was entitled to the benefit of the act of Parliament; but restricted his aliment from 7d. before modified to 5d. Of this sentence the creditors presented a bill of suspension, which Kames refused; and on a reclaiming bill and answers, we adhered, (*me renitente*,) because the particulars proved were only some household furniture, bed and table linen, eight or ten uncut webs of linen, a silver tea pot, flat, several silver table spoons, and dividing spoon, two boxes nailed down, and a scrutoire, feather bed, blankets, chairs, a carpet, &c. This the Court thought of too small value to deny him an aliment, because sundry of them were afterwards poinded by the creditors,—but we could not know what more he may have concealed, though these only were discovered, and far less what was carried off in the scrutoire and nailed boxes; and I could not reconcile this with our decisions 26th July 1734, Rattray against Thomson, nor with the last clause of the act 1696, on touching notour bankrupts.

ALTERNATIVE.

No. 1. 1742, Dec. 2. ANSTRUTHER *against* MAGISTRATES of PITTENWEEM.

As to the difference betwixt an alternative obligation, where the debtor has a proper option, and an obligation, with a penalty or liquidate damages, *vide* Note on these papers (*infra*.) Arniston and some others inclined to think, that this feu-duty was of this last sort; but as we would have differed in that, we determined only the point of form, that after the decreet in the inferior Court, Sir John Anstruther could not amend his libel and demand higher prices.

(AN ancestor of Sir John Anstruther had in 1634 granted to the Burgh of Pittenweem a feu-right of the mill of the barony, to be holden "for payment of twa chalders malt "and twa chalders bear, sick as grows on the ground of the lordship of Pittenweem, or "of the like goodness and sufficiency, merchant ware, and merchant mett, yearly betwixt "the feasts of Yule and Candlemas, with the common measure of Anstruther within the "said mill, *or* the sum of L.10 money of this realm for ilk boll thereof, in the *option* of "the Bailies council and community of the said burgh, in name of feu-farm only." The superior had demanded L.10 for each boll of arrears. The Magistrates pleaded, That as they had by their *reddendo* the option of either paying the bolls or L.10 each, and therefore might have paid the *ipsa corpora*, the superior could not demand more than the current price of each boll as at the time when he might have made the demand. Lord Balmerino, Ordinary, had decerned for L.10, (by mistake in the interlocutor L.10. 7s.) each boll, without regard to the current prices. Lord Elchies wrote the following Note upon a petition by the Magistrates against this interlocutor. Vol. 15. of Session Papers.—ED.)

"It seems hard to give a reason why the charger should in the terms of the feu-contract be obliged to receive less than L.10., if the suspenders will not deliver the victual, as he could ask no more than L10, whatever were the current prices. It is true this is properly an option, and not a conventional penalty, and therefore, if the demand had been only made this day, possibly the feuars might deliver the *ipsa corpora*, (though not of that year's growth,) and had they offered victual in 1741, though for the feu-duties of the mill in 1732, or of lands in 1718, I doubt the charger must have taken it; but since they did

not, it would seem they must pay the L.10, which by the by is below the current price at that time. But why is the interlocutor for L.10. 7s.—that is not told, nor any argument against it?

"*August* 21, 1742.—If the feu-contract to pay two chalders malt and two chalders barley, or L.10 Scots for each boll thereof in the option of the town, be understood as giving the debtor a proper option, whether the one or the other, I can hardly agree with the respondent, that *dies interpellat pro homine*, in his sense of it, that by the lapse of the term of payment of the victual, (Candlemas) he loses his option, and the option is transferred to the creditor; for if that were law, then if the prices of victual were even above L.10, if the vassal should not make his election, and before Candlemas, the creditor superior might after Candlemas demand the *ipsa corpora*, or failing thereof the current prices, though that were L.20, notwithstanding before Candlemas he was only liable for L.10. This I do not take to be the legal import of an alternative obligation, giving the debtor the option. Thus suppose the obligation had been for four chalders bear or four chalders meal in the vassal's option, it could not be said that the vassal had the option before the term, and superior the option after the term, which of them should be paid, for so long as the vassal could be liberated by paying the *ipsa corpora*, the vassal behoved still to have the option; but how long after the term the superior would be bound to accept the *ipsa corpora*, would be in the Judges arbitriment, and depend upon circumstances; and were the question now concerning the feu-duty payable at Candlemas last, I should have little doubt that the vassal might yet deliver the victual.

"*2dly*, If through the debtor's delay of performance, or otherwise, one of the members became imprestable, or such as the creditor cannot without great prejudice accept of, it ceases, and he becomes liable in the other member; and therefore, if one is bound to deliver a certain horse, or in his option so many bolls of barley, if the horse dies, the obligation for the barley becomes simple, and without any option, and the debtor cannot be liberated by offering what should be the worth of the horse, for the payment of *damnum et interesse* is only to be admitted when the obligation is imprestable, but so long as it can be performed it ought to be done *specifice*; and where one of the alternatives can be performed, the obligation cannot be said to be imprestable. The case seems also to be the same, where through the delay of the defender, *res non est integra* as to one of the members, so that the creditor cannot be obliged to accept of it. *Vide* 18th January 1675, Collector of the Taxes against Inglis,* quoted in the answers; but the case not distinctly stated, viz. that the bond was to present the debtor or pay the taxation, which made me at first view look on the obligation, to present, as the principal obligation, and the other, or pay the money, as the conventional damages. But the case was, as stated by Lord Stair, that the father became bound to pay the taxation, or produce discharges, or otherwise present his son the debtor; and that seemed to be a proper alternative obligation, and not a conventional penalty or liquidated damages, which is not an alternative obligation; (Stair, Lib. 1. Tit. 17, § 20. Sect. 1st, *in fine*, p. 154;) and in that case the Lords did not find, that by the lapse of the term the debtor lost his option, but that because *res non est integra* as to producing the son's person, in respect of the King's proclamation after the term concerning that taxation, therefore the producing him was not sufficient unless he renounced the proclamation.

