

his own house, from Edinburgh to Leith, and staid in the defender's house, being to go aboard himself: and that, upon the 2d day of January, he took protest against the skipper for damage, by the loss of his market, especially the herring; which, if they were not landed before Lent, would lose the market.

The defender ANSWERED, That, after the protest, he had used all diligence, and made sail the next day, but was stopped by storm until the 13th day of January, when the pursuer left him, and cited him before the Admiral. Which defence the Admiral thought relevant.

Whereupon the pursuer raised advocation on these reasons: *first*, That the Admiral did wrong, in not sustaining the libel upon the delay before the protest; for though protest may be taken *ad majorem evidentiam*, yet the defender was *in mora et culpa* in not using diligence, when he was first required and when other ships went out. *2do*. That he ought to prefer the pursuer to the probation that the wind was fair; at least given a conjunct probation as to the wind and weather.

The defender ANSWERED, that, in this contract, there being no term nor ly-days, *ubi dies interpellat pro homine*, he was not *in mora* until interpellation; which overly words cannot infer, but must be solemn by instrument. Neither was it competent to the Admiral to give a conjunct probation, which was only *ex nobili officio*. And that there was a storm, is much more positive and pregnant than the being of fair weather.

The Lords found, that interpellation was requisite by instrument, and found no delay till then: and found that the Admiral did no wrong therein, or in sustaining the defence: And therefore remitted the cause.

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1678. *February 21.* OLIPHANT *against* COWPER.

THE tutor of Stormont having drawn a precept upon Cowper to pay to Kinfauns 800 merks, Kinfauns assigns the precept to Laurence Oliphant; who thereupon pursues Gilbert Cowper for payment, who alleged compensation upon debts due by the cedent before the assignation; which was found relevant, and an act extracted: which being called, the defender produced some writs for proving the cedent's debts; the pursuer was content to allow what was produced, and craved decret for the rest.

The defender ALLEGED, That the Ordinary could not advise the writs produced for satisfying the desire of [the] act; but the same behoved to be advised by the Lords, proven or not proven, according to the ancient and inviolable custom; for though the Ordinary may refuse to admit writs not relating to the cause, when offered, to stop circumduction of the term, yet if that which is proper be offered, he cannot advise whether it proves in the whole or in part; which is a great security to the lieges, and hath this advantage to defenders,—that, before the probation come in to be advised by the course of the roll, he may produce further.

The Lords found, That the Ordinary could not advise the production; but declared,—that if the defender would not consent to a decret for the superplus, but delay, the same should be *cum onere expensarum*.

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