

decreets ; without which the superior and vassal could not collude to bring so grievous a servitude upon him, not being obliged thereto by his own infestment.

Page 279.

1672. November 29. SIR JOHN YOUNG of LENNIE *against* ISAAC BRAND, Baxter.

WILLIAM Young, tenant to Sir John Smith, being decerned, before the commissaries of Edinburgh, to make payment of the price of 28 bolls of wheat, did suspend upon double pouding ;—wherein Sir John Young of Lennie was called, who ALLEGED, That he ought to be preferred ; because he was infest upon a comprising of the lands, led against Sir John Smith, whereby he had right to the year's duty due by the tenants.

It was ALLEGED for Isaac Brand, That he having bought the said wheat, and the tenant having become debtor, by his promise, for delivery of the bolls, whereupon he having recovered decreet, the tenant must be liable to him, being bound, as said is.

It was ANSWERED for the tenant, That he ought only to be found liable in single payment to the person having best right ; and as for his voluntarily becoming debtor by promise, it was only proven by witnesses against law ; whereupon he had reduction depending.

It was REPLIED, That the said promise being accessory to a merchant's bargain, which, of its own nature, was probable by witnesses, the accessory promise, being a part of that same bargain, was probable in that same manner ; as was lately found in the case of the hiring of a workman, for his wages, by the servant of him who was to employ him ; so that, as, in *locatio et conductio*, the obligation was found probable by witnesses, it ought to be so found here in the case of *emptio et venditio*, where it was *pactum incontinenti adjectum*, and not *nuda emissio verborum*.

The Lords did sustain the reason of reduction, and found the promise only probable *scripto vel juramento* ; the emption and vendition not being betwixt the tenant and Isaac Brand, but betwixt him and his master ; and, albeit that he should confess that he had promised to deliver the victual, yet, before the delivery, Sir John Young, as having best right, ought to be answered and obeyed, and the tenant freed from double payment.

Page 281.

1672. December 4. HARLAW *against* HOME.

IN the forementioned action betwixt Harlaw and Home, wherein the executor-creditor was only found liable to assign, and not to do diligence, there being a count and reckoning betwixt the curator and the pursuer ;—it was ALLEGED for the curator, That he ought to have allowance out of the first end of his intromission of the sum of £700, paid in tocher with Agnes Harlaw, who was one