

suspender, who founds upon it. For to presume that the English bond is paid, because not produced by the charger, is *sine lege loqui*. And why might not he take assignation to the one, without inquiring after the other, or whether it was extant or not at the time; seeing the bond, wherein the suspender is bound, is an absolute, complete, and valid right; as well as indorsations use to be taken upon one of two bills of exchange for the same sum, without calling for the other?

The Lords repelled the reasons of suspension, unless the suspender would offer to prove payment of the bond granted by the principal after the English form.

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1706. July 11. ROBERT BROWN of Carsluith, *against* THOMAS MAXWELL of Cuill.

The deceased HUGH MAXWELL of Cuill having, in anno 1660, married Anna Boyd, relict of Robert Brown of Carsluith, whom he found in possession of the whole estate, he continued the said universal possession, although his wife had only right to a yearly liferent of 1400 merks. In the year 1667, he acquired an apprising of the estate from one James M'Gowan; and in anno 1680, transferred the same in favours of Robert Brown, now of Carsluith, his stepson, for advancing his marriage with Crawfordstoun's sister. Which translation, after narrating the apprising at M'Gowan's instance, and his disposition to Cuill, bears, "That Cuill, for certain sums of money, transfers and disposes the said heritable right by virtue of the foresaid disposition and assignation, &c. Together with the hail sums of money, principal, annual-rents, and expences, and sheriff fee contained in the foresaid apprising assigned by M'Gowan to him; and all right, title, interest which Cuill had, has, or may have thereto in time coming, &c. with power to call for the mails and duties thereof, as also the hail sums of money, principal, annual-rents and expences above transferred, which were disposed to him by M'Gowan, &c. Whilk Cuill obliges him to warrand from his own proper fact and deed allennarly; that is, that he had not done nor yet should thereafter make any other assignation, translation, disposition, renunciation, or any other security of the premisses to no other person or persons, &c." Upon this translation the said Robert Brown pursued Thomas Maxwell of Cuill, as representing his father, granter thereof, for his father's intromissions with the rents of the lands appraised preceding his conveyance of the foresaid apprising in favours of the pursuer, in so far as they exceeded his wife's life-rent.

ALLEGED for the defender,—He cannot be liable for any of his father's intromissions before translation of the apprising; because any intromission he had was allennarly, by virtue of his wife's life-rent right, and not by virtue of the apprising, which he never made use of, but, after it had lain long dormant beside him, disposed it to the pursuer *talis qualis* as it was. 2. The warrandice in the translation from fact and deed, is expressly qualified and restrict-

ed to dispositions, renunciations, or translations of the right, and obliges not against intromissions.

REPLIED for the Pursuer,—This translation not being a disposition of lands, but of the apprising itself *tanquam optimam maximam*, and hail sums therein contained, principal, annual-rents and penalties; if the disponent, by his intromission, hath got payment of any part thereof, the defender must make the same good to the pursuer, who has mails and duties assigned to him without restriction, and all that was assigned by M'Gowan. Now M'Gowan had right to the rents craved, and therefore the warrandice must extend thereto. The super-intromissions not life-rented cannot be ascribed to Cuill's title by his wife, but to the apprising, which was the only title existing in his person at the time. 2. Assignations, translations, dispositions, and renunciations in the warrandice, comprehend all the writs the cedent could have made to the principal debtor, or to any third party except tenants: and the subsequent words, "or any other security of the premisses, to no person or persons," plainly include his own super-intromissions; the same way as in the case of his translation of an infeftment of annual-rent, or any infeftment in security of a sum in the same terms, his bygone intromissions, that might have extinguished the subject assigned, would have fallen under the warrandice.

DUPLIED for the Defender,—The disposing of the apprising by the defender's father, with all right which he had or might have by virtue of the assignation from M'Gowan, implies that he intended only to dispoise what right he had so acquired, such as it was. And since he never intromitted by virtue of the said apprising, the warrandice in his assignation thereof can never make him liable for any intromissions he had, which his wife's possession and his own *bona fides* do abundantly legitimate.

The Lords found the warrandice was incurred by the defender's father's super-intromissions with the rents of the estate above his wife's jointure, preceding the conveyance of the apprising to his stepson. And remitted to the Ordinary to hear parties as to how far the defender is liable.

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1706. July 18. JAMES LEES, Merchant in Glasgow, *against* ROBERT DINWIDIE, Merchant there.

JAMES LEES, merchant in Glasgow, as executor-creditor to Ninian Glass in Crawford's-dike, having intented a process against Robert Dinwidie, merchant in Glasgow, and Elizabeth Kelburn, relict of the said Ninian Glass, for restitution and delivery to him of some barrels and a boat belonging to the defunct, and confirmed by the pursuer;—

ALLEGED for the Defender,—That before the pursuer's confirmation, the said Elizabeth Kelburn was confirmed executrix-dative to the defunct, and had obtained the goods pursued for, eiked to her confirmed testament; and Robert Dinwidie was assoilyied in a process at her instance for them, before the Commissaries of Glasgow, upon a ground of compensation by an equivalent debt the defunct was owing to him. So that the pursuer's confirmation is null, as being posterior to