No. 48. 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-

ponsality of the debtor; yet this clause in the translation in question bearing, to warrant the translation, and the sums transferred, to be good, valid, and effectual, must import the responsality of the debtor, because the sums themselves are warranted; which addition of the sums not being ordinary, must have some effect, and can have no other but the solvency of the debtor, and falls not under the general case decided. It was answered, That this addition doth not alter the case; for to warrant the sums, doth only import that they are truly due, and can be excluded by no exception, either personal, arising from the cedent, or any other way, which is implied in the absolute warrandice of the assignation, and the expressing of it here, doth not infer that it must have a special effect, but the solvency of the debtor is never inferred, unless it be expressed.

No. 49. that the *sum* should be "good, valid, and effectual."

The Lords found that the clause thus conceived, did not import the solvency of the debtor, and therefore adhered to their former interlocutor.

Stair, *v.* 2. *p.* 21.

1672. *Jannary 5.* CLUNIES *against* M'KENZIE.

No. 50. The same subject.

James M'Kenzie having assigned a bond of 1000 merks to M'Kenzie of Reidcastle to the behoof of Alexander Clunies, with absolute warrandice, and being charged upon the clause of warrandice, he suspends on this reason, that the clause of absolute warrandice did only import that the debt was due, and not that the debtor was *solvendo;* whereas by the special charge it is alleged, that the debtor is insolvent. The charger answered, That the clause of warrandice doth necessarily import that the cedent had not done, or should do no deed hurtful to the assignation; and albeit such clauses of warrandice were now found not to import the solvency of the debtor, that doth not quadrate with this case, where it is clear by the assignation, that the bond assigned was not delivered, but the cedent was obliged to deliver the same at such a day, wherein he failed, and before the delivery the debtor, who was solvent the time of assignation, became insolvent by apprisings, and the charger not having the assignation, could not apprise *debito tempore*. It was answered, That the assignation bears *per expressum*, that the bond was registrated, and bears the particular date and court, so that albeit the suspender failed to deliver it, he cannot be liable either for a contravention, or for damage through the not delivery, because it was no necessary consequence thereof, seeing the charger might have extracted the bond himself, and apprised, and that clause for delivery of the bond hath a liqudated penalty of £200, which ought also to be modified to such expenses as the charger would have been at in extracting the bond.

The Lords found, that seeing in the very assignation the date of the registration was expressed, that the not delivery did not import a contravention of the warrandice, and modified the penalty, for not delivery, to £200 Scots.

Stair, *v.* 2. *p.* 37.