

law, they raise a summons of reduction of the LORDS' decret before the Parliament, conform to the second act 1695, regulating such citations; and thereon take forth letters of arrestment, and arrest her jointure on the dependence. This was complained of as unwarrantable, seeing these appeals were not suspensive, but merely devolutive; and if this were allowed, they would sist executions, and stop all the effects of the other party, which was never intended by these protestations, seeing the foresaid act declares they shall not so much as found a prejudiciality or dependence till they be sustained by the Parliament. *Answered*, Arrestment on depending processes is a diligence allowed to all the subjects; and if there were a reduction of this decret raised before the LORDS themselves, they might both inhibit and arrest, and why not here? THE LORDS thought there was a disparity, because they could loose the arrestments laid on upon summonses before themselves, but not where the action was commenced before the Parliament, and so parties debts might perish during the long recesses of Parliament; and if this practice were once allowed, it would insignificantate most of the Session's decreets; for every one would enter their protest, and raise a summons, and thereon arrest and inhibit, which might continue many years before they be got discussed; and therefore the LORDS declared the arrestment null, and ordained the writer of it to be cited before them, in order to a reprimand, for introducing such a stile never before attempted.

Fol. Dic. v. 1. p. 540. Fountainhall, v. 1. p. 780. & v. 2. p. 57. & 63.

1705. February 9.

CONING and BOIK *against* COWAN.

WALTER EWING merchant in London, being debtor to one Coning, also merchant there, in L. 135 Sterling, as also to one Robert Cowan merchant in Glasgow in another sum, they both arrest in the hands of Hamilton of Orbiston, a debt owing by him to Ewing. In discussing the competition, it was found, the sum by the conception of Orbiston's bond, was liferented by Ewing's mother, so the fee only belonged to him, after her death, whereon she was preferred to the annualrent during her life; and then Coning, as the first arrester, came in after her death, *primo loco*, and Cowan only *secundo loco*. Whereupon it was *alleged*, That though Coning's arrestment was preferable, yet it could affect and carry no more of the sum arrested in Orbiston's hand, but allenarly as much as corresponded to the principal and annualrents that were owing to him at the time of laying on the arrestment; but as to any annualrents that shall run hereafter, till the sum can be made forthcoming and paid after the liferenter's death, he can have no preference before Cowan; *imo*, Because they were not due, nor in being at the time of laying on the arrestment; *2do*, At this rate, if the liferentrix live any considerable time, Coning's annualrents current during her life will exhaust the whole bond, and so his ranking will be elusory, and nothing will be left to pay Cowan so much as a part; but their debts must be consider-

No 50.
Found in conformity with Simpson against White, No 46. p. 8139.

No 50. ed as they stand now, and not as they grow, and may be accumulated at the liferentrix' death. *Answered*, This was a new and unheard of doctrine, that posterior annualrents had not the same privilege with those due before the arrestment; for if I adjudge, will not my right prefer me to my annualrents due after my decret of adjudication, as well as for those annualrents that were owing me at the time of my leading it? Will not an inhibition secure my subsequent annualrents as well as the bygones due before my inhibition? If a debt be suspended *ad diem vel sub conditione*, and several years intervene before the term of payment come, or the condition be purified, and if on this debt arrestment is used, who can doubt but the arrestment will carry him to all his annualrents that intervene betwixt his arrestment and the existence of the condition or day? It is true a forthcoming is a legal assignation, and so assigns only to what is due at that time liquidly; yet that only holds where the debt arrested is instantly due, and the forthcoming takes present effect, and not where the debt cannot be lifted, through the impediment of a liferentrix. THE LORDS found Coning's arrestment extended to secure him for his subsequent annualrents, as well as those due before his arrestment.

Fol. Dic. v. 1. p. 539. Fountainball, v. 2. p. 267.

1706. July 19.

Competition betwixt SIR JAMES ELPHINSTON and the other CREDITORS of STRICHAN.

No 51.
Found incompetent to use arrestment upon a summons, not yet executed.

IN the competition betwixt the Creditors of Fraser of Strichan, who all raised summonses upon the passive titles against Thomas and Alexander Frasers his younger children, and thereupon arrested in the hands of the Earl of Murray his debtor, and thereafter obtained decreets of constitution; the LORDS found, that a libelled and signed summons before it was executed, did not make a depending action; and therefore did not sustain arrestments raised and executed thereon.

Albeit it was *alleged*, That though an action is not said to be depending before an Ordinary till the libel be executed, tabled and called; and a summons till it be executed doth not render a matter litigious, or interrupt prescription; yet a signed libelled summons is an inchoate action, and was also held to be a dependence whereupon arrestment might be used. For vouching whereof, a declaration subscribed by thirty-five writers was produced, testifying that they were in use to raise letters of arrestment upon a libelled signed summons though not executed; and *credendum artifici in sua arte*.

In respect it was *answered*, That the declaration of the gathered hands is not to be regarded, most of them being young writers, and the old experienced masters of stile declare that the practice of raising inhibitions or arrestments