

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 allegeances.

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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

upon the wines till many months after the pursuer had refused to take away the wine ; and then he sold it at a small rate and avail, lest it should altogether perish. The Lords, before answer, ordained the pursuer to adduce witnesses for proving the sufficiency of the wines when they were sent from Leith, and that he sold of that same wine to others as sufficient, and for what price ; and ordained the defender to adduce witnesses for proving the condition of the wine when it came from Leith to Kelso, and when it was settled and sold.

No. 53, Page 37.

1662. *December.* SIR ANDREW DICK *against* JAMES BAILLIE.

SIR Andrew Dick pursues James Baillie, compriser of certain lands in Orkney pertaining to Sir Andrew, to hear and see it found, that James was satisfied by his intromissions within the legal ; and produced a rental according to certain tacks set to the tenants, wherewith James intromitted, or should have intromitted, and be countable conform to the tacks, he having meddled at least with some of the duties from the tenants. It was answered, That if any tacks were set to the tenants, they were for such duties as the tenants were not able to pay ; and what he *de facto* intromitted with, was all the lands were worth, and paid before the tacks ; at least, if they had been forced to pay greater duties, the lands would have been casten waste. It was replied, That a compriser once meddling with the tenants, cannot give down of the rents payable by the tenants at the time of his entry. The Lords ordained a commission to be directed to examine the payment made, by the tenants, the years preceding the tacks ; and what condition they were in, the time of the compriser's entry ; and whether they might have been able to keep the lands, if they had been distressed for the full duties contained in the tacks ; and, if the lands could have been made tenant-sted, if these tenants had been removed.

No. 57, Page 41.

1663. *January 8.* CATHARIN DUMBAR *against* ROBERT GRAHAM.

ROBERT Dumbar of Windiesheills, and Janet Baxter his spouse, being addebted to Catharin Dumbar in a certain sum, Catharin caused arrest another sum in the hands of William Ramsay, as debtor to the said Janet Baxter and her said husband *jure mariti* ; whereupon a process was intented before the Lords of Council and Session for making the sum arrested furthcoming. After the first arrestment, divers weeks, Robert Graham, merchant, arrests and pursues a furthcoming before the bailies of Leith, and obtains sentence, whereupon William Ramsay raises suspension of multiplepoinding. It was alleged for the first arrester, That she should be preferred, notwithstanding of the second arrestment and sentence, in regard of her prior diligence ; and that nothing done in the second process could prejudge the first arrestment, and dependence of furthcoming thereupon, the first arrester having done what she could. The Lords preferred the first arrester.

No. 59, Page 42.