

other hand, considering that our law had prefixed no precise time betwixt and which a compriser was obliged to perfect and consummate his diligence, therefore they forbore to decide this important point for a creditor apprising for a small sum a great estate of his debtor :—shall he, for obtaining himself infest in that great barony, pay the superior a full year's rent for that small debt? But they answer, *1mo.* You may apprise less than the whole ; *2do.* you may charge the superior to stop there.

This point being waved, the Lords proceeded to another ground of preference craved by Sprinkell against Purdy, *viz.* that the charge you gave the superior in 1652, a year after the legal, is null ; because you had not charged Hay of Mains, who was then the true superior, standing publicly infest, but only the Earl of Nithsdale, who was denuded.

ANSWERED,—The Earl was superior when I led the apprising, and named in the allowance ; and creditors cannot be put to such expiscations as to search out the true superiors ; and there was a probable ground here.

Yet the Lords, by plurality, found the charge null ; seeing it was not against the Earl, but only against his apparent heir, who was not in possession ; and that they had not at any time since rectified the mistake, by charging the right superior ; and therefore preferred Sprinkell, and assoilyied from Purdy's reduction.

*Vol. I. Page 592.*

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1694. *January 19.* The EARL of ABERDEEN *against* SIR ROBERT BAIRD.

PHILIPHAUGH reported the Earl of Aberdeen against Sir Robert Baird ; and the Lords adhered to their former interlocutor, finding that Sir Robert Baird's adjudication of Arthur Udney's *jus mariti* of these fishings was null ; because Arthur had then no right thereto in his person ;—Isobel Jack, the proprietor, having disposed these salmon-fishings to Isobel Douglas, her daughter, in life-rent, and to ———— Udney, her grand-child, in fee, with the express seclusion of Arthur and his creditors ; and she might qualify her donation in what terms she thought fit. And whereas Sir Robert alleged that the right of Arthur, his debtor, reconvalesced ; because the Earl of Aberdeen, for his security, and to take away the grand-child's right, raised a reduction of Jack's disposition to her grand-child *ex capite lecti* ; and actually reduced it, whereby the fee came in Isobel Douglas the mother's person ; and consequently the *jus mariti* recurred to Arthur Udney, her husband, his debtor : for they found there was no right of accrescing in legal diligences, but only in voluntary rights, and that it was *actus meræ facultatis* in Isobel Douglas to quarrel her mother's disposition, to which neither her husband nor his creditors could compel her ; and that, having disposed to Aberdeen, she could not hinder him to secure himself as he pleased, and wherein she had not concurred ; and that this was so decided, *supra*, betwixt them and George Lawson, merchant in Edinburgh.

Sir Robert insisted on a third reason of reduction, *viz.* That, before Udney's disposition to him, he was lying at the horn, at his instance ; and so, by the Act of Parliament 1621, he could not dispose to Aberdeen in prejudice of his diligence. But the Lords repelled this, in regard the said Act of Parliament only relates to creditors where a bankrupt gratifies and prefers one to another ; but

noways concerns nor extends to lawful buyers, and a stranger purchasing for a full and adequate price, who was not a creditor before. But, in regard some of the Lords thought it hard to allow a bankrupt to sell his lands, they also added another reason to their decision, *viz.* that a horning is not equivalent to an inhibition, *quoad* the effect of the Act of Parliament 1621; and cannot be reputed such a diligence as will hinder him to sell to a third party at any reasonable and just price.

*Vol. I. Page 594.*

1694. *January 19.* ALLAN and BYERS *against* The REPRESENTATIVES of ROBERT DEANS.

PHILIPHAUGH reported Allan and Byers against the Representatives of Robert Deans. The Lords found, though Patrick Steel had compeared in this process and defended, yet, not having produced his interest; and, by his oath, it now appearing that he had not a total assignation from Robert Deans, but only a wadset, whereof the reversion was provided to Mrs Margaret Mauld; therefore they found he came not fully in Robert Deans's place to be sole contradictor in this process, but that Deans's heirs and representatives behoved to be cited; and Mrs Mauld, the reverser, might be called *incidenter* if they pleased, that all parties having interest might be in the field.

*Vol. I. Page 594.*

1694. *January 19.* JAMES ARBUTHNOT of CATTERLAND *against* JAMES GENTLEMAN, Skipper in Montrose.

ARNISTON reported James Arbuthnot of Catterland, against James Gentleman, skipper in Montrose. The Lords repelled the reason of suspension, that the apprentice had gone to the King's fleet, and so the apprentice-fee was not due to the master; and found it not relevant, unless the cautioners in the indenture would say, that either he was drawn by lot or forced away *vi majore*: and that the master needed not prove that he protested against the Magistrates, who accepted of the boy to make up one of the number of seamen they were obliged to furnish; but assoilyied from the sixpence *per* day for the want of his service.

*Vol. I. Page 595.*

1694. *January 19.* CALLENDAR *against* HAMILTON of OLIVESTOB.

ANSTRUTHER reported Callendar against Hamilton of Olivestob, who was bound, by a bond of presentation, to produce and enter the person of Charles Hamilton in prison within ten days, or as soon as he could recover his strength; and it was pretended that he lingered under that disease to his death. The Commissaries, before whom it was first tabled, took a conjunct probation as to his condition; and found it proven that he went abroad, and rode several