

by which it now appears it was the minister's victual, and he betook himself singly to Meikle, and did not look on Mr Smith as his debtor; and that thir were writs newly come to his knowledge, which sufficiently took off the defence of Competent and Omitted. And they alleging he knew of these papers at the time of the first decret, he has deponed *negativè*.

ANSWERED,—They opponed their decret *in foro*, which was plainly *res judicata*; and there is no decret safe, if the pretence of new-found-out writs be received to open the same; for as *L. 19 and 20 Cod. de Transact.* refuses to annul transactions *sub prætextu instrumentorum nuper repertorum*, so the same must extend to sentences, which are judicial transactions. And his oath was not *parte deferente*, but taken *ex officio judicis*: And the writs produced, though they were competent here, as they are not, yet are not relevant to infer Mr Smith was factor. For what hinders me to lift my debtor's money in Meikle's hand, if he take his hazard to rely on my warrandice?

The Lords thought it dangerous to loose decreets *in foro* on the pretence of writs *noviter venientes ad notitiam*, though offered upon oath; yet here they were not straitened to decide that point, but found the new writs founded on not relevant, though they had been proponed before sentence; and therefore sustained the *res judicata*: but appointed the partial payments Drummond had received from Meikle to be deducted and allowed; and found Smith only liable for the remainder of the price of the victual. *Vol. II. Page 513.*

1709. *July 15.* JAMES VALLANCE of POSSILLS *against* MACDOWALL of FREUGH.

[See the Report of this Case, Dictionary, page 5840.]

VALLANCE of Possills, having sent a letter of solicitation, in his action mentioned 14th current, to one of the Lords; and the same being produced to the Lords, as contrary to their acts and resolve, they sent him to prison, and had fined him, if he had not been very poor. *Vol. II. Page 516.*

1709. *July 15.* LESLIE and OGILVIE of NEWRAINE *against* LEITH of BELSHIRRY.

LEITH of Belshirry, supposing himself lesed by the interlocutors in the cause pursued against him by Leslie and Ogilvie of Newraine, obliging him to condescend and prove how he paid the price of that land, gave in his appeal and protestation for remeid of law to the Parliament. *Vol. II. Page 516.*

1709. *July 15.* The LAIRD of GRANT and CAPTAIN BRODY *against* JEAN M'LELLAN of BOUDEN.

I REPORTED Grant and Brody against Jean M'Lellan, relict of Bailie Bouden.

The Lady Doun being debtor to the Laird of Grant in £1000 sterling by bond, he pursues the Earl of Sutherland, her late husband, for payment, as vitious in-tromitter with her paraphernalia and other goods, and as being *lucratus* by the marriage; and, on this dependence, arrests the like sum in the Earl of Murray's hands, owing by him to the Earl of Sutherland, as some bygone inlakes of his lady's jointure; and afterwards obtains a decret constituting his debt against Sutherland. Mrs Bouden being a creditor of my Lord Sutherland, in 4000 or 5000 merks, by his clear liquid bond, she likewise arrests in Murray's hands, but posterior to Grant's arrestment. The competition arising which of them were to be preferred, it was contended for Captain Brody, the Laird of Grant's assignee, that he had the first arrestment; and though it was on a dependence, yet, before the competition came to be debated, he had obtained a decret constituting his debt; and his arrestment being a *nexus realis* affecting the subject, his decret must be drawn back to the date of the arrestment; and so must prefer him.

ANSWERED for Mrs Bouden,—Though you are the first arrester, and had your debt constituted before the cause came on to be debated; yet my arrestment, being on a clear liquid bond, must be preferable; because my debt, at the moment of laying on the arrestment, *habebat paratam executionem*, which yours, laid on on a dependance, had not; and the Lords, in parallel cases, had found, that an arrestment laid on for a debt, whereof the term of payment is come, is preferable to a prior arrestment laid on upon a bond, whereof the term of payment was not come; 29th July 1670, *Charteris* against *Neilson*; and 17th July 1678, *Lord Pitmedden* against *Paterson*; and Stair, in his *Institutes*, *tit. Assignations*, extends this, a *paritate rationis*, to the present case, betwixt an arrestment on a dependance and another on a registrate bond. A case in 1704, betwixt my *Lord Prestonhall* and *Drummond of Megginch* was also cited.

The Lords, by a scrimp plurality, preferred the arrestment on the bond to that on the dependance, though prior.

This interlocutor was afterwards altered upon a bill.

*Vol. II. Page 516.*

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1709. July 20. The EARL of LAUDERDALE *against* the LORD HAY of YESTER.

THE deceased Duke of Lauderdale, and the Earl of Dunfermline, being debtors to —————; there is a comprising led, in 1653, against both their estates; and, in the 1668, the Duke, having transacted the debt, took an assignation to the comprising, in so far as concerned Dunfermline's estate, and a discharge and renunciation *quoad* his own. In 1665 he marries Lady Mary Maitland, his only daughter, to the present Marquis of Tweeddale, then Lord Yester, and disposes to her his whole estate, but under reversion, and redeemable, on payment of £10,000 sterling, in name of tocher, in case of redemption; and which disposition bore a general clause, that, besides the lands generally enumerated, he disposes to her all other lands and rights whatsoever pertaining, or which may be known to pertain or belong to him. Afterwards, in 1676, he uses an order of redemption against his daughter; and, on his paying the foresaid tocher, he obtains a decret of declarator of redemption; and she and