No 11.

unless diligence had been done *debito tempore*, against the debtors; who, if they have now become irresponsal, it should only prejudge the pursuer, being his own and his father's *mora*, and not the defender's. It was *answered*, That in the assignation, it was not provided that the receiver should do diligence, but that he should recover timeous payment; but so it is that he did not recover timeous payment: Likeas after the granting the assignation, the troubles of the country having grown, and sinsyne the pursuer having used diligence against the Lord Sinclair by horning, caption, &c. he has done more than he was obliged to do, he not being tied to diligence by the assignation.

THE LORDS repelled the allegeance.

Fol. Dic. v. 1. *p.* 238. *Gilmour, No* 99. *p.* 75.

1678. *February* 7. STUART *against* MELVILL.

No 12.
An assignation being granted with absolute warrandice, in case payment should not be obtained, and the assignee having done no diligence, the Lords found he had no claim against the granter of the assignation.

JOHN MELVILL being debtor to umquhile Henry Stuart, he gives him an assignation to a bond due by Patrick Scot, second son to Langshaw; which assignation bears warrandice at all hands, and that the assignee shall recover payment thereby. Patrick Scot being dead, Henry Stuart as heir to his father, pursues John Melvill for payment of the sum assigned, because he had not recovered payment from Patrick Scot. The defender *alleged*, that by this assignation and clause of warrandice, there was necessarily imported, that the assignee should have done diligence, it bearing expressly, that he should recover payment by the assignation: *Ita est*, Though the debtor, Patrick Scot, lived six years after the assignation, the assignee did no diligence against him; and it cannot be thought, that if the assignee had forborne for 39 years to pursue upon his assignation, that he could have returned upon his cedent, seeing the assignation was not granted in corroboration of any debt, but in satisfaction of a prior debt. The pursuer *answered*, that this clause must import the solvency of the debtor the time of the assignation, and therefore the cedent must prove at least that he was then solvent, and had a visible estate, which might be affected. It was *replied*, That solvency is presumed, unless notour irresponsality were proven, for after so long time the cedent was neither obliged, nor took notice to instruct the condition of his debtor, which should have appeared by the assignee's diligence, whereby if he had incarcerate him, it would have discovered his condition.

THE LORDS found, that this clause imported the solvency of the debtor, but that the same was presumed, unless it were proven that he was a notour Bankrupt, or that the assignee using diligence, did not recover; and if responsality be alleged, allows the cedent to condescend upon any visible estate he had to affect the same.

Fol. Dic. v. 1. *p.* 238. *Stair, v.* 2. *p.* 611.

*** Fountainhall reports the same case. No 13.

A recourse upon the absolute warrandice of an assignation, in case payment were not obtained, THE LORDS found this relevant to assoilzie, that Harry did no diligence to recover payment of this debt; for they thought the clause implied a necessity to do diligence, unless the executors would prove the debtor was bankrupt and insolvent the time of granting the assignation; and found this relevant to the defender, that he had then a visible estate. *Nota*, If it had only been absolute warrandice, without these words, 'in case payment be not obtained,' there had been no recourse, though the debtor had been insolvent.

Fountainhall, MS.

1682. *February.* HOME *against* HOME.

No 14.
A disposition to moveables, with symbolical possession, being granted in security of a debt, and the creditor intromitting with a part only, the rest remaining in the debtor's possession, he was found liable only for his actual intromissions.

SIR Alexander Home of Rentoun having granted a bond of corroboration to George Home of Keams, his uncle, for his payment and relief of certain sums of money that were due to him, and wherein he stood engaged as cautioner for the deceased Lord Rentoun, his brother; and for his farther security, Sir Alexander having disponed to him his hail stock of horse, noult, sheep, and other moveables, upon which there being an instrument of possesion by a symbolical tradition, and Keams having disponed and sold a great part of the goods, Sir Alexander pursues Mr Harry Home, to whom Keams had disponed his estate, with the burden of his debts, for count, reckoning, and payment to him of the price of the hail moveables contained in the instrument of possession. *Alleged* for the defender; that the goods being disponed to him only in corroboration, and for his further security for payment of his debts, he cannot be farther liable to count but only for his actual intromissions, in so far as he has actually sold and disposed of the goods. *Answered*, That the disposition being of the hail moveables, and the instrument of possession containing a particular condescendence of the number and prices of the moveables, the defender ought to be accountable for all that is contained in the instrument of possession, unless what he can make appear Sir Alexander intromitted with, or that Keams was otherways debarred from the intromission. And albeit Keams's right to the moveables was but a corroborative security, yet seeing it was a simple and absolute disposition as to Sir Alexander, and Keams having actually taken possession of the moveables, and having disposed of a great part of them, he ought to be countable for the hail goods contained in the inventory, unless he can condescend upon a relevant ground why he did not dispose of the hail moveables disponed, as well as of a part. *Replied*, that the disposition being only but a corroborative right, by the very nature of the security, Keams was not farther liable to account but accord-