

No 364.

ficer not only made search, but likewise enquired at the pursuer, if he had any moveables else upon the ground. To which it was *triplied*, That the officer's execution, albeit it were produced, could make no faith, he being a party principally called in this process, against whom the pursuer does insist; *2do*, The pursuer offers him to prove, that he was *alibi* distant ten miles the time of the pointing, and so the messenger could not have enquired at him; *3tio*, The pursuer offers him to prove positively that there were corn-stacks in the barn-yard, and horse, nolt, &c. within the defender's view, which would have satisfied the debt. THE LORDS repelled the first allegiance, founded on the condition, in regard of the reply made thereto; and also repelled the allegiance of pointing, in respect of the reply and triply pronounced for the pursuer, whereby it is offered to be proved, that there were more goods pointable upon the ground of the lands, and in the pointer's view the time of the alleged pointing, than would have satisfied the debt.

Fol. Dic. v. 2. p. 242. Newbyth, MS. p. 88.

1685. *March 24.* GLENDINNING *against* GLENDINNING.

No 365.

FOUND a note of a messenger pointing some oxen, not sufficient to instruct that the creditor pointed them, because it was not by way of instrument, nor were the letters of pointing produced.

Fol. Dic. v. 2. p. 242. Fountainhall.

. This case is No 67. p. 9213, *voce* MUTUAL CONTRACT.

SECT. II.

Notary's Instrument.

1541. *March 24.* MILLER *against* The LAIRD of CULLERNIE.

No 366.

ANE instrument under the note and subscription of ane notary-publick, beir- and ony gudis or geir alledgit spuilzeit to have bene lauchfullie restorit, als gude as thay wer the time of the away-taking thair of fra him, preivis not the avail of the saidis gudis, nor zit that thay wer als gude the time of the restitutioun, as

thay wer the time of the away-taking ; quia notarius non potest testificari, nisi de his, quæ percipit sensu corporeo ; et valor rei percipitur iudicio intellectus.

No 366.

Balfour, (OF PROBATION BE WRIT.) No 32. p. 368.

1611. December 1. ANSTRUTHER against THOMSON.

IN an action pursued by Roger Anstruther against William Thomson of Wigton, the LORDS refused process, upon an instrument subscribed by two notaries, bearing that the said William Thomson confessed that he sold and disposed to the said Roger his tack of certain lands holden of Lochinvar.

No 367.

Fol. Dic. v. 2. p. 243. Kerse, MS. fol. 255.

* * * Haddington reports this case :

1611. November 29.—IN an action betwixt Anstruther and Watson, in Tunland, founded upon an instrument of two notaries, containing the effect and substance of a contract between the said parties, the LORDS would not sustain the said instrument, because albeit two notaries might lawfully subscribe a contract for a party, that could not write himself, being required by him, yet they might not, by an instrument, bind him. Thereafter the pursuer offered to prove the verity of the tenor of the instrument, which was not of great consequence, by the defender's oath : The LORDS found it relevant.

Haddington, MS. No 2321.

1629. December 19. LAWRIE against MILLER.

A PURSUIT made by the assignee, constituted to the order of redemption by the father, against Graham of Panholls, the cedent, user of the order of redemption, and also the party from whom the lands should have been redeemed, and the depositar, in whose hands the money was consigned, whereupon the lands were redeemable ; after all their deceases the assignee pursues the heir of the depositar, for delivery of the money to him ; in the which action no other party being called, the LORDS sustained the pursuit, and found no necessity to call the heir or executor of the person against whom the order was used, albeit the money was consigned to his use, in respect the pursuer passed from that order, and renounced all right which he had to the land, and all right of reversion *simpliciter*, and was content that the party should bruik the land irredeemably, and pursued only for delivery of the consigned money.

No 368.

An instrument of consignment subscribed by a notary does not prove against the depositary, unless he sign it.

Clerk, *Gibson,*