

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. *voc* PRESCRIPTION.