being a specialty in a clause of warrandice, it was to be interpreted accordingly, *pro damno et interesse* only.

No 46.

Stair, v. 1. *p.* 593.

1669. *June* 25. HALIBURTON *against* HUNTER.

No. 47.
Warrandice from fact and deed entitles the purchaser to relief of the public burdens due out of the lands before the date of his right.

Alexander Haliburton having sold the lands of Balgillo to one Hunter of Burnside, with absolute warrandice, and after payment of a part of the price, having gotten a bond of 17,000 merks as the remainder; he did assign Mr. Thomas Haliburton, his nephew and apparent heir, and several others his creditors, to 11,000 merks thererof; whereupon the said Mr. Thomas having charged for 8000 merks, which was his part, they did suspend upon these reasons: That the bond being for the price of the land, and the seller being obliged by the disposition in absolute warrandice, he ought first to purge the land of bygone, and of an inhibition, at the instance of Kinloch of Bandoch. It was answered, As to the bond charged upon, there was no provision but to warrant from all deeds and infeftments, whereupon inhibition was served, following upon Haliburton's own fact and deed, and the said two particulars did not fall under that condition. The Lords found, that public burdens due by Haliburton, and not paid, did fall under the condition; and for the inhibition at Kinloch's instance, seeing there was no distress, and that it was not upon Haliburton's deed but upon the Lord Gray's, his author, alleged to have been served above 40 years ago; notwithstanding thereof, the letters were found orderly proceeded; but withal the Lords declared, that in case the lands should be thereupon evicted, that it should be reserved to the suspender to reduce Haliburton's assignation, as granted to an apparent heir for no onerous cause, or upon any other grounds of law relevant.

Gosford MS. p. 59.

1671. *November* 24. BARCLAY of PEARSTOUN *against* LIDDEL.

No. 48.
A clause of warrandice in an assignation found not to import the responsibility of the debtor at the time.

Robert Liddel having granted an assignation to Sir Robert Barclay, of a bond granted by the Laird of Reidcastle, which assignation contained absolute warrandice in these terms, obliging to warrant the assignation to be good and valid and effectual at all hands; and Reidcastle's estate being comprised both by Robert and others, he charges Liddel upon the warrandice; who suspends, and alleges that the warrandice of an assignation in these or the like terms can import no more then that the debt is a true debt, safe against all exceptions of law, but cannot import that the debtor was *solvendo*, for that never having been declared either by custom or decision, recourse must be had to the civil law, which we ordinarily follow where our own law or custom fails; by which it is clear, L. 4. D. De. hæredit, et actione vendita, that venditor nominis tenetur præstare debitum sub-

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esse, debitorem vero locupletem esse non præstare, upon which the opinion of all the doctors does agree: Now an assignation is nothing else but *venditio nominis*, and it were of most dangerous consequence, and would impede commerce, if cedents behoved to instruct the sufficiency of the debtor, which implies a labyrinth of difficulties; and in any doubtful clause, interpretation should always be made as is most expedient for commerce. Likeas some assignations use to be granted by way of corroboration of former rights, and not in satisfaction thereof, which will import the sufficiency of the debtor; but where that way is not followed, it is always understood that the assignee hath informed himself of the sufficiency of the debtor, and acquiesced therein; for though he had the money in his hand to lend out, he might be mistaken of the sufficiency of his own debtor. It was answered, that this case being undetermined by any prior law or decision, and therefore the Lords having appointed it to be disputed in their own presence, that it may be a rule to the lieges; the same is not to be decided by any subtility of the civil Roman law, but according to equity and reason, the common law of mankind, whereof these are two clear rules; *nemo debet lucrari ex alterius damno*; and in mutual onerous contracts the interpretation is to be made so, that both parties' interests should be equal, which cannot be observed unless the warrandice import the sufficiency at the time of the assignation; for when the one party gives clear money, and the other party assigns a bond of an equivalent sum, if the warrandice do not import that the debtor is solvent, but that by his insufficiency the sum is lost, the cedent *est lucratus ex alterius damno*, and gives not equivalent to what he gets. *2do*, Respect is to be had in the next place to the meaning of parties, and the common consuetude thence arising, *quæ pro lege habetur*, that by adjecting such clauses of warrandice, parties intend to secure themselves; and these are of two sorts, either absolute warrandice, or warrandice from the cedent's fact and deed, so that an absolute warrandice must always import more than warrandice from the cedent's fact and deed; but warrandice from fact and deed doth oft times import that the debt is due; for though in translations or subsequent rights, warrandice from the immediate cedent's fact and deed, doth not import so much as that the debtor cannot defend himself from any exception, but from such exceptions as proceed upon the cedent's fact; but where a party assigns a bond *in debito* himself, with warrandice from his own deed, there can be no exception but from his deed, and so absolute warrandice must import more, which can be nothing else but that the debtor is solvent: And as to the law adduced, it is only in the case of *venditio nominis*, and where the warrandice follows *ex natura negotii*, without any express exuberant clause, such as this is; but assignations being the common way to transmit all rights personal, it is oft-times not by vendition, but by any other contract, as by permutation, when one bond is assigned for another, or by the innominated contract *do ut des*, when lands or goods are disponed, for assignations to bonds, or other rights, or when a society, or co-partnery assigns a bond for their part of the common stock; here is no *venditio nominis*, which by the nature of that contract requires only warrandice *contra evictionem*, and so the law adduced reacheth not

