January 23, 1756.—On advising a petition and answers against this interlocutor, the Lords found the price of the goods sold and delivered, not arrestable by Souper.

Lord KILKERRAN has the following note of what passed on the Bench.

" Upon moving this petition, Elchies observed that the second point was rightly determined, because an adjudication in the case of the *Earl of Loudon and Galston* vested the right; whereas an arrestment is only an inchoat diligence to be followed out, but vests nothing in the arrester.

" But as to the first point, he thought that after the factor had sold the effects, the price was in the creditors, which no particular creditor could acquire a preference on by any diligence.

" There are here two questions, 1*st*, whether the money in the hands of Watson, by sale of the goods, was affectable by Souper's arrestment.

" 2*dly*, If it was, how far Inglis, who arrested at the same time with Souper, but who afterwards recovered a great part of his debt by poinding, is, when he draws *pari passu* with Souper, upon their arrestments, to be allowed to state himself creditor on his whole debt, as if he had not poinded, or if he is only to state himself creditor, in what remains due to him after the poinding.

" But if the first of these questions be determined in the negative, that the arrestment of Souper did not affect the money got in by Watson, as the price of the goods, there is no occasion for the second question. And I am of opinion, that Souper's arrestment did not affect the money in Watson's hands, because I think how soon the goods were sold, the price was generally in the creditors; and that therefore no particular creditor could acquire a preference thereon by any after diligence.

" But if it should be supposed that this money was affectable, then I think Inglis can only state himself creditor in the balance remaining due after his poinding; and that the case, *Earl of Loudon and Lord Ross*, does not apply, because in the *Earl of Loudon's* case, the estate was vested in him by his adjudication, before he got his partial payments.

" *January* 23, 1756.—Price of the goods sold and delivered, not arrestable by Souper."

This case is reported in the *Faculty Collection*, (*Mor.* p. 744.)

1756. *January* 27. SIR HENRY MUNRO of Fowlis, *against* COLIN MACKENZIE and OTHERS, adjudgers of the estate of BAIN of Tulloch.

THE question involved in this case, was reported to the Court by Lord KILKERRAN in the following terms:—

" I am to report to the Lords a very short, but a general point of law, in the ranking of the creditors of Bayne of Tulloch.

" There was an adjudication led of this estate in 1736, which came, by progress, in the person of Kenneth Mackenzie of Seaforth, who expede charter and seasine thereon in February 1744; and this is admitted to be the preferable adjudication

on this estate, as no other was led within year and day of it, nor for several years after.

" There afterwards followed four adjudications, two in July, 1743, and two in November and December, 1747, but on which no infeftment followed, nor diligence to obtain it.

" After these, a fifth adjudication was led by Sir Harry Munro, as trustee for Andrew Drummond of London, which, in the year 1748, was completed by charter and seasine.

" And the question I am to state to your Lordships is, whether these four adjudications, which yet remain personal rights, are to be preferred in their order next after the first, and preferable adjudication, or if Sir Harry Munro's is preferable to these adjudications, though prior, in respect charter and seasine has been expede upon it.

" It is said for the four adjudgers in July and November, 1747, that an apprising or adjudication now come in its place, is a proper sale, under reversion, and not merely a *pignus prætorium*, or right in security, as will be plain if the nature of the diligence is traced up to its first principles, as founded on the statutes of King Alexander II. and King James III.; for by these statutes, it appears to be a plain sale at a price, under a faculty of redemption to the debtor within seven years; and though it be true, that abuses crept in which were corrected by after statutes, which made the appriser accountable for his intromissions within the legal, yet still, when we come to inquire into the nature of an apprising, we must look back to see what the nature of it was originally, in which these later statutes, made for correcting abuses, has made no alteration; and the late case of the creditors of Wyliecleugh, between *Ramsay and Clappertoun* is appealed to, where this point was learnedly argued and established, that apprisings are still to be considered as of their original nature, proper sales, and not merely securities.

" And that being once established, that an apprising is a proper sale, it follows as a consequence, that the debtor being denuded in favours of the first adjudger, by charter and seasine, nothing remained with him but a right of reversion competent to be exerced within the legal; but so it is, that all rights of reversion are effectually carried by adjudication, without infeftment.

" That so it is, in the case of reversions of proper wadsets, that they are carried by the first adjudication, without infeftment, is said to be undoubted; and quotations are brought from our most approved authors, all agreeing in that point; and the case must be the same in reversions of apprisings and adjudications, which are in like manner as proper wadsets are, sales or legal conveyances under reversion; and for this, besides what is already said from the original nature of apprisings, they also refer to the opinions of the same approved authors, particularly *Lord Stair,* who, in so many words, says, lib. 3. tit. 2. § 17. p. 391, that the legal reversion of a prior apprising, is carried by a second apprising without infeftment; his words are,—' though second apprisings carry the legal reversion of anterior apprisings without infeftment, yet infeftment is frequently taken thereupon, that the posterior appriser may have interest thereby to reduce or quarrel the anterior apprisings, and to pursue for mails and duties, or removing, if the anterior appriser should forbear.'

" In like manner, Sir George M'Kenzie, in his Institutes,—' posterior apprisings need not infeftment, because they carry only the right of reversion.' And agree-

able to these principles, a decision of your Lordships' predecessors, in 1664, is referred to, where the precise same question with the present was determined in favour of the second adjudger, who had not taken infeftment, and who was preferred to the 3d, though infeft, on the very same principles now pled for the four adjudgers,—that after charter and seasine had followed on the first adjudication, whereby he had carried the *jus proprietatis*, nothing remained with the debtor but the *jus reversionis*, which the second apprising alone carried.

