

No 286.

debts whereof he might have had relief of the executry, if his curators had confirmed him."

*Fountainball, v. I. p. 104.*

1742. June 17.

PROVAN *against* CALDER and ANDERSON.

No 287.

A PERSON, supposed in liquor, having made a promise of marriage to a woman, to give her assurance of his being in earnest, granted her a bill for L.100 Sterling. The woman gave the bill in custody to a mutual friend who was present, and promised either to return it to her when called for, or pay the sum. The acceptor of the bill got it from the custodiary, and resiled from his promise. The woman brought an action against both, for exhibition of the bill or payment. The defenders *urged*, That the whole transaction was in joke; and besides, that the granting a bill, and its delivery, were not probable by witnesses. THE LORDS at first assoilzied; but upon a reclaiming petition, found the defenders, conjunctly and severally, liable for the L. 100 Sterling.

*Fol. Dic. v. 4. p. 163. C. Home.*

\*.\* This case is No 60. p. 9511, *voce* PACTUM ILLICITUM.

1755. January 24.

WILLIAM CRAWFURD *against* THOMAS MACFIE.

No 288.

A person became bound to convey all debts, and the grounds thereof, due to him by a third party, and one of the grounds of debt being lost, he was allowed to prove *pro ut de jure* that it was known at the time of the agreement to be lost.

WILLIAM CRAWFURD, in consideration of 7000 merks to be paid by Thomas Macfie, became bound to convey to him the hail principal sums, annualrents, and penalties due to Crawford by Wallace and Morton, with his hail grounds of debt and diligence, personal and real, affecting their heritable and moveable subjects.

Among the debts thus agreed to be conveyed was a bond of 700 merks due by Wallace and Morton, to which Crawford had right, on which adjudication had followed. Crawford produced the adjudication, but he did not produce the bond.

Macfie claimed deduction, to the amount of this bond, from the 7000 merks he had obliged himself to pay to Crawford.

Crawford charged for his whole sum, and offered to prove *prout de jure*. That at the time of the transaction Macfie was in the knowledge the bond in question was lost, and therefore could not expect to have it delivered to him.

Macfie suspended; and *answered*, The allegiance was only probable *scripto aut juramento*; for the import of it was, to take away the effect of a writing, to wit, Crawford's obligation to convey the whole debts with the diligences on them; and that could not be done by a proof *prout de jure*.

"THE LORDS allowed a proof of the allegiance *prout de jure*."

*Act. Arch. Hamilton & Millar.*

*Alt. J. Dalrymple.*

*J. D.*

*Fol. Dic. v. 4. p. 163. Fac. Col. No 131. p. 195.*