

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against the tenants: The LORDS thought he was *instante* debtor; but the rather, that he had been so long silent; but superceded execution till the first of November, betwixt and which he might pursue the tenants, and obtain payment himself.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.