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.

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 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.

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

of the four children, and so had right to a fourth part of the whole moveable estate due to her and the rest.

It was REPLIED, That the pursuer, Andrew Harlaw, pursuing as sole executor to Thomas Harlaw, upon two bonds granted by the curator to him *proprio nomine*, any payment of tocher to Agnes Harlaw cannot exoner him.

It was ANSWERED for the curator, That any bond granted by him to Thomas, being only for his intromission with money and goods, which belonged equally to four children, he could not be liable to Thomas but for his proportion thereof, if it should amount to the bonds which is the ground of the pursuit.

The Lords, having ordained the conjunct curator with Afleck to be examined upon the value of the estate; who deponed, That by the death of the father, there fell to the children above 7000 merks, so that Thomas's proportion did amount near to the whole sums contained in the bonds: Notwithstanding whereof, they did ordain, That Harlaw should prove the whole value of the defunct's estate, and that Thomas's proportion was no less than the sums contained in the bond. Which was hard; seeing that a curator intromitting, and being major, *sciens et prudens*, it cannot be presumed that he would have granted a bond to any of the children, unless he had been their debtor in so much; and that, after twenty years, to ordain children to prove the value of their own estate, against their own curator, who had acknowledged and given bond without any restriction or provision, it was not to be expected it was consisting in their knowledge.

Page 282.

1672. *December* 13. MR JAMES MURRAY *against* ROBERT FRENCH of FRENCHLAND.

ROBERT French, being pursued for payment of the whole debt contained in a bond granted to Murray, as having deforced the messenger in the execution of his caption against the debtor;—it was ALLEGED,—by the Acts of Parliament 1587 and 1592, it was statuted, That deforcers of messengers shall escheat their whole moveables, the one half to the King and the other to the party wronged; so that this being a penal action, and the punishment expressly determined by law, there is no power left to the Judges to extend the same. *2do.* The Acts of Parliament allowing that deforcers may be either civilly or criminally pursued, *una electa non recurritur ad aliam;* but so it is that the defender was pursued criminally before the justice for the same fault.

It was REPLIED, to the *first*, That the Acts of Parliament do only add a further pain than what is done by the common law; and that defenders, before these Acts of Parliament, being liable to the whole debt for deterring of deforcers, the escheat of their moveables was statuted to belong to the King, and the creditor who suffered thereby; and hath been so determined by the Lords, 25th July 1633, Mitchell against Barclay.—It was REPLIED, to the *second*, That albeit the deforcer was pursued criminally before the justice for his violence and breach of the peace, yet that hindereth not the pursuer to intent a civil process for his damage and loss, both these actions being consistent, and for divers causes; and the law doth not allow to recur where two actions are competent,—only where they are for one and the same cause, and where *pinguior actio electa, alia extinguitur.*