

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.

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to the Bills receiving insufficient caution; for that is done every day, and is to put them on their guard to be more wary; and if they venture then, to put them *in mala fide* and make them *subsidiarie* liable for the party's damage; and as to his laying on the arrestment before the summons was executed, he appeals to the practice of the writers to the signet, who will not raise letters of arrestment on blank summonses, but if they be specially libelled they are in custom to arrest on them, though not yet executed. Yea, they have been in use to raise both inhibitions and arrestments on bonds unregistrated, and before the term of payment, where there is no dependence at all; and if there were any error Mr Dunlop is not concerned, but the writer must account for the escape. And as to his brother Horsehill's being out of the the kingdom, he knows nothing of it, but that he was resolving to sell some goods in Ireland; and *esto* he were there, it is not *animo remanendi*; and he being his apparent heir had good enough interest *negotiorum gestione* to raise the summons and arrestment without any further mandate. THE LORDS found the arrestment laid on before the summons was executed could not be said to be on a dependence, and therefore declared it unwarrantable and null. The *second* part of Bangour's complaint was against my Lady Ormiston and her Husband, that he resolving to lift 3000 merks of his grand-uncle Whitlaw's money in the Earl of Glasgow's hands, had taken out letters loosing her arrestment laid on the dependence, and had found the old Lady Bangour and James Hamilton of Olivestob, cautioners in the loosing. Ormiston had taken out an extract of the bond of caution, and served inhibition thereon, which could proceed from nothing but animosity and humour, seeing they were secured beyond all exception, their effects exceeding all that was uplifted; and the LORDS were desired to stop such malicious diligence, as they have been in use frequently to do, as betwixt Sir John Houston and Sir Robert Dickson, and many other cases. *Answered*, To secure their interest is the privilege of every subject; and though *ex comitate*, and by way of civility, one may acquaint his debtor before he inhibit him; yet if he neglect it there is no penal effect of nullity inflicted on him; for *nemini injuriam facit qui jure suo utitur*. And to stop inhibition is to stop the *vena cava*, and the circulation of the law due to every subject. And people may be very responsal now, who in a short time come to a staggering condition in their fortunes. THE LORDS found the taking out an extract of the bond of caution, and raising inhibition thereon, without obtaining a special warrant of the LORDS, was illegal and unwarrantable, and therefore ordained the extract to be returned to the clerk, and discharged the inhibition to be registrated, or any farther progress to be made thereupon. The writers were somewhat stumbled at these interlocutors, as contrary to the ordinary practice in such cases.

Fel. Dic. v. 1. p. 540. Fountainball, v. 2. p. 682.