enter in possession till he was infeft, for the superior behoved to have a vassal, and was entitled to a year's rent for change of his vassal. But how soon the nature of an apprising was changed, the appriser was allowed to possess without infeftment as the fee remained full by the infeftment of the reverser.

"*5thly*, The express authority of an act of Parliament, that an apprising within the legal is but a *pignus prætorium*. I mean the act 1681, concerning the election of commissioners for shires, and where the distinction is put between proper wadsets and apprisers within the legal.

"*January* 27, 1756.—Prefer the decreets of adjudication to the adjudication with infeftment, upon the single medium that nothing was left with the common debtor but a personal reversion."

1756. *March* 3. EARL of SELKIRK *against* JOHN DALRYMPLE of Stair.

This case is reported in Fac. Coll. (*Mor. Adjudication, App. No.* 1.)—The debate was reported to the Court by Lord KILKERRAN in the following terms:—

"In the year 1707, John, last Earl of Stair, having made up proper titles, on the death of his father, executed a settlement of his estate and honours, according to the practice of those times, and granted procuratory for resigning the same in the crown's hands for new infeftment to himself and heirs male of his body, whom failing, in favours of such of the descendants of James, Viscount of Stair, as he should think fit. This resignation was accepted by Queen Ann, who by her signature granted peerage and estate in terms of the Earl's resignation, and upon this signature the Earl expede a charter and was thereon infeft, but containing a proviso that it should be lawful for him to alter.

"*May* 21, 1739.—The Earl made a new settlement of his estate and honours upon himself and heirs male of his body, which failing, on Captain John Dalrymple his brother, Colonel William's second son, and heirs male of his body, whom failing, on the other younger sons of the Colonel, whom failing, on his brother Baron Dalrymple, and the heirs male of his body, with certain other substitutions, with a proviso that the Earl should have power to alter; a very needless proviso in both cases.

"On the 2d June, 1739, the Earl executed a disposition of the lands of Drummuckloch, in the shire of Wigton, in favours of the said Captain John Dalrymple, and the heirs male of his body, which failing, the other heirs of entail, contained in the entail made by him on the 21st May preceding, heritably and irredeemably, without any manner of reversion, redemption, or regress whatsoever; and upon this disposition, a charter was expede under the great seal, whereupon Captain Dalrymple was infeft.

"In February 1740, the Earl executed another disposition, in favours of the Captain, of the lands of Breastmill in the shire of Linlithgow, and the heirs male of his body, whom failing, the other heirs in the said entail of the 21st May, but with and under the conditions, provisions, declarations, clauses irritant and resolutive, contained in the said entails heritably and irredeemably, without any manner of reversion; and upon this disposition the Captain was also infeft.

"Captain Dalrymple died in 1742, after having contracted considerable debts, particularly a debt of L.1600 Sterling to Bassil Hamilton of Baldoon, father to the Earl of Selkirk.

"And in the year 1747, the Earl executed a new settlement of his honours and estate, and grants procuratory for resigning the same, including the lands of Drummockloch and Breast-mill, in favours of himself and heirs male of his body, whom failing on the defender, John Dalrymple, his nephew, son of Baron Dalrymple, and the other heirs remaining in life, contained in the former entail, on which the defender was infeft.

"The Earl of Selkirk, in order to recover the debt due by Captain John Dalrymple to his father, brought an action of constitution against the Earl of Dumfries, and James, now Earl of Stair, as charged to enter heirs of conquest and of line to Captain John Dalrymple, their brother, for payment, and they having renounced, decreet *cognitionis causa* went of course, and thereon the Earl obtained decreet of adjudication *cognitionis causa*.

"Upon this adjudication, the Earl now pursues a mails and duties against the defender, John Dalrymple, now of Stair, and other possessors of the lands of Drummockloch and Breast-mill. And the defences made thereto I am now to state to your Lordships.

"And *first*, it was objected for the defenders, that the adjudication *cognitionis causa*, cannot carry the lands or rents in question, for this reason, that an adjudication *cognitionis causa* can carry no subject, other than what the heirs charged to enter could have succeeded to, but so it is, that *esto* the lands had belonged to Captain John Dalrymple, neither the Earl of Dumfries nor James, Earl of Stair, could have succeeded to him therein; neither the one nor the other were apparent heirs to the Captain in these lands, as they were descendible by the infeftments produced, to the heirs male of his body; whom failing, to the other heirs of tailyie, called to the succession by the tailyie 1739: and this principle, that an adjudication *cog. causa* can carry no subject other than what the heir charged could succeed, is supported by a variety of arguments.

"ANSWERED for the pursuer,—That were there any thing in the objection, the only effect of it would be to cast the diligence, and put him to the expense of a new adjudication against the defender.

"But, *secondly*, it is answered, as the property of these lands of Drummockloch and Breast-mill were by charter and investment vested in the pursuer's debtor, where no other destination appeared by the investiture, the only heirs from whom the creditor could adjudge, were the heirs at law. In the settlement 1739, the only heirs substituted are the heirs of his body, there is no substitution of other heirs particularly named, there is indeed a substitution in general to the heirs male of his body, of the other heirs contained in the settlement 1739; but as that remained a personal deed, it could not be incumbent on the creditors to search for such deed,—and were it otherwise, no creditor should know whom to charge, as heir to his debtor, if, because of a substitution in a personal deed not to be found on record, he could not effectually charge the heir at law, and who still is heir at law, notwithstanding of such personal latent deed.

