1698. *December* 23. BOTHWELL *against* CHILDREN of PRESTON.

No 74.
Implied warandice.

In this case, Hary Bothwell of Glencorse against the children of Sir Robert Preston, who had led an adjudication of the estate for an old tocher; and Glencorse resolving to purchase the same; they entered into a minute, whereby they are obliged to give him a valid and ample disposition, and he to pay them 6000 merks for the right; and being charged on this minute, Glencorse suspends, and raises reduction on this reason, that he entered into the transaction, expecting a good and a valid right; but now, on the producing the grounds and warrants of the adjudication, he finds it labouring under such defects and nullities, that is it not worth a sixpence; and by the minute you are to give me a valid disposition; *ita est*, if it were to be extended, it behoved to contain at least this warrandice, not only *debitum subesse*, but also that the diligence for the same is formally and legally deduced; and though in law a cedent is not bound to warrant *debitorem esse solvendo et locupletem*, yet he must always [warrant] his right and title good, L. 4. *D. De act. et hæredit. vendit.* See Dirleton, 10th November 1666, Bowie *contra* Hamilton, No. 43. p. 16587; and 9th February 1675, Burd *contra* Reid, No. 54. p. 16602. Answered, The obligement in the minute to grant a valid disposition, can never extend to warrant the legality of the adjudication; for if that had been under view, then a special clause was necessary, particularly obliging to that effect, which is frequent and usual to adject in such cases; and by the smallness of the price paid, it appears there was no such thing intended, else they would not quit 14,000 merks for six thousand, and you have taken your hazard of the right *talis qualis* as it is. The Lords found the Prestons were not obliged to warrant the formality of the diligence and adjudications following thereon.

Fountainhall, v. 2. p. 28.

1704. *February* 3. STIRLING *against* STEEL.

No. 75.
Warrandice of an assignation.

In this case, Anna Deans, and Mr. Walter Stirling her husband, against Alexander Deans, and Watson of Muirhouse, his tutor, the deceased Thomas Deans, by his assignation in February 1701, dispones to Anna Deans, his sister, 6000 merks, to be paid her by Patrick Steel out of the fore-end of a greater sum he was owing him; and after his death, Anna and Mr. Walter pursue Patrick Steel for payment, and refer the debt to his oath. He compears, and acknowledges he was owing at the time of the assignation 10,000 merks, but that he had made sundry payments for the defunct, and likewise defrayed all the expense of his funeral, so that there was not remaining in his hands above £200 Sterling of the whole; all which deductions the Sheriff allowed to the said Patrick, as being debts of their own nature preferable to a voluntary gratuitous assignation. Whereupon Anna Deans and her husband falling short of their legacy in 2400 merks,

No. 75. they intent a process against Alexander Deans her nephew, as executor to Thomas, the granter of the assignation, for making up the deficiency of what she wanted by Patrick Steel's deductions, and compensations, so that she may have her entire 6000 merks. Alleged for Alexander Deans, the executor, That his assignation is of the nature of a *donatio mortis causa quæ legato æquiparatur*, and being a special legacy out of a sum due by Patrick Steel, if the testator had uplifted his money in Steel's hand, no man would have pretended that the legatar would have had recourse to recover it from the executor; and so *à pari*, Steel having exhausted it by necessary payments made on the donant's affairs, which is as effectual as if it had been expressly revoked, for the assignation in its narrative bears love and favour, and he assigns it to take effect after his decease, all which are the clear marks and characters of a donation *mortis causa*;—and the collusion betwixt Steel and Mr. Walter, allowing deductions without any other probation save Steel's oath, cannot prejudge the executor, so as to recur upon the warrandice against him for making up what it fell short; for Thomas Deans the donor might have uplifted, altered, or discharged at pleasure, without founding any recourse of warrandice either against himself, or his executor. Answered for Anna Deans and her husband, That this was no donation *mortis causa*, nor legacy, but truly *actus inter vivos*; and such donations import warrandice from all future facts and deeds, and become irrevocable, except in the case of the donatar's ingratitude; and the narrative of love and favour does not make it a legacy; for even donations *inter vivos* are gratuitous; and the mentioning his decease is not the impulsive cause and motive of his assignation, but is allenarly the term of payment; et ubi tempus mortis est adjectum solutioni, non efficit mortis causa donationem; and the learned Vinnius, ad § 1. Institut. De donationibus is clear on this point; si Titio centum donavero praestanda post mortem, donatio non mortis causa, sed inter vivos est; nam tempus adjectum differendæ solutionis causa ad substantiam donationis non pertinet; and collusion was denied; for there being no other mean of probation of the debt but Patrick Steel's oath, and he having deponed with qualities, and the funeral-charges being a preferable debt, the sheriff would not divide his oath, but took it complexly as it stood; and so what Anna Deans wants by Patrick Steel's defalcations allowed him, she must necessarily have it made up to her by her brother's exectutor. The Lords thought, if Steel's payment had been by Thomas Dean's special precepts or order, he might have pleaded much for himself; but he not being now in the field, it was moved he might be called *incidenter* to this process to defend his own payments; and if he could not, then he behoved to relieve the executor of this pursuit to make up the deficiency of what Anna Deans wanted of her 6000 merks.

Fountainhall, v. 2. p. 218.

*** See sequel of this case, is No. 120. p. 11442. *voce* PRESUMPTION.