

1676. July. ANENT ALTERNATIVE OBLIGEMENTS.

In alternativis obligationibus electio est debitoris; sed si semel optaverit, consumitur optio, nec licet recurrere. Vide Tit. D. de Optione Legata; et Schotanium, in Examine Juridico, de Concursu et Cumulatione Actionum, pag. 187 et seq.; and Spotswood's Practiques, in Principio, (18th January, 1628, Halkerton;) yet if it be debitum annuum that has cursum futuri temporis, et ubi quolibet anno nascitur actio, it may seem probable the election binds only for that year, since the rest are not yet existent, nondum nata. Vide Titulos D. de Annuis Legatis, Quando dies ususfructus cedat, et de usucapionibus; upon which title Harprecht debates, Utrum annuis redivitis præscribi possit cum quotannis nascantur. For the Countess Dowager of Erroll's case against the Earl of Erroll, anent an alternative obligation in her contract matrimonial, providing her to 70 chalders of victual, or 100 merks for each chaldar; vide this determined, infra, 17th January, 1677, No. 533. Vide E. Brouchorstium, ad Legem, 75. D. de Regulis Juris.

Advocates' MS. No. 492, § 5, folio 258.

1676. July. ANENT ARRESTMENTS.

IN competition between two arrestments, the first arrestment is laid on by a bond and debt, whereof the term of payment was not as yet come; a second arrests after, and pretends preference, in regard his term of payment was come, and the other's diligence was nimious and preposterous; for I suppose them both equal as to the pursuing to make arrested goods forthcoming.

The Lords found, on the 3d of July, 1628, *Scot*, that arrestment might lawfully be used on a bond, whereof the term of payment was not come. But on the 19th of November, 1623, *Ker* contra *Colthird* and *Paterson*, they found the contrary, unless the negative particle, *Not*, be there redundant and wrong inserted. But a second question arises more knotty, where the term of payment of the debt that is arrested is not come the time of the first arrestment, and is past the time the second arrestment is laid on,—*Queritur*, If the second arrestment will be preferable to the first, since the law *non amat nimium diligentes*? *Dury*, 20th March, 1633, *Sympson* contra *Whyte*, tells, the Lords found that *pæcunia debita ad diem* might be arrested before the day of payment of it came, for here the obligation is presently effectual, albeit the solution be superseded to a day: *cessit dies, licet nondum venit solutionis exactio*, L. 213. *D. de Verborum Signif. sup.* No. 48, February, 1671. (Vide *parag. secundum, ibique Vinnium in Commentario, Institut. de Verborum Obligationibus. Vide 17th July, 1678, Pitmedden and Paterson.*) It seems debts *ad diem* may either be the foundation of an arrestment *activè*, or the subject of an arrestment *passivè*, before the terms of payment come, because *debitum vere subest*; but where the debt is conditional, during the dependence or not existence of the condition, no arrestment or other diligence can validly affect these debts *passivè*, or be done upon them *activè*, if any middle diligence depending on a debt not conditional intervene, or arrest a debt after the condition of the debt arrested exists; for if no impediment interpose, it is reasonable that the diligence convalesce and