

## 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

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## 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 expences awarded.

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&amp;.. 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 paid *'betwixt and a certain day,'* he was held to have been *instant* 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