

## ALTERNATIVE.

1623. July 5.

BROWN *against* WRIGHT.

JOHN BROWN by his obligation, having bound him to pay to Thomas Wright 1200 merks, at a term contained in the bond; and, in case of failzie at the said term, to infest the said Thomas in certain of the said John's lands, exprest in the said bond; the said John being charged to pay the said Thomas Wright that sum, suspends upon that clause contained in the bond, whereby he is not simply obliged to pay that sum, but in case of failzie at the said term appointed for payment, he is only holden by the bond to give the creditor infestment of his land; which he was content to do, and to give him with the infestment, possession of the land, which being done by him, must import satisfaction of the bond, seeing by the clause foresaid, he that is debtor hath the election, either to pay the sum, or to give the infestment; and he being willing to give the infestment, the creditor cannot urge him farther. THE LORDS found this reason not relevant; and that in this bond, and in all others of the like nature, the creditor had the election, either to seek the money, or the fulfilling of that which was adjected to the not-payment thereof at the term, in case of failzie. For the LORDS found these clauses not to be alternative, whereof the election ought to be conferred to the option of the debtor, but were clauses introduced in favours of the creditors, which ought not to derogate from the force of that which was deduced principally in the obligation.

*Fol. Dic. v. I. p. 34. Durie, p. 69.*

1638. July 25.

BROWN *against* BLAICKBURN.

ONE BROWN pursuing Blaickburn for spuilzie of four horses, the defender excepting upon a poinding of the same, for satisfying of a decreet obtained by Blaickburn against this pursuer; and this poinding being quarrelled, because it was deduced at Dumfermling, being the head burgh of the regality of Dumfermling; whereas this pursuer, whose horses were poinded, then of before, and ever since has dwelt within the royalty, viz. in the town of Innerkeithing, so that his goods could never have been lawfully poinded or apprised, except at the market cross of the head burgh of the sheriffdom, which is Cupar; and, albeit the goods were found accidentally within the bounds of the regality, in their

VOL. I.

3 M

## No 1.

A man giving bond to pay a sum at a term, and in case of failzie, to infest the creditor in certain lands; this is no alternative, so as to give the election to the debtor. Such clauses to be interpreted in favour of creditors, which is an exception from the general rule.

## No 2.

A party was decerned to deliver writs, or pay a sum. Not having been charged to deliver; but being poinded for the sum; the poinding found unlawful, and restitution, damages, and expenses awarded.