

No 2. bringing of coals to the pursuer's house, yet that was no reason to warrant the pointing, except it had been deduced at the market cross of Cupar; likeas, before the pointing was fully compleat, the pursuer had obtained suspension of that decret, which he that same day had sent to Cupar, to have stopped the pointing, thinking verily that no pointing could be orderly deduced, but at the head burgh of the sheriffdom, within which he dwelt; and, finding that the defender had so circumveened him; upon the next day after the pointing, he intimates this suspension, both to the officer and to the party. Attour he *alleged*, he could not lawfully point upon that sentence, because the same decerned the pursuer to deliver to this defender some obligations, that were alleged to be in his hands, or else to pay such sums of money contained therein; and this sentence being alternative, the pursuer, who was decerned, had the election to do any of them; and he never being charged upon that decret, as he ought to have been, before he could have been pointed for the liquid sum; therefore, he *alleged*, the pointing could not be lawful, being so summarily execute. THE LORDS, albeit they found, that the pointing should not fall because the same was deduced at Dumfermling, the head burgh of the regality (for they thought, that albeit the party, owner of the goods, dwelt within the royalty, where the same was not execute, but that the goods being apprehended within the regality, might lawfully be pointed at the head burgh of the regality, and so the pointing was sustained, notwithstanding of that allegiance); yet in respect of the other above written points of the reply, the same was sustained, and the exception upon the pointing was repelled, to infer restitution of the horses, and prices therefor, to be modified by the Lords; and also for payment of such expences to the pursuer, for satisfying of the profits, and all that he could seek by this pursuit, as the Lords should modify.

A&.. Baird.

Alt.

Fol. Dic. v. 1. p. 35. Durie, p. 879.

No 3.

A chamberlain granted bond to his master, either to take decrees against the tenants for arrears, or pay the debt himself.

Not having said *'betwixt and a certain day,'* he was held to have been *instanter* debtor.

1665. July 8.. E. of ROTHES against LESLY of Tulloch.

In a pursuit at the Earl of Rothes's instance, against Lesly of Tulloch, his chamberlain, for payment of L. 1718, for which he had given ticket in July 1662, alleging, (*obliging*) himself either to obtain decrees against the tenants of Rothes, or qualify them to be resting that sum; and in case he did not clear it, he obliged him to pay it out of his own estate. The said Walter Lesly having done nothing for obtaining decrees against the tenants, as he was obliged, that ever came to the pursuer's knowledge, albeit he was often required thereto, pursues him for payment of the said sum. It was *alleged* by the defender, That he had fulfilled his part of the obligation, in so far as he had recovered decrees against the tenants, and so could not be liable for the same, and which decrees

he is content to assign; and that the tenants are in as good condition as at the time of granting the ticket. THE LORDS repelled the defence, and decreed against the chamberlain, in regard of his long silence; for there being no day set down in the ticket, betwixt and which he was to clear the debt, against the tenants: The LORDS thought he was *instante* debtor; but the rather, that he had been so long silent; but superceded execution till the first of November, betwixt and which he might pursue the tenants, and obtain payment himself.

Fol. Dic. v. 1. p. 34. Newbyth, MS. p. 34.

No 3.

1673. July 22. SIR PATRICK NISBET *against* LORD BALMERINO.

IN an action at Sir Patrick's instance against Balmerino, for procuring new tacks of his teinds of a part of the lands of Restalrig, belonging to him, conform to an obligation of Balmerino's father, where (who) for sums of money, had assigned Sir Patrick's father to the tacks of his teinds, which are now expired, and obliged himself to procure new tacks. It was *alleged* for Balmerino, *imo*, That the obligation to procure new tacks, was alternative either to do the same, or to refund the money then paid, which he is willing to do, *et in alternativis electio est debitoris*; *2do*, It was not now in his power to perform the same; the rights of the said teinds being settled in the person of his son, the Master of Balmerino, who was now married, and *extra familiam*, and so all that he could be obliged to in law, was to refund the money. It was *replied* to the first, that the said obligation was not alternative, and could not be so construed, seeing the Lord Balmerino having disposed a right for a sum of money received, so long as it is in his power to grant the same he ought to perform; and the adjection with (of) payment of the money, can only be interpreted to take place, in case he should not be able to procure that right from a third party. It was *replied* to the second, that albeit the Master was married, yet being the apparent heir of his father, it was not to be imagined but he had so much power over him as to prevail with him to perform. THE LORDS found, That the defender was not in the case of such an alternative, as he had it in his option, it being *emptio et venditio*, and in the first place, he being obliged to grant a right, which, so long as it was in his own power, he could not refuse to perform, and that the pretended alternative was only made in respect the right might depend upon another, in which case, the refunding of the money was only *loco damni et interesse*; but, as to the second point, it was not denied, it being referred to some of the Lords to agree it.

Fol. Dic. v. 1. p. 35. Gosford, MS. No 631. p. 365.

No 4.

One having a tack of teinds, assigned the heritor to his own teinds, and obliged himself to procure new tacks at the expiration of the former, or refund a sum of money paid with this view. This found no alternative obligation. He was bound to grant a new tack, if in his power.