The Lords, *in præsentia*, found a man could not pass by his father who stood last vested and seased, and enter to his goodsire; and that the doing thereof inferred behaviour, unless he could condescend on some pregnant presumptions that he was ignorant of his father's being infeft: which is *ignorantia facti*, and so *nonnunquam excusat*; though it may be called *ignorantia juris, unusquisque enim tenetur scire quæ sunt in publica custodia*, and should seek the registers.

Advocates' MS. No. 268, *folio* 115.

1671. *November* 23. ROLLAND of DISBLAIR, and OTHERS *against* CRAIGIEVAR.

IN the debate about the regality of Lundors, pursued by Disblair Rolland, Sir Patrick Young of Seaton, and others, against Craigievar; it was ALLEGED, that though they were indeed vassals of the Abbacy of Lundors, and so liable to that regality before the act of annexation in 1587; yet by that act, (and the act 13, *in anno* 1633,) they became vassals to his Majesty, and so became subject to the courts within the royalty; and accordingly, by the space of forty years and more, they had prescribed immunity from the regality court, and had given suit and presence with the sheriff.

To this it was ANSWERED,—That *jurisdictio nequit præscribi*. *2do*, That some of the vassals of that regality, benorth the Cairnamont, have acknowledged the jurisdiction, and answered to the Court, and been amerciated for their absence; which use of some must interrupt the prescription *quoad* the whole. *3tio*, In counting the forty years, the ten years of the English usurpation must not be reckoned, because, during that time, all regalities were suppressed. 4*to*, They offered to prove positive acts of interruption within the years of prescription.

The debate being reported, the Lords found immunity from jurisdiction might be prescribed, but they behoved to make up forty years beside those under the usurpers. They sustained likewise the reply of interruption for eliding their exception upon prescription, but found the exercising the jurisdiction *quoad* some did not interrupt *quoad* the rest.

There were sundry acts of homologation condescended upon, whereby they alleged thir persons had *tacite* acknowledged the regality; as their adjusting their proportions of stents and public burdens with the rest of the vassals of the regality, &c. But thir were referred to the mutual declarators, one of the right of regality, the other against it, as to their proper place.

Advocates' MS. No. 269, *folio* 115.

1671. *November* 10 and 24. SIR ROBERT BARCLAY of Peirstone, *against* LIDDELL and OTHERS.

November 10. PEIRSTONE having had dealing with one Robert King, tailor; after count and reckoning, King is found his debtor in L.1100; they agree that

Peirstone take an assignation to a bond of the like sum owing to King by Sir Francis Ruthven of Reidcastle, in satisfaction; only he warrants the assignation at all hands, and against all deadly. King dies, his relict marries to one Liddell, merchant. Peirstone discovering, after two or three years, Reidcastle's condition to be such that he would not easily recover his money, he comes back upon the representatives of his cedent, offers to repone them again to their own right, and craves they may be decerned to pay him the said sum, conform to the clause of absolute warrandice contained in the assignation.

It was ALLEGED It was now out of all controversy, yea become a maxim in law, that it imported not what were the warrandice inserted in an assignation or other personal right, whether the same were absolute or made only from facts and deeds; seeing in such it was all one thing, and had but one and the self same signification: and whatever way it was conceived, it was only interpreted to be from facts and deeds, and comprehended these two things and no more, *videlicet, quod debitum vere subest*, and that the cedent has undoubted right to the same, and such a right as will exclude all others from the said sum, and that he has not made, nor shall not make double assignations; but in no sense or law * does it import the responsality of the debtor, since the assignee takes that on his own peril, *et sic caveat emptor*, especially if the term of payment contained in the bond be come, and so if the assignee may instantly charge and distress for the sum; but if the term of payment be not come, then though strict law requires it not, yet *bonum et æquum* seems to say that the cedent shall warrant the responsality of the debtor till *dies solutionis* be come, or a term after: in which time, if he do no diligence for recovery of the sum, then *sibi imputet*, it is his own fault, it is just he suffer for his negligence; neither will any law ever allow him regress upon the clause of warrandice, for getting off the cedent what he cannot recover of him whom he once accepted to be his debtor. But we are no ways straitened in this case, to insist on the rigour of law; for not only here *debitum vere suberat*, and I the cedent had the sole undoubted right thereto, and consequently you my assignee, but also (which is more than we need to say,) Reidcastle, the debtor, was most responsal the time of the assignation. If you had but charged upon the bond, he would have paid the money: and he being debtor to you in far greater sums upon other accounts, ye got payment of them since this assignation, voluntarily, without the least legal distress; which is a clear demonstration ye might have recovered this lesser sum likewise, if ye had used any diligence. But what reason is there that I should stand bound for the responsality of a debtor, where ye have the power of application, where it is in your free will and option whether you will put him to it or no, so long as he is able? Is it anyways just that ye shall neglect to do diligence for recovery of it till the debtor turn insolvent, because, forsooth, ye judge yourself secure, imagining to have recourse back upon me? whereas if I had not made over the right to you, I would have done diligence *debito tempore* myself and gotten it. And that this is no novelty, appears, because there is an express decision already in it, betwixt *Wm. Hay* and ; wherein a cautioner paying the debt, and taking assignation to the bond, with a clause of absolute warrandice, the Lords found the creditor assigner not bound for the princi-

* And the civil law is most clear; l. 4 and 5 *D. de hæreditate et actione vendita; ibique* Mornasius, *in Commentariis.*

pal debtor's solvency, but allenarly that it was a true debt, and as yet unpaid *quoad* the principal. *Vide supra No.* 129, (*13th February* 1671.) *Codex* Fabrianus *page* 421, *definitione ibi* 15. See Stair's System, tit. 13. *Of infeftments of property*, No. 38, p. 220.

