No. 76.

1707. *March* 4.—The Lords heard and determined the cause between Riddell and Whyte, mentioned 9th February, 1706, and found that Whyte's assignation to Crichton, though it bore for onerous causes, yet having no warrandice, could not be interpreted to imply absolute warrandice, but only from fact and deed, which is the common natural warrandice inserted in assignations to debts or decreets. For the brocard, That no warrandice must be understood to be absolute warrandice, must be applied according to the nature of the right, if it be a sale of lands for onerous adequate causes, then it holds, but not in assignations to personal rights; and though it should at least import *debitum subesse*, and here there was no debt at all, he having, on his being reponed to his oath, deponed *negative*, yet, at the time of Whyte's assignation, there was a decreet standing, though afterwards annulled, *quod sententia judicis pro veritate habetur*, till it be reduced and taken away.

Fountainhall, v. 2. *pp.* 325. *and* 354.

1710. *January* 6. ROBERT GLENDINNING of Partoun, *against* JOHN IRVINE of DRUMCOLTRAN.

No. 77.
A charter of apprising bearing for onerous causes and warrandice from the granter's fact and deed not considered as granted only in obedience, and the granter's heir not allowed to quarrel the same for not production of the original rights, in respect of the obligation of warrandice.

In a reduction and improbation pursued by Robert Glendinning, against John Irvine, for reducing a decreet of apprising of the lands of Barwhillanty from John Maxwel, obtained by Thomas Lidderdale of Gerran (*alias* St. Mary Isle) and a charter of apprising granted to him by the deceased Robert Glendinning of Partoun the superior, bearing, For certain onerous causes, and warrandice from his proper fact and deed; to which apprising and charter John Irvine acquired right in the year 1690;

Alleged for the pursuer: The decreet of apprising was pronounced against John Maxwel who never had right to the lands; and the charter of apprising, not an original right, but given only in obedience to the decreet, did communicate no further right than stood in the debtor's person, against whom the apprising was led; seeing it contains no clause of *novodamus*.

Answered for the defender: Though common charters of apprising, understood to be granted in obedience and *ex necessitate juris*, do not prejudice the superior of his right to the lands apprised; yet here the superior having freely gone beyond the terms of an ordinary charter of apprising, by not mentioning a previous charge to have been given, by expressing that he granted it for onerous causes, and obliging himself and his successors to warrant the same from their fact and deed, which he was under no necessity by law to do; these clauses must operate as effectually against him as a *novodamus*. Especially considering, that the defender, a singular successor by apprising, cannot be supposed to have the original writs,

which *de facto* are abstracted and kept out of the way by the debtor, who colludes with the pursuer. No. 77.

Replied for the pursuer: All charters of apprising do justly bear the like narrative for onerous causes, whereby is meant, only the years rent due to the superior for granting the charter. Albeit the defender's charter mention not the giving of a previous charge, it narrates the apprising, and the Lords' allowance, whereby the superior was *nominatim* decerned to grant a charter in favours of the appriser; so that his granting thereof can never be understood a voluntary act, but a receiving the appriser in obedience, to give him preference in a competition with others, *salvo jure cujuslibet et superioris*, Stair, Instit. Lib. 2. Tit. 4. § 12. Lib. 3. Tit. 2. § 25. The clause of warrandice from fact and deed, imports no more, than that the superior neither has, nor shall by any deed of his prefer another creditor to the appriser; which is the least of all warrandice, and implied in all cases, whether expressed or not. Again, warrandice from fact and deed being regulated by the nature of the writ to which it is adjected; it imports only in this case, that the charter is good in its kind, viz. a sufficient charter of obedience, and that the superior has done no deed to incapacitate him to grant the same, and shall do nothing in prejudice thereof, such as it is.

The Lords found, That the charter granted by the deceased Robert Glendinning of Partoun, to Thomas Lidderdale appriser of the lands of Barwhillanty, cannot be considered as given in obedience; and that the pursuer cannot quarrel the property, in respect of the obligement of warrandice.

Forbes, p. 385.

1710. *February* 2. HEPBURN *against* DUTCHESS of BUCCLEUGH. No. 78.

A person having granted a tack of teinds with warrandice, and thereafter another tack of the same teinds to another person who attained possession; the Lords sustained action of warrandice against him, at the instance of the first tacksman, although the want of possession was owing to the pursuer's own neglect; but the defender was not admitted to make this allegation, who had granted double rights.

Fountainhall.

*** This case is No. 371. p. 11191. *voce* PRESCRIPTION.