No. 39. gard the eviction was by a supervenient law *in anno* 1649, they declared they would hear the parties farther *in præsentia*.

Gilmour, No. 88. *p.* 68.

1664. *June* 16. WILLIAM HAY *against* JOHN NICOLSON.

No. 40.
A clause of warrandice "against all deadly" contained in an assignation of a bond found not to extend to the solvency of the debtor.

John Nicolson having an assignation *in anno* 1653, of a bond granted to him by James Crichtoun, Sheriff of Nithsdale, principal, and umquhile William Livingstoun cautioner, the name of the assignee was left blank till 1663, at which time William Hay's name was filled up, and which assignation contained a clause of warrandice against all deadly, as law will. William Hay having used execution on the assignation, against the principal and cautioner in the bond, returns upon the warrandice, and charges Nicolson; who suspends on this reason, that the clause of warrandice, as it is conceived in the assignation, could import no more, than that the debt assigned, was a real debt resting, and not to be evicted by any other right; especially seeing it did not bear expressly, to warrant it to be good, valid, and sufficient, which might infer to warrant, not only the assignation should clear the right of the debt, but that the debtor should be *solvendo*. And *secondly*, considering that there is no onerous equivalent cause for granting the assignation, Nicolson the creditor might have discharged Livingston the cautioner, and given him an assignation that he might thereupon charge the principal. The charger opponed the clause of absolute warrandice; which clauses have ever been esteemed to reach to the debtors' being *solvendo*.

The Lords found the clause thus conceived, could not extend to the sufficiency of the debtor.

Stair, v. 1. *p.* 198.

1665. *February* 15. BOYD *against* TENANTS of CARSLUITH.

No. 41.

A superior being bound to warrant his vassal against wards *per expressum*, this was found only to comprehend wards already fallen.

Stair.

*** This case is No. 11 . p. 7758. *voce* JUS SUPERVENIENS, &c.

1666. *July* 17. BURNET *against* JOHNSTON.

No. 42.
Warrandice found to give recourse,

Johnston of Frosterhill having disponed his lands with absolute warrandice in favours of Gordon of Lesmore; reserving his own and his wife's liferent; and

thereafter having disponed the same lands in favours of Mr. William Johnston, who did obtain the first infeftment; and being charged at the instance of Alexander Burnet, having right by assignation to the disposition in favours of Lesmore; the letters were found orderly proceeded; notwithstanding the suspender alleged the charger had no interest during the suspender's life; seeing he never did nor could possess, by reason of the reservation foresaid. And the Lords found a difference, when warrandice is craved upon a deed of the party obliged, and upon any other ground; and that as to his deed he may be charged to purge it, without necessity to allege a distress.

No. 42. though there would be no present distress.

Dirleton, No. 27. p. 9.

Stair reports this case:

John Johnston, having disponed the lands of Frosterhill to Gordoun of Lesmore, whose right Alexander Burnet having apprised, and by the apprising, having right to the clause of warrandice contained in the disposition; charges Johnston the disponer, to warrant the right against a posterior right, granted by him, to William Johnstoun, who had obtained first infeftment. It was answered, that the warrandice could have no effect, because there neither was, nor could be a distress, in so far as in William Johnstoun's disposition, John Johnstoun's and his wife's liferent were reserved, during whose life he could never distress Burnet. *2dly*, It was Burnet's author's fault, that for many years, he did not take infeftment, having long right before the second disposition. It was answered, that Johnstoun himself could never object this delay, to excuse his fraudulent deed, of granting double dispositions, whereby parties become infamous by the act of Parliament, 1540. Cap. 105. and unto the other point, albeit there was no present distress, yet there was unquestionable ground of a future distress, against which the defender could answer nothing, that could elide it, and who being but a naked liferenter, if no execution should pass upon the clause of warrandice during his lifetime, he would be fully frustrated.

The Lords decerned Johnston the disponer, to purge the posterior disposition, granted by him, and found neither of the allegeances in the contrary relevant.

Stair, v. 1. p. 398.

1666. *November* 10. BOWIE *against* HAMILTON.

No. 43. Found that absolute warrandice in the conveyance of an apprising, did only extend to the formality of

Hamilton of Silvertounhill having disponed to James Bowie certain lands, whereto he had right by comprising, and the said James being removed at the instance of a wadsetter, and having pursued upon the warrandice contained in the disposition; it was alleged by Silvertounhill, that though the disposition did bear absolute warrandice, yet by a margin subscribed, it was restricted to warrant only the formality of the comprising, and the truth of the debt, and the executions.