

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

upon unexecuted summonses is contrary to sense, law, and stile ; the unwarrantableness whereof doth appear from these words in the bill and letters ; as the summons duly executed bears. And whatever might be said for the raising of letters of arrestments before execution of the summons, the anterior executing of the arrestment cannot be accounted for. As though a general charge and summons on the passive titles be ordinarily raised together, the summons is never executed before the general charge.

Fol. Dic. v. 1. p. 540. Forbes, p. 128.

* * Fountainhall reports this case :

1706. July 30.—IN a competition betwixt Sir James Elphinston of Logie, and some others, the Creditors of Fraser of Strichen, Sir James's arrestment was laid on after the summons was executed, and so on a clear dependence ; the rest were indeed after the date of the summons, but prior to its being executed, and so was alleged to be null, seeing it could not be called on a dependence, which is only by a citation. *Answered*, Though this seems preposterous, yet it is every day practised, and grown up to a fixed custom, which is sufficient to sustain it *quoad* bygones, being *communis error*, else many rights may be branded. THE LORDS thought, if it had been the common debtor quarrelling this, it might have been sustained ; but this being with a creditor who has used a more legal and formal diligence, they preferred Sir James Elphinston's arrestment, without entering on the trial what had been the general custom in this case, as had been urged by some.

Fountainhall, v. 2. p. 347.

1711. December 4.

HAMILTON *against* DUNLOP and ORMISTON.

HAMILTON of Bangour, and his tutors, gave in a complaint consisting of two branches ; one against William Dunlop writer ; and the other against my Lord Ormiston and his Lady. The *first* bore, That Bangour was loosing some arrestments laid upon my Lord Whitelaw his grand uncle's effects, upon a depending process of constitution ; and Mr Dunlop had officiously come and instrumented the Clerks of the Bills not to accept of the caution offered, and had on a summons, raised in his brother J. Dunlop of Househill's name, used an arrestment in the debtor's hand, before his summons was executed, which was most injurious and unwarrantable, *imo*, Because his brother is in Ireland, and he had no special procuratory nor mandate from him ; *2do*, No such arrestment could have been laid on till the summons was executed ; for till then it cannot be called a dependence ; but so it was, this arrestment was laid on before any citation given on the summons, its warrant, and so was *filius ante patrem*. *Answered* for Mr Dunlop, That it can never be a crime to protest against the Clerk.

No 52.

Found in conformity with the above.