

No 48.

*** This case is No 160. p. 813., *voce* ARRESTMENT.

See a similar decision, 27th February 1728, Meres against York Buildings Company, No 145. p. 800. *voce* ARRESTMENT.

1697. June 30.

RUTHVENS and MURRAY *against* TEMPLE.

No 49.
A decree of
the Court of
Session being
appealed, ar-
restment on
the depen-
dence of the
appeal was
reduced.

MERSINGTON reported Mrs Clara and Patricia Ruthvens, and Murray of Spot, husband to the said Clara, against Mrs Martha Temple, relict of Edward Ruthven, their brother, for repetition of L. 1000 Sterling, she got from Lord David Hay, son to the Marquis of Tweeddale, for demitting his place as Cornet of the King's guards in 1683. THE LORDS, before answer, had appointed the said Lord David, with Sir Stephen Fox, and Francis Littleton, communiers at that transaction, to be examined; and the act extracted burdened Madam Temple with reporting the commission containing their depositions; and the term being circumduced against her, she reclaimed by a petition, that it was only the extractor's error in putting in the defender's name instead of the pursuers, and that the signed interlocutor did not express who should report the commission; but common reason and *evidentia facti* required that it should be the pursuer, who proponed the allegiance, and was to reap the benefit of it when proved, that ought to be burdened with it, and not force her to prove their libel against herself. *Answered*, They opposed the act extracted by herself, and so homologated and acquiesced in; and it cannot be supposed that Spot, a stranger, can compel these gentlemen to appear before the Commissioners, and depone; which is easy for her so do, they being her friends and relations. THE LORDS found the imposing the burden of reporting the Commission on her was a mistake in extracting the act; but in regard of the dubiety of the case, they renewed and prorogated the commission to a farther day, but burdened Spot, the pursuer, with reporting thereof.

1699. July 5.—THE LORDS having determined the declarator pursued by Clara and Patricia Ruthvens and Murray of Spot; against Mrs Martha Temple, (*Vid.* 30th June 1697.) that the L. 1000 Sterling paid by Lord David Hay, for Edward Ruthven's place in the King's guards was the said Edward's money, and so must compensate Mrs Martha's jointure; and having assoilzied her from the declarator, the Laird of Spot this day gave in his appeal and protestation for remeid of law to the Parliament, against the LORDS' interlocutor, having given in a reclaiming bill, which was refused.

1699. July 22.—Mrs Martha Temple prevailing against Ruthven's and Spot's declarator, mentioned 5th current; and they having protested for remeid of

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.