

Gardener's advocates, who are made compearing in the decreet, have deponed upon oath, that they had proponed their allegiance only upon the discharge, but not upon the disposition that was relative thereto; and that they were never called the time of the advising of the cause:

The Lords did repone Gardiner against the decreet of spuilie, and ordained it to be turned into a libel; that both parties might be heard to allege, as if they were *in prima instantia*; and that, notwithstanding the decreet was extracted, as being *in foro contradictorio*: because they found, that it was done by the error or negligence of the clerk.

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1670. *February 4.* GEORGE DRUMMOND, Bailie in Edinburgh, *against* JOHN HALL, Bailie there.

IN a suspension of double poinding, raised at the instance of Alexander Arnot, who was debtor to Robert Walker in Queensbridge; which Robert, was common debtor to the said Drummond, and Hall, who were contending for preference:—It was ALLEGED for Bailie Drummond, That he ought to be preferred; because Walker having made an assignation, to one Stothart, of Arnot's bond, which was intimated before any arrestment made by Bailie Hall, he did write a missive letter to Stothart to transfer his right to Bailie Drummond; whereupon he arrested in Stothart's hands all writs and papers, before the arrestment used by Hall against Arnot; and thereupon did obtain a translation dated that same day that the Bailie did arrest. It was ANSWERED for Bailie Hall, That he ought to be preferred notwithstanding; because it is clear, by Stothart's translation, that his name was only borrowed to the behoof of Walker, the common debtor; and any intimation he had made of the assignation was only to Walker's behoof, who, being the common debtor, could not debate with him: And, for his arrestment upon the missive letter, it was only an execution by a town-officer in Edinburgh, upon a verbal order, which could not be respected; it being neither upon a decreet nor any dependence of a process, without which no letters can be directed by the Lords of Session, or any other judge.

The Lords, before answer, did ordain the custom of burghs to be proven in such cases; finding it of a general concernment that the Bailies should give warrant to arrest, where the ground was for no civil debt: and reserved likewise to give answer to the first part of the allegiance; which they inclined not to sustain *per se*.

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1670. *February 10.* GEORGE HAY of BALHOUSE *against* BANE of DELNY.

IN an action pursued at Balhouse's instance, as heir to his father, for payment of the sum of £1730, as part of £2501, against Bane of Delny, as heir to his fa-

ther, who was cautioner for Monro of Foules, compearance was made for Foules, the principal, who proponed a defence of payment of the whole bond ; and, for verifying thereof, produced three discharges, one dated in August 1648, bearing the receipt of the whole byrun annualrents, and of £987 of principal ; the second, bearing a receipt of 1000 merks, dated the 1st of December 1646 ; and a third, dated the 6th day of the said month, 1646, bearing, at the date thereof, and of before, to have received payment of the whole preceding annualrents, and of the sum of £1148 ; whereupon he inferred that the three discharges did amount to the whole sum in the bond.

It was REPLIED for the pursuer, That the two first discharges were included in the last, which was granted within six days after the second discharge, and the sum therein contained did amount to the two sums contained in the two first discharges. Likeas, the defunct Mr Francis Hay, being a right honest and understanding man, would have granted a full discharge of the bond, or have given up the same ; whereas, after the said last discharge, he did assign the sums now pursued for as a part of his daughter's tocher.

The Lords, notwithstanding, finding the matter unclear ; in respect the last discharge, which was posterior to the first two, did bear a receipt of money at the date thereof ; before answer, they did ordain the persons who did pay the sums contained in the two first discharges, and such others as knew what was done at that time, to be examined upon their knowledge if the last discharge was given in contemplation of money given at that time.

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1670. February 11. BRUCE and CURATORS *against* JEAN JACK.

BRUCE, pursuing the said Jack, as executrix to her mother, for merchant goods alleged sold and delivered to her, extending to £150 sterling ; it was ALLEGED, That the action was prescribed, being for merchant goods, and not pursued for within three years ; unless the delivery were proven *scripto vel juramento*.

It was REPLIED, That the Act of Parliament did only comprehend merchants' accounts, where the goods were sold by retailers, but not where they were sold in gross, such as the goods libelled were ; it being offered to be proven that they were all delivered at two several times only.

The Lords did sustain the defence, founded upon the Act of Parliament ; which was general, [for] all merchants accounts : but, thereafter, the delivery of the goods being offered to be proven by the defender's tutors, who ought not to be looked upon as ordinary witnesses, their oath, *ex officio*, was ordained to be taken before answer.

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1670. February 15. BROWN *against* LEVINGSTOUN.

DAVID BROWN, being infest in a tenement of land in Dalkeith, and having
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