

No 1. debtor; for, if the cautioner in the suspension was not answerable to pay the debt, the creditor would be prejudged, who would not find the debtor so easily to be apprehended, and put again in ward; so that it might seem reasonable, that if the suspension should discuss in favour of the creditor, that he who was bound to enter him, should be holden to enter him, *eo casu* to the creditor to be warded.

Clerk, Hay.

Fol. Dic. v. 1. p. 114. Durie, p. 417.

1663. February 12.

EARL of SOUTHESK' and CARNEGIE against BROOMHALL.

No 2.
A bond of presentation found implemented, tho' the debtor was not produced till a day after the time appointed, which being *modica mora*, was not regarded, unless the creditor could instruct some detriment by the delay.

BROOMHALL having taken the Lord Sinclair with caption, Southesk and his son gave bond to produce him to the messengers, or to pay the sum on the third of February, betwixt two and ten; whereupon Southesk having re-produced him, craved by supplication his bond up, or to be declared satisfied and extinct.—The defender *answered, first*, He not being a member, or dependent on the College of Justice, cannot be called thus summarily; especially to declare a bond void, which is in effect a reduction. *2dly*, The bond was not performed, in so far as the Lord Sinclair was not re-produced till the 4th of February.—The pursuer *answered*, That the defender living in Edinburgh, and not comparing, the bill, *per modum quærelæ*, might be sustained. To the *second*, it being *modica mora* of one day, without damage to the defender, and there being trysting amongst the parties all the time betwixt, it was sufficient.

THE LORDS sustained the petition, and found it extinct.

Fol. Dic. v. 1. p. 114. Stair, v. 1. p. 177.

1672. November 16. KENNAWAY against DAVIE.

No 3.
Found in conformity with the above.

JAMES DAVIE having enacted himself to cause William Cassils compt and pay to David Kennaway some excise uplifted by him, or to return him to prison by such a day, or otherwise to pay the debt; whereupon Kennaway pursues for payment:—The defender *alleged* absolvitor, because he had fulfilled, in so far as Cassils had offered himself to the Bailie upon the precise day agreed upon, being Saturday, and upon Monday thereafter had actually entered to prison, and there continued several months, which being *modica mora*, was sufficient.—It was *answered*, That implement could only be in the terms of the bond; and if need be, it was offered to be proven that Cassils was set out by the Bailie, with Davie's consent, without the consent of Kennaway, or by order of law.