To this judgement the Court adhered, on advising a reclaiming petition and answers. No 78.

Reporter, *Lord Monboddo.* For Janet Allan and her Children, *Lord Advocate, Maclaurin.* For the Creditors of Richard Cameron, *Ilay Campbell, Craig.*

S. *Fol. Dic. v. 4. p. 70. Fac. Col. No 118. p. 218.*

*** This case was appealed.

1781. *May 15.*—The House of Lords ORDERED and ADJUDGED, That the appeal be dismissed, and the interlocutor complained of affirmed.

1788. *January 14.* JOHN BALFOUR *against* PATRICK MONCRIEFF.

No 79.
Real warrandice, how far effectual against singular successors, if it be not specified in the warrentor's infeftment.

THE late Mr Balfour Ramsay was proprietor of the lands of Demperstone in fee-simple, while his wife, Mrs Anna Ramsay, held those of Whitehill under a strict entail, in favour of the heirs-male of her body, bearing the name and arms of Ramsay.

In order to preserve the representation of the two families, it was agreed, that Mr Balfour Ramsay should convey the lands of Demperstone to his second son, under an obligation to exchange them with his elder brother for the lands of Whitehill. These last the second son was to hold under the limitations of the entail.

The proposed exchange was effected soon after Mr Balfour Ramsay's death. The nature of the transaction was distinctly set forth in the disposition of the lands of Demperstone, in favour of Mr John Balfour, the eldest son. But in the charter under the great seal which followed, it was only stated in general terms, and in the instrument of sasine it was not at all mentioned.

Mr Balfour afterwards sold the lands of Demperstone to Mr Moncrieff, who refused to pay the price, on this ground chiefly, that if any of the sons of Mr Balfour, who were the proper heirs of entail in the lands of Whitehill, should at any time enter their claim, Mr Balfour's younger brother and his heirs might have recourse, in virtue of the real warrandice, against the lands of Demperstone. Mr Balfour, on the other hand, contended, that as the circumstances of the exchange did not appear from his infeftment, those who purchased from him were perfectly secure. He

Pleaded, Nothing can affect a singular successor in landed property, which is not accurately pointed out in the records. Even where, from a registered sasine, it appears, that some limitation or incumbrance was intended, and where its nature and extent is precisely specified in the charter or other warrant for taking infeftment, this is not enough, if it do not enter the infeftment itself.

No 79. The case of real warrandice is not an exception from the general rule. It has indeed been said, by some of our lawyers, to be effectual even against singular successors, if the nature of the bargain has been mentioned in the deed; but by this must be understood, such a writing or document as is inserted in a proper record for publication, or in other words, in the register of sasines, into which alone purchasers are obliged to look for discovering incumbrances on land. Without this, the boasted security of our records would prove a snare to those who relied on them; Bankton, b. 1. tit. 19. § 4.; Erskine, b. 2. tit. 3. § 51.; See 17th July 1706, Campbell *contra* The Creditors of Park, 27th November 1711, Lady Monboddo *contra* Haliburton, and other cases in Section 8. *h. t.*

Answered; It is true, that in consequence of various enactments respecting different deeds which are used for the transmission or burdening of landed property, no incumbrance can now be imposed on it by the agreement of parties, which may not be discovered on a proper search of the public registers. But there are many incumbrances, which, as they arise from the operation of the law, and without any positive agreement, must still be enforced in the same way as if these enactments had never been made. Thus, the rights of courtesy and terce, and in the same manner, the legal reversion of adjudications, although the two former do not appear from the infeftment of the husband and wife, and although the last cannot, in general, be discovered from the adjudger's sasine, must ever be effectual against the lands. A right of real warrandice is precisely in the same situation. If the circumstances of the exchange appear in the disposition or other deed of conveyance, the party warranted has, by the act of the law itself, the same preference, in case of eviction, over every one laying claim to the lands originally belonging to him, as if the infeftment in his person had never suffered any alteration; Erskine, b. 2. tit. 3, § 28.

A precise determination of the general question was here unnecessary, it being sufficient for Mr Moncrieff the purchaser's argument, to show, that the right given to him was of such a questionable nature, as justified his refusal to pay the price. But the case was thought by the Court to be attended with considerable difficulty; and it was only upon Mr Balfour's younger brother's agreeing to concur in the conveyance in favour of Mr Moncrieff, and thereby renouncing his claim of recourse, that, in a suspension of a charge for the price,

"THE LORDS found the letters orderly proceeded."

Reporter, *Lord Alva.* Act. *Rolland.* Alt. *Blair.* Clerk, *Sinclair.*

Fac. Col. No 13. *p.* 23.

C.