made to the chamberlain for their behoof, so they were acquainted therewith, and consented that the chamberlain should intimate the same as trustee for them, which was accordingly done before any arrestment; and in consideration thereof, they had abstained from doing any diligence against the Laird of Drum, who was common debtor. It was *alleged* for the arrester, That any such acknowledgment or homologation by intimation was only *asser-tio notarii*, and could not prejudice creditors who had arrested. THE LORDS did find it probable by the assignees' own oath, and the chamberlain's, that truly the assignation was made known to them, and they gave order to intimate the same for their behoof, and so preferred them to the posterior arresters, seeing their right did not only depend upon their own oath, they being lawful creditors by bonds; and that it was agreeable to the ordinary prosecution of diligence to continue to employ a trustee for their behoof, without taking a translation from the common debtor, which might bring a long delay and prejudice them by the diligence of others.

There was likewise compearance made for the Town of Aberdeen, and some merchants there, who had comprised the Laird of Drum's estate, whereupon they craved preference, both as to the assignees and arresters, because Drum being denuded of the right of the lands by comprising, as they have the only right to the fruits and victual which was the product of the ground, so they ought to have right to the price thereof, which was yet in the merchants' hands. It was *answered* for the assignees and the arresters, That they ought to be preferred notwithstanding, because albeit a compriser had done diligence against tenants so long as the fruits are extant upon the ground, and not delivered nor sold, he will be preferred to other creditors who had right only by assignation or arrestment, yet if he suffer the common debtor to continue in possession, and uplift the duties, and sell the same to merchants, after delivery

thereof, he can have no right to the price by virtue of his comprising; but other creditors having right by assignation or arrestment can only have right to the money which is the price thereof. This case was thought to be of difficulty by some of the LORDS, and so was continued to be advised for some days, but thereafter it was concluded by vote that the assignees and arresters should be preferred to the comprisers, which was most just, upon this reason, that not only it would bring a great hazard and uncertainty upon all public concern and trade, as to merchants who buy victual for satisfying of their own debt, and become debtors to others upon precepts or assignations, but likewise because a comprising being only a legal disposition of lands, if the compriser suffer his debtor to possess and dispose of the fruits before he do any diligence against the tenants for delivery of the same, all persons are *in bona fide* to contract with the common debtor, as being only possessor and heritor of the lands wherein he stands infest, and the merchant who becomes debtor to him can never be liable to a compriser who hath only right to pursue the tenants or labourers of the ground for the fruits, as being *pars fundi*, but the price thereof after delivery can only be affected by arrestment or assignation.

*Gosford, MS. No 501. No 797. & 798.*

1677. November 22. GRAHAM and BOYD against MALLOCH.

GRAHAM and Boyd, apprisers of the Lady Barfoot's liferent, pursue a declarator against Robert Malloch a prior appriser, that he is satisfied by intromission. *Alleged, 1mo*, This comprising is null *in toto*, because it is led both upon a bond and a decret, proceeding upon a count and reckoning, and which decret was turned into a libel, and the debt referred to the Lady's oath, who hath never yet deponed, and so that cannot be called due; and when a comprising is led for sums heritably not due, it is null *in toto*; *2do*, He cannot exhaust the mails and duties by the sums in the decret, but they must be ascribed to the payment of the sum in the bond. *Answered*, He was *in bona fide* to intromit for the annual rent of both. THE LORDS found he was not liable to refund the mails and duties intromitted with by him before intending this process, though the said decret was turned into a libel; and allowed him yet to prove the debt, in fortification of the apprising, for the LORDS considered that these pursuers had done little diligence, and if Malloch had not intromitted, the common debtor would have done it. A bill given in seeking a rectification of this was refused.

*Fol. Dic. v. 2. p. 353. Fountainball, MS.*

No 4.

No 5.

Found that a compriser was not liable to refund mails and duties which he had intromitted with, before a decret, on which his comprising was founded, had been turned in a libel.