

(NATURE and EFFECT.)

1668. February 6. Mr GEORGE JOHNSTON against Sir CHARLES ERSKINE.

THE lands of Knockhill, being part of the lands of Houdon, did belong to umquhile Richard Irwing; umquhile Mr John Alexander minister, having charged Robert Irwing to enter heir in special to the said Richard, his grand-fire in these lands, he did apprise the same from Robert, as specially charged to enter heir, but Robert died before he was infest, or charged the superior; Sir Charles Erskine, hath apprifed from Mr John Alexander, all right competent to him in these lands, and thereby having right to Mr John Alexander's apprifing, he is infest thereupon. After Robert Irwing's decease, his sisters served themselves heirs to Richard their grand-fire, and are infest, do dispone to Mr George Johnston, who is also infest. Mr George pursues for mails and duties, in the name of Irwings, his authors; compearance is made for Sir Charles Erskine, who alleged absolutor: *1mo*, Because he has been seven years in possession of the lands in question, by virtue of Mr John Alexander's apprifing, and his own, and so is *tutus exceptione in judicio possessorio*, and cannot be quarrelled till his right be reduced. *2do*, He is *potior jure*, and his right must exclude the pursuers; because he having right to Mr John Alexander's apprifing, which was deduced against Robert Irwing, as specially charged to enter heir; so Richard, as to him, is in as good case, as Robert had been actually entered, and infest by the act of Parliament, declaring that when parties are charged to enter heir, and lie out, sicklike process and execution shall be against them, as they were actually entered; likeas, the tenor of the special charge introduced by custom, to perfect the foresaid act of Parliament, bears expressly, that the person charged shall enter specially, and obtain himself infest, with certification, that the user of the charge shall have the like execution against him, as if he were entered and infest; and therefore, Mr John Alexander's apprifing against Robert Irwing, so charged, was as effectual to him, as if Robert had been actually infest, in which case there is no question, but the apprifer might obtain himself infest upon the apprifing, after the death of him against whom he apprifed; and that summarily, without new process, and there is no difference whether the superior were charged during the life of the debtor or not. The pursuer *answered* to the first, that no party can claim the benefit of a possessory judgment, unless he have a real right by infestment, or at least by tack; but a naked apprifing, though it may carry mails and duties, as a naked assignation, and is valid against the debtor or his heir, yet in itself is an incomplete right and not become real. It was *answered*, that the apprifing alone was sufficient, as was lately found in the case of Mr Roger Hog against the Tenant of Wauchton.

THE LORDS repelled the first defence, and found there was no ground for a possessory judgment; here, there was neither infestment nor charge upon the apprifing.

No 10.

An apprifing deduced upon a special charge, effectual, tho' the apparent heir charged, die before infestment on the apprifing, or a charge against the superior.

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The pursuer *answered* to the second defence, that it was not relevant to exclude him, because Richard Irwing having died last vest and seised in the lands, and Robert Irwing never having been infeft, the pursuers, Robert's sisters, who were heirs apparent, both to Richard their grand-fire, and Robert their brother, could not possibly obtain themselves infeft as heirs to their brother, because the inquest could not find that Robert died last vest and seised as of fee, but Richard; and any apprising against Robert (who was never infeft) evanished, seeing no infeftment was obtained upon the apprising, nor any charge used against the superior, during Robert's life; so that the appriser ought to have charged *de novo* these pursuers to enter heirs to Richard, and ought to have apprised from them, as lawfully charged, and to have obtained infeftment upon the apprising in their life; and as the sisters would exclude the imperfect diligence against the brother, so much more may George Johnston, who is their singular successor. It was *duplicated* by the defender, that Mr George Johnston, albeit he be singular successor, yet he is infeft after Sir Charles Erskine; and, therefore, the question now is only betwixt the appriser, having charged the brother in special, to enter to these lands to his grand-fire, and these sisters being infeft as heirs to the same grandfire; and albeit they could only infeft themselves as heirs to the grandfire, the brother never having been infeft, to the effect, that they might either reduce, or redeem the apprising led against their brother; because the charge to enter heir, did state their brother charged, as if he had been actually infeft, only in relation to, and in favours of the appriser, who charged him; yet, as to that appriser, he is in the same condition as if Robert had been actually infeft, and there is no law requiring him to obtain infeftment, or to charge the superior during the life of Robert, who is specially charged; but, as in other apprisings, so in this, he may charge the superior, or obtain infeftment whenever he pleases. It is true, that if a successor singular had obtained infeftment upon the resignation of Richard's heirs, entered and infeft before the appriser had obtained infeftment, the appriser's delay might have prejudged him, and preferred the first complete right; but the heirs themselves could never exclude him, though their infeftment were prior.

THE LORDS found the second defence and duply relevant; and found the infeftment upon the apprising (against the apparent heir) specially charged, and the apprising itself to be as valid, as if the apparent heir had been actually infeft; and that the comprising became not void through want of infeftment, or charge against the superior, during that apparent heir's life, (*See* POSSESSORY JUDGMENT.)

*Fol. Dic. v. 1. p. 14. Stair, v. 1. p. 518.*