

No 1.

craves to be entered,) had right.—The pursuer *answered*, That he needed to instruct no right; nor was he obliged to dispute the superior's right; but craved the ordinary course, to be entered, *sub periculo*; with reservation of every man's right, and the superior's own right, as is ordinary in apprisings and adjudications.—The defender *alleged*, That albeit that was sustained in apprisings, where the superior gets a year's rent; and though it might be allowed in ordinary adjudications, proceeding upon a liquid debt, *favore creditorum*; yet not in such a case as this, where the vassal's apparent heir disposes, and obliges himself to renounce, of purpose to charge his superior.

THE LORDS found no process, till the pursuer instructed his author's titles; but an infeftment being produced, he was not put to dispute the validity thereof, in this instance. (*See Bankton, v. 2. p. 233.*)

*Stair, v. 1. p. 193.*

1666. February 8.

CRUICKSHANKS *against* LORD FRASER.

No 2.

The assignee to an heritable bond, charged the heir to enter, and to grant procuratory. The assignee obtained decree, charged with horning, and denounced; and infested for adjudication. The adjudication sustained without any renunciation.

THE clause of warrandice, contained in the end of the tack, whereby the granter was obliged to warrant the same, weighed much with the Lords. There being a bond of 6000 merks, granted by the Lord Frazer to Robert Cruickshanks, containing precept of sasine, whereupon he is infest; the said Robert, having assigned the said bond to David Cruickshanks, who was never infest during the cedent's lifetime; the said David charges the apparent heir of the said Robert to enter heir, to the effect he might dispose and infest the assignee in the said sum; and thereupon obtains decree against him, as lawfully charged to enter heir; whereupon there was a charge of horning and denunciation, and now pursues an action of adjudication of the foresaid bonds and sums; in which action, the Lord Frazer is likewise called, who is willing to make payment, so far as a valid right is established in the person of the pursuer.—It was *alleged*, That an adjudication is not *habilis modus*, for establishing the right of the foresaid sums, and bond, in the person of the pursuer, in so far as adjudications proceed, allenarly in such cases where parties renounce; whereupon *hereditas jacens* is adjudged; but, in this case, there is a decret against the apparent heirs, as lawfully charged, which constitute the party charged personally debtor; whether in a sum of money, or in *facto prestando*. So that in law he cannot be denuded by adjudication, no more than if he had been retoured to his predecessor; but the legal manner is, that the pursuer infest against the apparent heir, as lawfully charged to enter heir, and libel *alternative* to fulfil the foresaid assignation, or to pay him a liquid sum; so that if the apparent heir renounce, he may adjudge; and if he do not renounce, he may apprise for the sums contained in the decret; either lands, or heretable bonds.—THE LORDS repelled the alledgeance; and sustained the adjudication, without a renunciation, as being consonant to the daily practice, there being a decret recovered, as lawfully charged to enter heir; and the party against whom, being sufficiently discussed.

*Fol. Dic. v. 1. p. 4. Newbyth, MS. p. 56.*