No. 45.

which no law doth require; or if the lands had been apprised from him, he could not be liable for the ward of the appriser's heir, which is cleared by the ordinary custom, there being nothing more frequent in charters, than clauses of absolute warrandice; and yet none were ever overtaken thereby, after they ceased to be superiors. The pursuers answered, that their libel was most relevant, because this being an obligation, conceived in their favours by Barscub, not qualified as superior, no deed of Barscub's, without their consent, can take it from them, unless Barscub, when he sold the superiority, had taken the new superior obliged, to receive the vassals with the same warrandice; but now the new superior, not being obliged by this personal clause, Barscub the old superior, must remain obliged, especially in a clause of this nature, which is expressed for all wards to come.

The Lords repelled the defence, and sustained the libel, and found the superior (albeit denuded) liable for warrandice.

Stair, v. 1. *p.* 547.

1660. *January* 26. Boil of Kelburn *against* Mr. John Wilkie.

No. 46.
Warrandice in whatever terms conceived, found to extend no further than the sums paid out, and the expenses of the party.

Boil of Kelburn having gotten a commission from the Presbytery of Irvine, to uplift some vacant stipends, he gave bond to pay to them £850 therefore; and being thereafter charged by Mr. John Wilkie, collector of the vacant stipends, Kelburn paid him 600 merks; whereupon Mr. John gave Kelburn hisd ischarge of these vacant stipends, and of his bond to the Presbytery, with absolute warrandice of the discharge, especially bearing to relieve and free him of the bond to the Presbytery. Thereafter Kelburn was decerned to make payment of that bond. After a long debate Mr. John Wilkie compeared; whereupon Kelburn charged Mr. John to pay him the £850, with annual-rent and expenses, upon the clause of warrandice. Mr. John suspends on these reasons, *First*, That he was circumvened, never having read the discharge; 2*dly*, That clauses of warrandice, (however conceived) are never extended further by the Lords, than to the skaith and damage of the party warranted, which, if it be componed for never so little, the warrandice reacheth no further than the composition, and it can never be extended *ad captandum lucrum ex alterius damno;* so Kelburn having gotten stipend worth £850, he cannot seek the same back again, but only the £400 he paid out. It was answered, That albeit general clauses of warrandice be so interpreted, yet this is an express and special paction, to relieve Kelburn of this bond, which, if it had been *per se*, would have been valid, although without an onerous cause, and cannot be less valid, having so much of an onerous cause.

The Lords did take no notice of the reason of circumvention, Mr. John being known to be a provident person, but restricted the warrandice to the £400 received by the suspender, and annual-rents thereof, and the expenses of plea against the Presbytery; and found it nowise alike, as if it had been a paction apart, but

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 thereof; 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-