

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\*.\* The advocates having withdrawn from the house upon the oath prescribed by the regulation, nothing was called until the middle of December.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

arrestment, and the assignation made to Crawford was long after his arrestment.— It was *answered* for Crawford, That he had arrested before Birnie, and raised summons thereupon; but Rankine having assigned him to the debt and Mowat's bonds, he found no necessity to insist for a sentence; but now he produceth the first arrestment and summons, and thereupon craves sentence; which will prefer him to Birnie the second arrester.—It was *replied* for Birnie, That albeit Crawford had the first arrestment and summons, yet he hath done greater diligence, having insisted upon his summons, and made liti-contestation, and the cause being now concluded, and advising, he ought to be preferred, or at least to come in *pari passu* with Crawford who had not insisted.

THE LORDS preferred Crawford, as having the first arrestment, and a process, whereupon sentence might now be pronounced.

July 19. 1673. In the competition betwixt John Birnie and Thomas Crawford, decided the 5th day of July instant, the LORDS found, that Thomas Crawford having the first arrestment and summons was preferable, albeit Birnie, the second arrester, was now ready to get sentence, and that the first arrester did not insist to get the first sentence, seeing he had gotten assignation from his debtor, and thereupon had obtained payment; and now having produced his summons, it was *objected* for Birnie, That upon the summons the first arrester could not have been preferred, because the summons was never continued, and he had done ultimate diligence.—It was *answered*, That Crawford having obtained assignation and payment, could not insist for further diligence, which therefore must supply as if he had done diligence, seeing it was without collusion; for if the debtor had not voluntarily paid, he would have insisted in diligence.

THE LORDS preferred Crawford as the first arrester, seeing there was no double pointing to put him in *mala fide*, by knowing of Birnie's arrestment.

*Fol. Dic. v. 1. p. 60. Stair, v. 2. p. 203. and 217.*

1678. July 17.

LORD PITMEDDEN *against* PATERSONS.

PITMEDDEN having arrested in the hands of merchants in Aberdeen; the price of some bear fold to them by Cromarty, Masters William and Robert Paterfons having arrested the same also; the merchants gave in a bill of suspension of double pointing, and both parties having compeared, the Lords appointed the cause to be discussed upon the bill, and did prefer Pitmedden, though the last arrester, to the Paterfons, because they arrested before the term of payment of their bonds for which they arrested, and Pitmedden's term was past, albeit several decisions were adduced, sustaining arrestments laid on before the term, to take effect after the term; so that such executions were not null, otherwise inhibition would be also null on the same ground, in respect that the Lords did not find the first arrestment null, but that the same might be sustained where the

No 159.  
debt arrested,  
not excluded  
as *in mora*,  
in competi-  
tion with a  
posterior ar-  
rester, who  
had done ex-  
act diligence.

No 160.  
Found in con-  
formity with  
Charters a-  
gainst Neil-  
son, No 157.  
p. 211.