and reduced a bond, because it was proven to have been given to shun a poinding *via facti* upon a decreet, which decreet stood actually suspended, and the suspension intimated and undiscussed; and therefore they reponed against the bond. *Vol. I. Page 33.*

Anent Poinding of the Ground.

It was queried, if a party has a good interest to say,—"If you take out a decreet of poinding of the ground against such lands, my lands, which lie runridge therewith, must be expressly reserved forth of the said decreet, since the pasturage for beasts on these places is promiscuous, and they may easily pass from one rig to another." But now the Lords following equity, not only in ordinary poindings but also in poindings of the ground, if the party be ready to depone that the goods are his, they find that ought to stop poinding, even as it did formerly in the poinding of moveables. See *February* 1676, *Lawson*, [No. 465, § 3, page 61.] *Vol. I. Page 35.*

Anent Liferent.

A man infefts his wife in liferent of some lands, which paid victual; thereafter he sets a tack of these lands, and makes commutation from one species of victual to another, or from victual to money, in diminution of the former rental. Whether will the relict be obliged to stand to this new tack or not? It is thought she ought not to be prejudged thereby. *Vol. I. Page 35.*

1678 *and* 1679. Cleland of Hearshaw *against* Lockhart of Birkhill.

1678. *January* 1.—Cleilland of Hearshaw, as assignee by Hamilton of Green, charges Lockhart of Birkhill, &c. to pay the sum of £440 Scots, for not presenting of Claud Hamilton of Letham, conform to their bond of cautionry.

They suspend on this reason, That, at the day mentioned in the bond, the debtor, who was to have been presented, was sick; and that, *primo quoque tempore*, so soon as he recovered, about two months thereafter, they offered him; which ought to exoner them.

Answered,—By their bond, they were obliged to have sisted him in the prison of Hamilton; which they did not: and these obligations are *stricti juris*, and to be performed in *forma specifica*.

This being reported by Harcourse, the Lords, before answer, ordained the witnesses in the instrument of the offer of him after his recovery, to be examined. *Vide supra, 2d July* 1670, *num.* 58.

The suspenders aimed likewise at this reason, That their obligation to sist the principal debtor at such a precise day, was conditional: as if they had promised under the condition, *si navis ex Asia venerit*; and he being impeded *vi majore et casu fortuito*, by sickness, they were not liable, thereafter, to present him when he reconvalesced, but were *simpliciter* free. This was not debated. *Vide legem* 26 *C. de Fidejussoribus.*

Modica mora, in producing one whom we are bound to enter, makes him not incur the penalty, says *Paulus J. C.tus in Lege* 91, § 3, *D. de Verborum Obligationibus,—Hattomani liber juris consultus dictus, pagina* 66. *Vide supra*, 1*st November* 1677, *Jameson. Vide* 18*th January* 1679, thir same parties. See *Lanfrancus Balbus, decisione* 345.

Advocates' MS. No. 699, *folio* 314.

1679. *January* 18.—In the action between Cleland of Hearshaw and Lockhart of Birkhill, (*Vide* 1*st January* 1678;) the Lords having ordained the instrument to be proven in thir terms,—That, when they sisted and offered him, Hamilton of Green either discharged them to take him to prison directly, or in words of equipollent sense; the *testes instrumentarii* being examined, *viz.* Monkland and Raploch, they deponed that Green only refused to accept of him there, at his own house.

The Lords having advised the testimonies, they found the depositions did not prove; and therefore found the letters orderly proceeded against the cautioners.

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1677 *and* 1679. HARY, &c. STRAITONS *against* their Brother, the LAIRD of LAURISTON.

1677. *November* 8.—A FATHER dies, leaving several children: he grants a bond of provision, to be paid by his eldest son to the younger, and ordains their portions to be paid to them at their age of fifteen years, or at the next term after their marriage. *Quæritur* in whose option this alternative is. It may seem to be introduced in favours of the eldest son, who is debtor; for, *in alternativis obligationibus, electio est debitoris*; especially here, that if they die before the term of payment, it is provided their portion shall fall in return, and accresce to the eldest. Yet, others think it is in the option of the children, that, either at fifteen or at the next term after their marriage, they may call for their principal sum; for the annualrent is unquestionably due to them for their aliment: otherwise (say they) this inconvenience will follow, that it shall force them, immediately after they are fifteen, if their brother refuse payment, to anticipate and run headlong on marriage, and so the clause would abridge *libertatem matrimonii* and that mature deliberation which is requisite in a case of so great concern; which is absurd, and *contra leges et bonos mores.* And they make a distinction *inter alternativa et alternata*, which I conceive not; only we say, in patronages, *vicibus alternatis*, not *alternativis.*

Advocates' MS. No. 650, § 4, *folio* 305.

1679. *January* 21.—In the actions pursued by Hary, &c. Straitons, children of the second marriage to the Laird of Lauriston, against Lauriston their brother of the first marriage, for payment of their portions natural, or provisions due at their marriage, or age of fifteen,—*vide* 8th November 1677,—the Lords found the election of their alternatives was *debitoris*; and therefore that their portions were not due at fifteen, but only at their marriage; which was the election made by the heir, their eldest brother, who was debtor. This decision was upon a report.

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