

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 The advocates having withdrawn from the house upon the oath prescribed by the regulation, nothing was called until the middle of December.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