1791. *June* 22.

HENRY PIERCE, and his ATTORNEY, *against* DAVID LIMOND.

No 16.
In what manner an adjudication is made the firſt effectual one, when the debtor has not been infeft.

THE lands of Brackenhill, held of a ſubject, were diſponed to Hugh Roſs: But, although the diſpoſition contained a procuratory of reſignation, and a precept of ſaſine, he never was infeft.

After the death of Hugh Roſs, his ſon Hugh Roſs, expede a general ſervice, as heir to his father; thus acquiring right to the unexecuted procuratory and precept reſpecting theſe lands. But he alſo omitted to take infeftment.

The affairs of Hugh Roſs, the younger, having gone into diſorder, his creditors led adjudications. Among others, David Limond adjudged the lands of Brackenhill, and charged the ſuperior to enter him as vaſſal. And, after a conſiderable interval, Henry Pierce led another adjudication; but, in order to make it effectual, he recovered the diſpoſition in favour of Hugh Roſs, the elder, and took infeftment, by executing the precept of ſaſine contained in it.

The lands having been *judicially* ſold, the common agent propoſed to rank the creditors on the price, as if David Limond's adjudication had been the firſt effectual one. But it was *objected*, for Henry Pierce, That a charge, againſt the ſuperior of the adjudged lands, where the debtor was not infeft, was inept; and that of courſe the ſubſequent adjudication taken by Mr Pierce was to be conſidered as the leading one. In ſupport of this objection, he

Pleaded: By a decree of appriſing, which was the earlieſt method of attaching landed property, in Scotland, for the debts of the owner, the lands were judicially diſponed to the creditor. But, in order to make the transfer complete, according to feudal forms, it farther behoved the creditor to obtain infeftment.

When the debtor had been infeft, the appriſer was authoriſed to apply to the ſuperior of the lands, who, upon receiving a year's rent, as a compoſition for renewing the inveſtiture, was obliged to give infeftment; the Court of Seſſion being in uſe to iſſue letters, charging him to do ſo, without any farther inveſtigation. If, after being thus required by one creditor, the ſuperior took it upon him to give infeftment to another, this, as a fraudulent act, was altogether diſregarded; Hope, Minor Pract. § 275.; Craig, 3. 2. 20. And this is the rule recogniſed by the ſtatute of 1661, introducing a *pari paſſu* preference of ſuch appriſings as are within year and day of the firſt effectual one, which is declared to be that 'which is 'preferable in reſpect of the firſt infeftment, or the firſt exact diligence for ob-'taining the ſame.'

In the caſe of an appriſing deduced againſt one who had never been infeft, the ſituation of matters is very different. In ſuch a caſe, it would have been in vain to apply to the ſuperior, whoſe vaſſal the debtor had never been. As a voluntary diſponee, in ſuch a caſe, was obliged to complete his right, by executing the precept of ſaſine, or by reſigning, in virtue of the procuratory, ſo the appriſer was

obliged to follow the ſame courſe. And, now that adjudications have been ſubſtituted in the place of appriſings, it muſt follow, that, when the debtor has never been feudally veſted in the lands, a charge againſt the ſuperior muſt be inept, in the ſame manner as if the ſuperior had proceeded to give charter and infeftment to the adjudger, without being formally required ſo to do; and ſo it was ſolemnly decided, 6th December 1695, Dewar againſt French, (*No* 12. *h. t.*) No 16.

Anſwered: The ſtatute of 1661 declares, in general terms, that a charge againſt the ſuperior ſhall be equal to infeftment; wherever, therefore, a charge has been given, the requiſites of the ſtatute muſt be conſidered as complied with, and the preference of the creditors muſt be regulated by it. To enter into farther diſcuſſions would only be injurious to creditors, who cannot always know how their debtor's rights ſtand; and ſo the rule is laid down by all the authors, no diſtinction being made whether the debtor was infeft or not. Stair, 2. 3. 29.; 3. 2. 49.; Erſkine, 2. 12. 24.

Where the ſuperior pays no regard to the charge at the inſtance of an adjudger, it would be equally unjuſt to enquire, whether the debtor had been regularly received as the vaſſal, as it would be to examine, whether, along with the warrant for charging the ſuperior, the creditor had offered a year's rent, without which, however, a ſuperior is not obliged to give infeftment to an adjudger. The deciſion, quoted on the other ſide, appears to have been erroneouſly abridged in the Dictionary, the queſtion, in the caſe there noticed, having turned on the effect of a general charge, and of the ſtatute 1693, reſpecting unexecuted procuratories. At any rate, it is a ſingle deciſion, in oppoſition to the general tenor of the beſt authorities.

THE LORDS unanimouſly found, That the adjudication at the inſtance of Henry Pierce was the firſt effectual one.

Reporter, *Lord Swinton.* For David Limond, *Mat. Roſs, et alii.* For Henry Pierce, *Abercromby, Honyman, et alii.* Clerk, *Sinclair.*

Craigie. *Fol. Dic. v.* 3. *p.* 14. *Fac. Col. No* 2. APPEND. *p.* 9.

1663. *February* 5. GRAHAME *againſt* ROSS.

THESE parties competed upon appriſings: (*See* the 24th of January, *No* 8. *h. t.*) Wherein the LORDS found, That none of the appriſers ſhould come in with him who was firſt infeft, till firſt they paid their proportional part of the compoſition and expences. No 17. Appriſers, before coming in with the firſt effectual, muſt pay the whole compoſition and expences.

Now, having again conſidered the tenor of the act of Parliament, they found that they behoved to ſatisfy the whole, and that the obtainer of the firſt infeftment ſhould bear no ſhare of it, that being all the other appriſers gave, to get the benefit of the act, to come in *pari paſſu.*

Fol. Dic. v. 1. *p.* 19. *Stair, v.* 1. *p.* 171.