It was REPLIED, That it being confessed there were ropes carried into the tolbooth, by which the prisoner escaped, and that the window of the bell-house was open, out of which it was easy for any person to go down to the roofs of houses built underneath, against which the magistrates had provided since, by putting in of iron stauncheons in the windows: As likewise, that a woman being prisoner for a crime, did make her escape that way, albeit she was bruised in the attempt, because she did it without the help of any ropes; which occasion should have made the magistrates guard against all such attempts.

The Lords did ordain some of their number to visit the way of the escape.—Upon their report, did assoilyie the jailer, as not being intrusted with the key of the bell-house. As likewise, the magistrates, in respect there was never any attempt but that one wherein the prisoner suffered so much: Which, as to the magistrates, was hard, they being forewarned, and not having secured from any further attempt, as they have now done.

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1672. *November* 26. HENRY BARDINER of CULTMILN *against* WILLIAM COLZIAR of HALCROFT.

HENRY Bardiner having a feu of the Miln of Cults, with the astricted multures of all grindable corns, whereupon he was infeft, and confirmed by the superior, and did obtain decreet against Colziar; who did SUSPEND, upon this reason;—That he could not be liable for the multures of any bear not tholing fire and water, because he stood infeft in the lands of Halcroft, free of all restriction; which were feued long before any infeftment or confirmation granted to the charger, of all grindable corns; and had never been in use of paying any multures, but of oats and bear, which were ground for the suspender's use; but never for any bear sold to a merchant.

It was ANSWERED, That the charger standing infeft in the miln, with the astricted multures of all grindable corns; and being confirmed, and having acts of thirlage, and decreet conform, the suspender, by payment of multure for his oats, must be liable for all other grindable corns, seeing his possession of a part gives him right to the whole: as was found by a decision betwixt the Laird of Waughton and Foord, *in anno* 1635;—whereby it was expressly found, That *omnia grana crescentia*, being thirled, albeit the feuar of the miln had not been in possession of the multures of all corns growing by the space of 40 years; it being sufficient that, by virtue of the astriction, they had been in possession of a part.

The Lords, notwithstanding, did find the reason relevant to assoilyie from the multures of bear sold to merchants, or not tholing fire and water; in respect that the defender's authors were infeft by the Abbots of Culross, without any restriction to the miln of Cults, long before the Abbots' confirmation of the charter granted to the charger's authors, bearing all grindable corns:—and found, That the acts of thirlage or decreets could not infer payment of the multure for such bear as was sold, unless that either the heritor had consented thereto, or made payment of the multures of bear, in obedience of the said acts or

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 infeftment.

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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 poinding;—wherein Sir John Young of Lennie was called, who ALLEGED, That he ought to be preferred; because he was infeft 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.

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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