

1670. July 29.

CHARLES CHARTERS *against* CORNELIUS NEILSON.

CHARLES CHARTERS and Cornelius Neilson, both having arrested their debtor's money in the same hand, Cornelius's arrestment was upon the 24th of June, and Charles's arrestment upon the 28th. But Cornelius's arrestment was upon a bond, whereof the term of payment was not come, and the term of payment of Charles his bond was come, both parties having their citation before the bailies of Edinburgh in one day, where Cornelius *alleged* preference, because his arrestment was prior.—Charles Charters *answered*, That albeit his arrestment was four days posterior, yet it ought to be preferred, because the term of payment of Cornelius' debt was not come, whereas Charles his term being past, he has *paratam executionem*, this being ready to be advised by the bailies. Cornelius raises advocacy, and the cause being advocate, the same debate was repeated before the Lords, and Cornelius added that now the term of payment of his sum was past, and *alleged*, That albeit his term were not come, his first arrestment is preferable, though the decret thereupon could only be to pay after the term were past, and now his term being also past before sentence, there needs no such limitation.—It was *answered*, That it is not the arrestment that constitutes the right, but the sentence making furthcoming; and though ordinarily the first arrestment is preferred, yet oftentimes posterior arrestments are preferred upon more timeous or more orderly diligence; and the diligence done by Charters is done more orderly, because it was after the term; for, if it were sustained, that arrestments made before the term of payment, should be preferred to those made after the term, creditors who have ready execution should be postponed to others whose debts were payable after a liferent of twenty years time; but, as the second arrester may poind his debtor's goods, though arrested formerly by another, so may he crave sentence to make furthcoming to take present effect by poinding, and cannot be excluded by another creditor, upon pretence of a prior arrestment, which cannot receive present execution; and albeit the prior arrester's term be now come, yet he ought not to be preferred, because he procured advocacy of the cause, without any just reason, either of incompetency or iniquity, only to procure delay till his term were past; and therefore the cause being now advocate of consent, the sentence must now be of the same manner, as it would have been before the bailies when the cause was advocate, at which time Cornelius's term of payment was not come.

THE LORDS found, that the unwarrantable delay by the advocacy should not prejudice Charters, and that the case should be considered as it was the time that the advocacy was raised; and preferred Charles Charters upon his posterior arrestment, in respect the term of payment of his debt was come, to the prior arrestment laid on upon a debt, the term of payment whereof was not come, whereupon citation was used before the term came.

No 157.

The last of two arresters preferred, he having *parata executio*; whereas the other had only arrested in security of a debt of which the term of payment was not come at the time of competition.

No 157.

. The advocates having withdrawn from the house upon the oath prescribed by the regulation, nothing was called until the middle of December.

Fol. Dic. v. 1. p. 60. Stair, v. 1. p. 701.

1673. January 23.

MADER against SMITH.

No 158.

Arrestment laid on after the term of payment, preferred to a prior arrestment, laid on before the term of payment of the debt arrested.

ARCHIBALD DON, in Kelfo, being debtor by bond to Richard Govenlocks, in L. 656, the same was arrested in his hands by John Smith and John Mader, creditors to Govenlock, who had obtained decreets for making furthcoming; and Don having raised a suspension upon double poinding; it was *alleged* for Smith, That he had the first arrestment, and the first decret, and so was preferable in diligence.

It was *answered* for Mader; That albeit his arrestment and decret were a little posterior, yet he ought to be preferred, because he had done the more orderly diligence, in so far as Smith had arrested before the term of payment of Don's debt, and had taken decret for making furthcoming also before the term, which, though it bore to be paid after the term, yet it was *præmatura diligentia*; and if such were sustained against other creditors, arrestments and decreets might be used many years before the terms of payment; which, though it might be sufficient against the debtor, or against any voluntary right by assignation, yet could not be sufficient against another creditor doing a more orderly diligence, as was found January 12, 1628, Douglas *contra* Achefon, Durie, p. 326. *voce* LEGAL DILIGENCE.

It was *replied*, That as inhibition may be used before the term, so arrestment is but an inhibition as to moveables; and as to the practice, it was only in the case of a minister's stipend arrested, which was no debt till the minister survived the term, *nam dies nec venit, nec cessit*; but in a bond, albeit the term was not come, *dies cessit, sed non venit*; so that it was a true debt when the arrestment was laid on.

THE LORDS preferred the posterior arrestment laid on after the term, and the decret following thereupon.

Fol. Dic. v. 1. p. 60. Stair, v. 2. p. 159.

No 159.

A first arrester, who had forborn to proceed in diligence, because he had obtained an assignation from the common debtor to the

1673. July 5.

BIRNIE against MOWAT and CRAWFURD.

JOHN BIRNIE having arrested in the hands of James Mowat, all sums due by him to Henry Rankine; pursues to make furthcoming: Mowat depones that he was debtor in a certain sum the time of the arrestment, but, that at that time being pursued by Rankine, he did consign certain bonds, by the ordinance of the Lords, for Rankine's payment, and Thomas Crawford having gotten assignation from Rankine, hath obtained decret against him, and taken up the bonds: Whereupon it was *alleged* for Birnie, That he ought to have sentence upon his