

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-