* DICT. App. II. *voce* ALTERNATIVE.

" Indeed, if this were considered as a conventional penalty or the liquidated damages, there equity would interpose to reduce to the real damage, but then that would not be properly an alternative obligation, and the debtor would not properly have any option, for he might still be charged or poinded for the victual, if he had victual, and the creditor would not be bound to accept of the liquidated damages or conventional penalty. 22d July 1673, Nisbet against Lord Balmerino, observed by Gosford, DICT. *verbo* ALTERNATIVE, (No. 4. p. 459;) and it is upon that ground the decision quoted in the answers proceeds, 5th July 1623, Brown against Wright, (No. 1. p. 457.)

" Now this would seem to be a proper alternative obligation. The option being given expressly to the vassal, and therefore one member, the delivery of victual for 1732 and downwards, being now imprestable, at least such as the superior cannot be bound to accept, the option thereby ceases, and he (as the above reasoning seems to infer) becomes simply liable for the victual; for, as is said before, in alternative obligations, if one member becomes imprestable long after the term of performance, (or perhaps even before) and the other is still prestable, I cannot think, that thereafter the debtor can make choice of that member that is imprestable, and at the same time say he cannot perform, but will pay the damages, because these will be less than the other member of the obligation.

" But then this would make the debtor's (in this case the vassal's) condition worse by having an option, than if it were a penalty, and that he had no option, and subject him to L.10 the boll, though the real value had not exceeded the half; and *2dly*, in this case a requisition was necessary, the victual being deliverable at the mill, and the superior not bound to carry it.

" As to the first, as in some respects an alternative obligation is easier to the debtor, because of the option he has,—in other cases it may eventually become heavier. If the two members of the alternative differ much in their value, and that which is least should become simply imprestable, then the debtor would become simply bound to the other, and not for the value of that which is become imprestable; and I think to me it sounds oddly, that one liable for four chalders victual, or in his option L.10 the boll, should be found not liable either for the one or the other, but for another lesser sum, as the true worth of the victual.

" As to the second, I incline indeed with the petitioner to understand the words " within " the said mill," rather to mean the place of delivery, and that the vassal was not bound to carry the victual, since no obligation to carry it to any place is mentioned in the contract, and seems better adapted to the nature of the subject it served, the miller not being presumed to keep a number of horses for carrying four chalders victual, than to understand it as descriptive of the measures, viz. the common measure of Anstruther and Pittenweem, within the said mill, a description I hardly understand. The common measures within the said mill would indeed have been intelligible, but for any thing I know these may be very different from the common measure of Anstruther or Pittenweem.

" But then what is the consequence? The petitioner says, there must be a requisition by the superior. But first, I do not find that a superior in a feu is at all obliged to require his feu-duty. The vassal is bound to make a tender of it to him, and that commonly, and in this very case, under an irritancy. *2dly*, Suppose requisition by the superior were necessary, that will not forfeit the feu-duty of the years when it is not required.

like a blench duty that is due *tantum si petatur;* and therefore the consequence must be one of two, either that the vassal has still his option till requisition is made, and may then pay up the feu-duties even of former years in kind, though with victual of a different year, (which I doubt he cannot do,) and if he could, then the petitioners should have paid all the bygone feu-duties when the decreet was taken against them, which seems to have been in spring 1741, when the price was above L.10; or, *2dly*, if the vassal cannot pay the feu-duty 1732 with victual in 1742, then before the requisition one of the members of the alternative became imprestable, and so he is simply liable for the other.

" I suppose it is an error in writing the interlocutor, when it is said to be for L.10. 7s., for it cannot exceed L.10. But still another question occurs in form. It seems the inferior Court decreet is for the current prices, and that being turned to libel, the pursuer was allowed to amend his libel, which he did, and insisted for the L.10. As to the excuse for this, that the Chamberlain did not know the terms of the feu-contract, or did not see it till the suspenders produced it, that will not be sufficient if in form it cannot be done. But I doubt the objection is too late, for he was allowed to mend it by interlocutor 21st July 1741, and it was amended 24th November, and that not complained of till June 1742. But if the matter is entire, though amendments of libels be admitted in ordinary actions, or even advocations, yet I do not see how, after a decreet, that libel can be amended in the suspension. We are in use indeed to turn decreets into libels, that is to allow the charger to insist *tanquam in libello;* yet how that libel, *i. e.* the decreet, can be amended so as to insert new conclusions in it, I cannot see. *2dly*, How can the cautioner be made liable for more than is contained in the charge, except expenses, in terms of the act of sederunt 27th December 1709, add 23d November 1613?"

ANNAT.

No. 1. 1747, June 9. MAGISTRATES of EDINBURGH *against* WOOD.

THE relict pursued the Magistrates as Mr Wood's widow for the ann. Their defences were, 1*st*, That the stipend was payable not out of teinds but by the town; *2dly*, Acts of Council settling a certain stipend in full of the ann. Answered, By the act 1672 the ann is due to the widows of all Ministers without distinction, and so found 8th February 1709, Shiels against Magistrates of St Andrews.* *3dly*, No act of Council could repeal the statute, and the town have uniformly paid the ann of all their Ministers. I repelled the defence, and this day the Lords adhered, *nem con.*

ANNUALRENT.

No. 1. 1733, Nov. 27. CREDITORS of STEWART *against* DUNBAR.

DENUNCIATION at the market-cross of Edinburgh makes not sums bear annualrent, when the debtor lives not there.

* DICT. No. 10. p. 466.