"*2dly*, It was ANSWERED,—That this destination 1739, which contains this substitution to Captain Dalrymple, is actually cancelled, and was so when first

produced in this process, and actually was so before the pursuer's adjudication was led.

"To this it was REPLIED for the defenders,—That it had never been cancelled by the Earl, but that the Earl's subscription had been torn off by accident, when the deed was sent to London in the year 1748.

"To which the pursuer DUPLIES,—That it is *gratis dictum*, it is enough for him to say, that it is cancelled, and was so before he led his adjudication, and therefore, cannot be considered as a deed that can regulate the Captain's succession to any subject whatever.

"It is *secundo*, objected for the defenders, with respect to the lands of Breast-mills, that although the pursuer's adjudication had been regularly deduced against the heir of the investiture, yet the same could not effectually carry the lands of Breast-mills, because the disposition to these lands is, with and under the conditions, provisions, and declarations, contained in the settlement 1739, whereof this is one, that the Earl had power to alter, and which he accordingly did by the settlement 1747.

"To this various ANSWERS are made, 1*st*, That the reference in the disposition, to Breast-mill, to the conditions, provisions, and declarations, in the deed 1739, can only be understood of the limitations and irritances contained in the deed 1739, but in no propriety to a reserved faculty to alter, as such faculty does with no propriety fall under any of these general words, especially when it is considered, that the Earl dispones the lands irredeemably, which is inconsistent with a reserved power to alter.

"2*dly*, There is no reservation of a power to alter in the tailyie 1739, and it had been inept to reserve such a power in that tailyie, as it was a settlement by the Earl of his own estate, upon himself, which by no construction could import or imply any limitation upon the Earl. It is true the tailyie 1739, bearing it to be granted under the provisions, limitations, powers, &c. contained in the bond of tailyie 1707, whereof a power to alter is said to have been one; but 1*st*, That tailyie 1707, has never been produced, and therefore there is no arguing from what powers it may contain.

"But I have rather troubled your Lordships too much upon this, as the pursuer seems pretty indifferent what your Lordships shall find with respect to these lands of Breast-mill, as the lands of Drummockloch are sufficient for the payment of his debt.

"It was for the defenders objected, 3*tio*, That it was apparent that the two conveyances to Drummockloch and Breast-mill, with the infeftments following thereon, were no other than a scheme to give Captain Dalrymple a qualification for Member of Parliament in the shires of Wigton and Linlithgow: but as this scheme was never carried into execution, but was deserted by the Earl, who still retained the conveyances and infeftments thereon, which remained constantly in the hands of the Earl's doers till they were recovered out of his hands by a diligence in this process; therefore the lands remained the Earl's as if no such dispositions had been granted; for, say the defenders, the Earl having changed his views, he might have cancelled the disposition, and thereby put an end to the infeftment whereof he had always retained the custody, as he also did the possession, and for this an argument is brought from some decisions.

"It is ANSWERED,—for the pursuer, That as infeftment followed upon the charter, it is in vain to talk of the Earl's power to cancel the disposition, because it remained in his hand, and that he had still retained the possession, for as infeftment is the proper delivery, and the only transference of possession in land rights, the custody of the writings is of no moment, as whoever has the custody of the writings, is obliged to deliver them up to the person infeft; and whoever be in the natural possession is obliged to account to him for the rents. Not to mention that in this case it appears from an article in Robert Dalrymple's accounts that there was a tack granted by Captain Dalrymple to the Earl, which, after the Captain's infeftment, became the only title of the Earl's possession. And on this occasion notice is taken of a contract, between the Earl and the Colonel, for paying Captain John's debts, which is recited p. 11 of the pursuer's information, which shows the *res gesta.*

"And as to the decisions, which are three, no notice is taken by the pursuer, of the first two, viz. that of Harden and Huychester. Therefore I fail to make no answer to them, in making my report, whatever may be said afterwards, when the Lords are speaking to the case.

"And, as to the third, in the case of Alexander Ross and General Ross,—The pursuer says, that as the decision is not on record, he cannot know upon what grounds the Lords found a trust proven; but thus much he says, that whatever may have moved the Lords to that decision, it is not pleadable, that there was a trust here, when the deed itself proceeds on the narrative of love and favour.

"*N. B.* One of the chief grounds on which the disposition to Alexander Ross was found a trust, was that he acknowledged in his oath that the disposition and infeftment were expede upon the General's expense, whereas the expense in this case was not paid either by the Earl or the Captain, but has been since paid by the Earl of Selkirk, to the agent, in consequence of his hypotheque, though it may be thought that it should have made no difference in this case, albeit the Earl had paid it, as the disposition was granted for love and favour.

"*2do,* As to the decision, Scott of Raeburn against Scott of Huychester, it appears rather to make against Captain Dalrymple. The case there was of a tailyie remaining in the state of a personal deed, on which no infeftment had followed, and in the reasoning for Huychester, it is, in so many words, admitted, that had the tailyie been completed by infeftment, Harden could not have altered the same; but as infeftment had not followed, the granter remained proprietor, with an inherent power to alter, and accordingly the *rationes decidendi* in the interlocutor, distinguish that case from the present, both in that and in other respects. *Vide the Judgment, June* 23, 1713.

"*3tio,* As to the decision in the case of Breadesholm it is thought to be met with no where, but by a general mention of it, in that very decision between Raeburn and Huychester, but what the circumstances of it were nobody knows.

"*March* 3, 1756.—Found the adjudication null on the first reason of reduction, that the heir charged could succeed to nothing." *Nota.* The settlement in *May* 1739, referred to in the decision of Drummockloch, was registered long prior to the adjudication.