

double pointing against a person having right from the debtor *post sententiam*. The Lords sustained the decret, and found, that the defence was not unjustly sustained.

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1662. July. JAMES LOCKHART *against* ALEXANDER KENNEDY.

IN a removing, pursued at the instance of Alexander Kennedy against his tenants, compeared James Lockhart; who alleged, There can be no process upon the pursuer's infestment, because, it being a seasine of lands within the town of Air, it ought to have been given by one of the bailies and town-clerk; whereas it is given by the Sheriff and Sheriff-clerk, by a commission from the English Judges, who had no power. 2. It is given by a precept of *clare constat*, whereas it should have been given upon a retour, or upon a cognition of sworn neighbours. It was answered, That, the time of this infestment, there was no magistracy in Air, nor bailies, in regard they refused the tender, and consequently the Judges might very well commissionate the Sheriffs. And as to the 2d, it was answered, That as the bailies might have entered an apparent heir by hasp and staple, without service or cognition, so as well by a precept of *clare constat*. The Lords repelled the alleigances.

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1662. July. THOMAS LEITCHFIELD *against* CHARLES POTT.

THOMAS Leitchfield, Englishman, pursues Charles Pott, in Kelso, for £47 sterling, as the price of two hogsheads of canary and two hogsheads of French wine, sent by the said Thomas to him, conform to his two missive letters to the pursuer for that effect. It was alleged, Absolvitor, Because the first missive letter directed the pursuer to send the best canary and best French wine; whereas it was offered to be proven, That the canary was most insufficient, spoiled malaga; and the French wine was old spoiled claret; and that the defender did write to the pursuer of the insufficiency thereof, and desired them to be taken back by him. It was answered, That the defender should have, immediately after his receipt thereof, sent and intimated the same to the pursuer, and required him, by way of instrument, to receive the same under protestation; whereas, on the contrary, he did, notwithstanding of his letter sent to the pursuer, sell and dispose thereupon; and, after the receipt of the wine, he, by his second letter, desired the pursuer to send him more. It was replied, There was no necessity of a notary and instrument: seeing, by the first letter, he desired the pursuer to send him special good wine; and by the other letter he told him of the insufficiency of the first: and though, by a second letter, he did write for more, that letter was sent within a few days after the first wine came; at which time, being troubled with the carriage, it was not ready to pierce; nor could it be known whether it had been good or bad wine, till after many months that the pursuer had refused to take away the wine. Neither did the defender dispose