1706. *February* 9.

ALEXANDER RIDDELL *against* THOMAS WHYTE, Brewer in Leith, and CRICHTON SEIVEWRIGHT in Edinburgh.

No. 76.
Implied warrandice.

Whyte had a decreet against James Watson for £279 Scots, holding him as confessed on a promise of payment: This decreet he assigns to Crichton, on a narrative of onerous causes, and containing no warrandice. Crichton transfers it to one Dunbar, and it likewise bears onerous causes, but the warrandice is expressed to be only from his fact and deed. Dunbar being debtor to Alexander Riddell merchant in Edinburgh, in the equivalent sum, he, towards his farther security, dispones this debt to him, and he having charged Watson on the decreet, he suspends on the decreet's being in absence, and having paid two dollars of expenses, and for his contumacy, is reponed again to his oath; and depones *negative*, that he owed Whyte the first cedent, and obtainer of the decreet, nothing. Dunbar, and Riddell, his assignee, finding themselves thus disappointed, raised a process against Whyte and Crichton, for recourse upon the warrandice, and to make the debt effectual, seeing Whyte's right bore onerous causes received by him, and no warrandice being provided, that is ever interpreted to be absolute warrandice; and law has clearly determined, that a cedent, though not obliged to uphold the debtor as solvent and responsal, yet by the nature of the transaction, he is bound to make it appear that he is debtor, L. 4. D. De art. et hæredit. vendit. Nominis venditor tenetur præstare debitum subesse, debitorem vero locupletum esse non tenetur præstare; and it was so decided, 24th November, 1671, Barclay, No. 48. p. 16591. Answered, That in dispositions of lands, and discharges of debts, no warrandice is absolute warrandice; but in assignations to bonds, debts, and decreets, no such construction by any law is introduced; and there is a great difference betwixt the *cessio nominis* and *cessio actionis, vel sententiæ*, as this is; and Riddell has no prejudice, for it was only in farther security to him, and he has Dunbar still bound, not having accepted it in satisfaction, and so *nihil ei deest, et cedendo actionem*, I only make you *procurator in rem suam*, but nowise engage, *quod debitum subest*, and I only transmit the right *ut talis qualis*, but am not liable that *aliquid exigi potest;* and such warrandice extends no farther than to repair the skaith and damage which the party warranted sustains, and was so found, 28th February, 1672, Earl of Argyle, No. 52. p. 16598. and 14th December, 1678. Dick, No. 58. p. 16603. And many instances can be given of this, as if a man assign a bond which is afterwards declared by act of Parliament to be a public debt, and so discharged, or if it be reduced *ex capite inhibitionis vel interdictionis*, warrandice from fact and deed will furnish no recourse in these cases against the cedent, seeing there is no dole nor fraud upon his part. The Lords thought the case somewhat singular, and having inconveniencies on both sides, therefore before decision they resolved to hear it in their own presence, and how far a difference is to be made betwixt an assignation to a bond and to an action or a decreet.

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,