"And, last of all, it was said that if the law stood otherways, great inconveniencies should follow, for if every creditor, who leads an adjudication, should be obliged to infeft himself, the consequence would be, that where lands held of subjects, the superiors will have a year's rent from every adjudger, which may exhaust the subject; and the case will be little better where the lands held of the crown, as the expense of charters from the crown is great, and might greatly lessen the fund of the creditors' payment.

"It was, on the other hand, said for Sir Harry Munro, that his competitors assume propositions as the foundation of their argument, which he contends are erroneous in point of law; that by an apprising with infeftment following on it, the debtor is denuded of the *jus proprietatis* or right of fee, and that nothing remains with him but the *jus reversionis*, the reversion, which the second adjudication effectually carries, which he contends the direct contrary thereof, says he, is true, for that an apprising, however an infeftment has followed upon it, is during the legal truly no more but an incumbrance or security for the debt, or *pignus prætorium*, as the lawyers call it, and the fee or *jus proprietatis* still remains with the debtor whereof he cannot be divested but by the infeftment. So that the point, as argued between the parties, just turns upon that question, whether such be the nature of an apprising, that it is truly a sale, though under redemption, which leaves nothing in the debtor but a reversion, or if it be no other than a right in security, or *pignus prætorium*, notwithstanding whereof the property remains with the debtor.

"And that it is no other than a security, or *pignus prætorium*, the procurators for Sir Harry appeal to the same learned author, Lord Stair, who, B. 2, Tit. 10, § 1, treating of wadsets, and the reversion of these, his words are, "Like unto these, in all points, are infeftments upon apprisings, which are truly *pignora prætoria*, whereby the debtor is not denuded, but his infeftment stands; and if the apprising being satisfied within the legal, it is extinguished, and the debtor needs not be re-invested, and therefore he may receive vassals within the legal; and § 37 of the same title, apprisings are elided by payment, without necessity of renunciation or resignation, as in case of other infeftments; and the reason is, because apprising being but a legal diligence for security of the sum, which ceasing, it falls without other solemnities, and the debtor's own infeftment stands valid without renovation, which, with the infeftment upon the apprising, stood but as a parallel right for security."

"These words, *stood but as a parallel right for security*, is, in other words, to say that the two infeftments, that in the debtor, and that in the appriser, are consistent, which could not be said if the one denuded the debtor of his infeftment; and therefore whatever may have originally been the nature of an apprising, it is now no other than a security consistent with the infeftment of the debtor.

"It was at the same time admitted, that a second apprising will, without infeft-

ment, carry the reversion of the first apprising, if there be no other to compete with it; and this is said to be all that the passages quoted from Lord Stair and Sir George Mackenzie amount to, that a second apprising will carry the reversion of the first, which no body denies; but it comes to be a different question, when the competition comes to be betwixt this second apprising, on which no infeftment has followed, and a third, on which infeftment has followed; for in that case, if it is true that, notwithstanding of an apprising with infeftment on it, the right of property remains with the debtor, it must be a consequence that the third apprising on which infeftment has followed, must be preferable to the second, which still remains a personal right.

"That it is true there is one decision which prefers the second appriser, but there is but one nigh a century ago, and never confirmed by another, and therefore it still remains for your Lordships to consider the points on which that decision proceeded.

"The appriser infeft supposes that this question had occurred before the 1661, or which comes to the same thing, supposes that a competition should now arise between an apprising led before the 1st January, 1652, and a posterior apprising first completed by infeftment, and makes no doubt but the appriser first infeft would be preferable to the prior appriser; albeit, there had been an apprising before this supposed prior apprising, with infeftment on it; and if that is so, the act 1661 can have no influence in the present question, for as none of the apprisers competing, are within year and day of the first, that first and preferable apprising is to be laid out of the case, and the question at issue between the posterior apprisers, as among themselves, falls to be determined as if the act 1661 had never been made.

"1*st*, Originally, no doubt, apprisings were proper sales, because no more lands were conveyed to the appriser than what paid his debt; and he was not accountable for his intromissions during the legal.

"But how soon the law was in this respect altered, that there was no proof of the value of the lands; that great estates were apprised for small sums, and the appriser made accountable for his intromissions, which, if they exceeded the debt, the apprising was extinguished; it no more could remain of the nature of a sale, it being inconsistent with the nature of this that a right of property can be extinguished.

"*2dly*, As the law now stands, if an appriser do not intromit, the rents belong to the reverser; how can that be reconciled with the notion of its being a sale, as originally it was, and that an appriser is proprietor of the lands, and not a creditor?

"Our statutes are not intended to settle abstract points; that is left to be gathered from the points established to be law in our statutes; and it seems plain, that the points now established to be law necessarily infer an alteration of the constitution of an apprising, from a sale under redemption to a disposition in security of the debt, for how otherways is it possible that the apprising can be extinguished by possession, or that the rents belong to the reverser where the appriser does not intromit?

"*3dly*, Do not casualties fall by the death of the reverser, and not by the death of the appriser during the legal? For what reason?—No other than that the appriser is only a creditor and not proprietor within the legal.

"*4thly*, Of old, while apprisings were right of property, the appriser could not

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.