To this it was REPLIED,—They confessed that the ordinary clause of absolute warrandice in an assignation implied no more than from fact and deed, but contended they were in a different case; and it behoved to import more here, because he not only warranted the assignation and the right at all hands and against all deadly, but likeways the sums; which words can admit of no other sense but this, he shall be liable to make the assignation effectual,* *quocunque modo* it be rendered ineffectual, whether by the debtor's irresponsality or otherways. As for the practique it noways meets; because it is obvious to every body that a creditor getting payment from his cautioner (whom he assigns to the bond for his speedier relief) can warrant no more but allenarly the debt, and that it is yet unuplifted by him from the principal; and it were ridiculous to say he should be liable to refund the sum again to the cautioner, if he could not recover payment upon the assignation, which is noways our case.

My Lord Newbayth inclined to find the allegeance relevant, and to assoilyie from the summons; yet was content to give them the Lords' answer, whether a cedent giving absolute warrandice will be liable for the sum to the assignee, if the debtor was not responsal the time of the assignation.

Advocates' MS. No. 246, *folio* 110.

November 24.—The debate set down at No. 246, betwixt Peirston and Liddell, about the warrandice in an assignation, being taken to avizandum, the Lords, after long debates in their own presence, found (and declared they would make it a constant rule hereafter, for putting the lieges in surety,) that absolute warrandice in an assignation imported no more but allenarly that *vere debitum subest*, and that he is such a debitor *qui non est tutus ulla exceptione*, and that it is yet resting unpaid, and that no other has right to it; but noways imported the responsality or sufficiency of the debtor, and that it should be recoverable of him, or if ye cannot get it off him then ye shall recur against the cedent: and this notwithstanding of the specialties alleged, viz. That he not only warranted the right but also the sums. *2do*, That he obliged himself to make it effectual. *3tio*, That the law *non tenetur præstare locupletem sed tantum debitorem* was only *in emptione nominis*, in which case it is just the buyer take his hazard because he gets an ease in the bargain: *sed hoc non tenet in cessione seu delegatione*. All which the Lords repelled, and found *ut supra*. And, therefore, *pro futuro*, no assignation should be taken but expressly with this quality, that if he do not recover the sum by virtue of that assignation, then he shall recur again to the cedent, or that he shall make the debt good and effectual at all hands: and to make it equal on all hands, it should bear, the assignee always doing diligence within such a definite time as they shall agree upon; and the diligence would also be qualified, viz. the length of the registrate horning or otherwise, as they shall agree. And when one

* The word "*effectual*" has a great emphasis in it, though some call it but *stilus curiæ*, and that it imports no more than the words *good, valid, and sufficient*.

takes an assignation to a bond in corroboration of a debt owing him by the cedent, he will do well to advert what diligence he is tied to do.*

Before this decision many advocates were in a mistake as to the import of this absolute warrandice.

Peirston having lost the interlocutor, then offered him to prove it was communed and agreed to by this defender, that he should warrant the debt against all accidents that could befal it.

The Lords found this relevant to be proven *scripto vel juramento;* though it was alleged that he should not be heard to found on that now, because of his supine negligence in letting the debtor turn insolvent, and not putting him to it by the space of three years. *Advocates' MS. No. 270, folio* 115.

1671. *November* 28. HAMILTON of KINKELL *against* AYTON of Kinnaldy.

ONE pursuing for implement of a contract to which he had right, it was ALLEGED, I cannot fulfil to you, because your author is denuded by an assignation in favours of ———, who has intimated the same to me, and has recovered sentence. The Lords *in præsentia* found (they say it was found so before,) it was *jus tertii* to the debtor; and therefore repelled his allegeance, except he could show an interest.

ALLEGED he had good enough interest,—lest he be made pay it twice. The Lords found he should suspend on double poinding.

ALLEGED, it were better to receive it here than needlessly to multiply processes and charges. Yet the Lords found in form it could not be received here, but only in a double poinding.

This pursuit was at the instance of Hamilton of Kinkell against Ayton of Kinnaldy, as heir to his father *et cæteris nominibus passivis*, to fulfil a contract whereby he was obliged to dispone some lands to Kinkell's father, who assigned this contract to one Mr. Henry Danskein; who intimated his assignation, and pursued for transferring this contract against Kinnaldie *passive*, and obtained sentence. It was confessed by all, if Danskein had recovered sentence for implement it would have been a good defence against Kinkell's pursuit; but being only for transferring, it was not exclusive of the pursuer's right, unless Danskein's representatives did compear and propone on their right, and crave to be preferred; though it was alleged the transferring was equivalent to a decreet for implement, and would receive the self same execution as if it were for implement.

Advocates' MS. No. 273, folio 116.

* The Lords were also moved with the authority of President Spotswood, who in his practiques is of this opinion. There were also French *plaidoiez* and *arrests* adduced for it by my Lord Newbayth. See Peleus his *Actions Forenses singulieres, Lib. 5, Act. 15, pag. 259.*