

to the children of the marriage, he was obliged to provide them to the whole conquest of lands, or money, during the marriage.

The Lords did sustain the reduction, in so far as might be extended to the sum of two thousand merks only; and found, that taking the bond to her in fee, ought to be interpreted in satisfaction of her portion *pro tanto*; and could not be ascribed to the obligation of conquest, unless her whole portion had been first satisfied *aliunde*; and that the pursuer ought to be assigned to that bond.

Page 302.

1673. *January 22.* JOHN MADER *against* ANDREW SMITH.

In a suspension of double pointing, raised by Archibald Don, as debtor to Richard Gavenlock, against Mader and Smith, as creditors to the said Gavenlock, who had both of them arrested, and obtained decreets to make forthcoming against the suspender,—it was ALLEGED for Smith, That he ought to be preferred; because he had done the first diligence, by getting a decret to make forthcoming.

It was ANSWERED for Mader, That no respect could be had to Smith's diligence, because it was preposterous, *et nimia diligentia*, in respect the arrestment was used long before the term of payment of his bond; whereas Mader had arrested after the term of payment, and thereupon obtained decret, before which he was not obliged to do diligence; as was found by practick in Durie, 12th January 1628, betwixt Douglas and Acheson.

The Lords preferred Mader to Smith, albeit posterior in diligence; and found, that Smith's arrestment and decret, being before the term of payment, was *nimia diligentia*: which was hard; seeing that arrestments or inhibitions might lawfully be served before the term of payment; and the decret to make forthcoming was justly given, superseding the execution, until after the term of payment; and that the case in Durie was upon the arrestment of a minister's stipend before it was due, being only *in cursu*, whereas, in this case of a personal bond, *cessit dies*, the time of the subscribing thereof by the debtor, *licet nondum venit*, until the term of payment.

Page 302.

1673. *January.* The LORD THESAURER-DEPUTE *against* The EARL of WEMYSS, NORTHEK, and OTHERS.

In a declarator of recognition of the lands of Rossy, which pertained to the Laird of Craig, and held ward of his Majesty, at the instance of the Lord Hatton, treasurer-depute, as donatar to the gift of recognition under the Great Seal, against the Earl of Wemyss, as being infest in an annualrent, effeiring to £17,000 principal out of the said lands, and Northesk and others, who were infest upon dispositions or comprisings:

It was ALLEGED for the Earl of Wemyss, That his infestment was public, and confirmed by a charter under the Great Seal long before the gift of

Q q q q