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such cases which are most frequent; for by the nature of permutation, if the right received fails, recourse is had to that which was given therefore, and when ware is disponed for assignations, the seller is answerable for any latent insufficiency in the ware, so must the cedent in any latent insufficiency in the debtor; and it were a strange incongruity that if a bond assigned as a part of a common stock, should prove relief, that that party should have proportionable share of the common stock, whereas no profit arose from his part. The suspender answered, that the citation of the civil law founded upon, is not a peculiar statute of that people, but an assertion of the common law of nations, founded upon great conveniency for promoval of commerce, that he who accepts an assignment with any warrandice, is understood to take his hazard of the sufficiency of the debtor, which is *facti*, and only to secure himself against eviction, which is *juris*; and there is a clear difference betwixt absolute warrandice, and from fact and deed, that the one is only against exceptions upon the cedent's fact, the other against all exceptions whatsomever; as if one should assign a bond granted to himself, which were a public debt, and declared by act of Parliament to be ineffectual; if it were with absolute warrandice, he would be liable, but not if the warrandice were from his own deed only; or if the debtor were interdicted, or inhibited, the exceptions that might be founded thereon would not fall within warrandice from fact and deed, but would fall under absolute warrandice: And as to the meaning of the parties, certainly it does not infer a common custom, not being common; for many think this clause imports the solvency of the debtor, and many think not. As for the instances of assignations in other contracts, there is no difference as to the warrandice from venditions, seeing in all the assignee is ever understood to take his hazard of the debtor's solvency, whatever the tenor of the clause be, unless the sufficiency of the debtor be expressed, as sometimes it is, which shows that parties who intend so, must express it.

The Lords found that such clauses of absolute warrandice do not import that the debtor was solvent the time of the assignation, but only that there was no exception that could defend him either from the cedent's deed or otherwise.

Stair, v. 2. *p.* 10.

*** Gosford reports this case:

Liddel having assigned Sir Robert to a bond granted to him by Sir Francis Ruthven of Reidcastle *in anno* 1667, bearing a clause of absolute warrandice, and that it should be a valid, good, and effectual right; the said Robert three years thereafter, finding Reidcastle's estate to be comprised, and himself at the horn, did pursue the cedent upon the clause of warrandice for payment of the sum of money assigned. It was alleged for the defender, That a clause of warrandice, albeit absolute and conceived as said is, could not make him liable, because all that was thereby imported was, that *debitum vere subest*, and that the debtor could not defend himself against the debt; but it did not import the responsality of the

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debtor, which was clear by the civil law, *D. De actione vendita et cessione nominum debitorum*, and was so interpreted by the law of nations. It was replied for the pursuer, That if a clause of absolute warrandice were not extended to make the debtor responsal, but only that the debt was a true debt, it imported no more than warrandice from fact and deed; and that it was generally so constructed by all persons who were made assignees with such clauses, that it should import the responsality of the debtor; and if it were otherwise, it would obstruct all commerce by transactions, seeing assignees being ignorant of the condition of the debtors, think themselves secure by a clause of absolute warrandice: And further, that in the case of permutations, and granting bills of exchange, or societies *inest de natura rei*, that all assignations made, import no less than the responsality of the debtor, and if payment cannot be recovered, that recourse may be had against the cedent.

The Lords resolved to make a practique of this case, which before had never been clearly decided. After a full hearing of both parties *in præsentia*, they did find that a clause of absolute warrandice did not import that the debtor is responsal the time of the assignation, but only that *debitum vere subest*, and that the bond, decreet, or other deed assigned, are such as can never be reduced, and that the cedent hath the undoubted right to that debt, and no other person, so that the debtor being pursued, can never defend in law; which was done upon these considerations; 1*mo*, That these did import much more than warrandice from fact and deed; 2*do*, That by the civil law, and law of nations, *venditio vel cessio nominum*, did import no more but that *debitum vere subest*; 3*tio*, That seeing if it had been otherwise, then it had been easy to express it, not only by absolute warrandice, but by an addition that the debtor was solvent, and therefore in law, *semper præsumitur contra eum qui apertius potuit dicere*; and it is presumed, that the assignee neither did know the condition of the debtor, nor had enquired after him; 4*to*, If it were interpreted otherwise, it would be the seed of infinite pleas, and would prove impracticable, seeing debtors being merchants, or their fortunes not consistent in land-rent, they dying or becoming bankrupt long after the assignation, it were impossible for the cedent to discover the true condition of their fortune, and to balance the same with their debts, which might be latent the time of the assignation.

Gosford MS. p. 203.

1671. *December* 12. LIDDEL *against* BARCLAY.

No. 49.
Found as above where the assignation bore not only absolute warrandice, but

In the suspension disputed betwixt Robert Liddel and Sir John Barclay, the 24th day of November last, anent the importance of a clause of absolute warrandice, (*supra*,) the suspender further alleged, that albeit the Lords have already found that clauses of absolute warrandice in assignations, or translations, though bearing the assignation to be good, valid, and effectual, doth not import the res-