

1706. July 12. BROWN of CARSLUITH against MAXWELL of CUILL.

ANNE Boyd, relict of Brown of Carsluith, being married to Maxwell of Cuill, in 1660, he acquired a comprising led against the lands of Carsluith, by one Mackgowan: and, his stepson coming to be married, in 1680, to Creighton of Crawfordston's daughter, Cuill gets in the tocher, and disposes to him Mackgowan's apprising, principal, annualrents, and expenses, with warrandice from all facts and deeds of his own; but reserves nor excepts not his former intromissions exceeding his wife's jointure-lands, preceding the date of his disposition. Carsluith having raised a process against him, for counting for the superplus rents more than his mother's liferent extended to, Cuill ALLEGED he had, done no fact nor deed in prejudice of his disposition to Carsluith; for he had, neither before nor since, conveyed that apprising to any other, and so had not contravened his warrandice: And none can imagine that one in his right wits would convey a comprising so as to lay a foundation for an action against himself, to restore all he had intromitted with by virtue of that comprising, prior to his disposing it; for that were to make him a loser for the favour he did Carsluith, in disposing to him that comprising to be a title to him for bruiking his lands, and to make him give back, not only what he got for it, but much more; which is against all equity and justice; especially since he never bruiked by it, but only entered to the possession of the whole, as he found his wife in it.

ANSWERED,—Cuill had clearly contravened the warrandice, because he had uplifted the rents of these years he had assigned to Carsluith; and his discharges to the tenants were produced. For, he having disposed the apprising and hail sums of money therein contained, without any reservation of his intromissions, with warrandice from his facts and deeds, his discharges were a clear fact of his own, and his ascribing it to his wife's right can never infer a *bona fides*; because, by her contract of marriage, she was restricted to fourteen chalders of victual: And to say, I did not possess the superplus above that fourteen chalders of victual by that apprising, but only by the right I derived from my wife, is the answer which a *prædo*, having no right, gives,—*possideo quia possideo*, without founding on any title whatsoever except mere possession. Likeas, this apprising was of little use to Carsluith; for, when he came to compete with other creditors-apprisers, they were preferred: so that he was obliged to transact with them, and purchase in their right, for securing himself in the lands.

The Lords found Cuill had contravened the warrandice by uplifting the surplus rents above his wife's jointure, and found him accountable for the same; but allowed him to be further heard, what should be the extent and quota of his counting; for, *1mo*, He alleged, that no intromissions before his acquiring the said apprising could enter *in computo*, but only since; *2do*, That, he being overtaken on his warrandice, so uncautiously drawn by the writer's ignorance, and his own inadvertency of not adding an exception and reservation, it can go no farther than the onerous cause of the disposition; which was little or nothing, not exceeding a thousand merks, the disposition not being express nor specific, but only bearing sums of money in the general; and it cannot be presumed adequate to the value of the apprising disposed, seeing he gives not absolute warrandice, but fact and deed. And Stair, *Inst. page 223*, &c. shows, that recourse of warran-

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