

1666. June 5. MR ALEXANDER NISBET *against* ———.

MR ALEXANDER NISBET, as assignee to a sum, pursues the debtor for payment. Compears the arrester, who had arrested it in the debtor's hand for a debt due to him by the cedent, and whereupon he had obtained decret before the Sheriff of Berwick. It was *alleged* for the assignee, that the decret was null, because the principal debtor was not called in the decret for making furthcoming, or at least, at that time, he lived not within that jurisdiction. It was *answered*, That albeit the arrester had no more but his naked arrestment, he might compear for his interest, and crave preference to the assignee, whose intimation was posterior. It was *answered*, He could not be pursued *hoc ordine*, because he, whose money was arrested, was not yet called, viz. the assignee's cedent, who is the arrester's principal debtor; who, if he were called, might allege, that the debt, whereupon the arrestment proceeded, was satisfied, which was not competent to the assignee, being *jus tertii* to him.

THE LORDS found the arrester might compear in this process without calling his debtor; but they found that the assignee might either allege payment in name of his cedent, or, if he craved a time to intimate to his cedent, they would supercede to extract till that time, that the cedent might defend himself.

*Fol. Dic. v. 1. p. 141. Stair, v. 1. p. 372.*

1678. July 16. THOMAS COURTAY *against* MARTIN STEVENSON.

AN adjudication quarrelled, *ima*, because the decret *cognitionis* and adjudication were both in one; yet the LORDS sustained this cumulation, though not customary. *2do*, Being obtained before the Sheriff of Edinburgh, he had not called the Duke of Buccleugh superior, who was out of the country, by a supplement. THE LORDS found no necessity of calling superiors. *3tio*, He sought contrary things, both to reduce another's right and to redeem it. THE LORDS found he might insist on either of the two conclusions he pleased.

*Fol. Dic. v. 1. p. 141. Fountainball, MS.*

1681. January 20. MAXWELL of Springkell *against* JAMES RIDDELL in Leith.

IN an action to make forthcoming a moveable sum, the heir of the party is not *legitimus contradictor* to be called as defender, but the executor should be called.

*Fol. Dic. v. 1. p. 141. Fountainball, MS.*

No 111.

In a process at an assignee's instance for payment, it was found relevant for a prior arrester to appear in the process, and plead his preference without calling the common debtor.

No 112.

In an adjudication against a vassal, the superior need not be called.

No 113.