

dice can go no further than to make up their damage by the contravention, and the value of the thing warranted, and the onerous cause of the thing or price given for it, and purge any prejudice they instruct they have incurred by the contravention founded on. And, in equity, Cuill can refund no farther than *in quantum* he was *locupletatus* and made benefit by disposing that comprising to Carsluith; and cannot be countable for a vast superintromission, far exceeding the sum transacted for.

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1706. July 16.

ANENT PROBATION by WITNESSES.

SOME parties, to whose probation certain points were admitted to be proven *prout de jure*, petitioned the Lords, that the witnesses by whom they expected to have proven, were either dead or gone out of the country, after they were, by their extracted diligence, cited, or were cast upon legal objections; and, therefore, craved liberty to cite others in their room, who were come to their knowledge since.

Some thought, if there were none yet adduced, or that those led deponed *nihil novunt*, they might be allowed to cite others, though not in the first diligence,—they deponing they were emergent, and *noviter venientes ad notitiam*. But the plurality thought this against form, and a bad preparative; which might open a door to suborning and picking out of witnesses: and therefore refused the bill, seeing he may blame himself that did not put in all the witnesses he intended to make use of into his first diligence.

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1706. July 23. MR THOMAS LUTWIDGE *against* JOHN and JAMES MURRAY.

THE Lord Forglan, as probationer, reported Mr Thomas Lutwidge, merchant in Whitehaven, in England, against John and James Murrays, merchants in Dumfries. Mr Lutwidge having brought 35 hogsheads of tobacco to Annan, he enters into a bargain for some of it with Mr Murray; who apprehending he was going to sell it to another, he applies to the sheriff of Dumfries, craving a warrant to arrest him till he found caution; which is granted: And there the bargain is referred to oath, which he acknowledges. And Murray's oath is taken, which of them was to pay the Scots duty: And Mr Murray depones, It was Mr Lutwidge; whereon he is decerned to deliver the tobacco, and they only to pay threepence-halfpenny the pound free of duty.

Of this decret he raised suspension and reduction on thir grounds:—*1mo*, It is null, being in time of vacance, without a dispensation; *2do*, His compearance was by force of arrestment and concussion, being brought *oborto collo*; *3tio*, It was *ultra petita*, the warrant being only sought to secure him till he found caution; and yet, he is decerned to fulfil the bargain; and he is decerned to fulfil to John and James Murrays, and yet the complaint is only given in by James; *4to*, He adjected several qualities to his oath, anent their being