

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.

*Vol. II. Page 342.*

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.

*Vol. II. Page 343.*

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

liable to pay the Scots duty, which the judge refused to insert; whereas, the price he decerns, deducing the duty, is cheaper than the prime cost it stands at the Plantations.

ANSWERED,—Mr Lutwidge being a stranger, who might retire where he pleased, it was just and necessary to arrest him, and make him answer, though in vacance time: and, seeing he found not caution *judicio sisti et judicatum solvi*, the sheriff might very well put him to deponé anent the bargain. And he mentioning John Murray as a partner, why might not the judge decern for him as well as James, it resulting from his own oath? And that the bargain was cheap, was never sustained in Scotland to reponé any. And the tie of an oath is so inviolable and sacred, that he ought not to be heard to impugn it *postquam juratum est*.

The Lords thought this case stronger than that of the 18th February 1680, *Burnet* against *Ewing*; where one being arrested at London, and giving a bond to be free, the bond was reduced; therefore, the Lords here turned the decret to a libel, and reponed the stranger thereagainst. *Vol. II. Page 345.*

1706. July 23. WILLIAM BLACK, &c. Tenants of Gogar, against HUGH MACGILL and ALEXANDER MALCOLM.

LORD Minto reported Black against Macgill and Alexander Malcolm. Alexander, being infeft by Meldrum of Tillybodie, in an annualrent of £1000 out of the lands of Gogar, pursues a poiding of the ground against William Black, and other tenants thereof, before Hugh Macgill, bailie of the regality of Culross, within which jurisdiction the lands lie.

The tenants ALLEGED,—No poiding against us; because our master, the granter of the infeftment, nor his heirs, are not called to defend us, as they ought to be. The bailie having repelled this, the decret goes out, and the poor tenants are poided, and they broke; whereupon they not only raised suspension, but likewise a reduction and declarator, wherein they call the judge and clerk to be decerned to refund and pay the hail skaith and damage they have sustained through the palpable gross iniquity committed by him in the foresaid decret, and likewise to be deprived of his office, conform to the certification of some old Acts of Parliament.

When this was called, the Lords were very clear to annul the decret, and reponé the tenants against it: But the debate arose on the conclusion against the judge and clerk. And as to the clerk, he being a passive-obedience man, there was no difficulty in assoilyeing him, who must write as he is directed.

And, *quoad* the bailie, it was ALLEGED,—The error here committed was only in a punctilio of form, and the heritor's heir was unknown, the land having been so long in the hands of the creditors; and such a pursuit was wholly new and unprecedented: and the Acts of Parliament founded on were either in desuetude or only struck against judges who, by bribery and corruption, determined unjustly. And how many decreets of inferior judges are every day annulled and reduced on informalities; yea, even on natural iniquity and injustice, as directly contrary to law and Acts of Parliament! yet the judges are never made liable for the parties' damages. And, if this were once sustained, there would be in-