

1575. *January 21.*LAIRD of Corstophine, *against* the LAIRD of Lethingtoun.

No. 124.

Arrestment of corns, peats, &c. if used the first year of the ar- restee's pos- session of the ground, could not be loosed on caution, after the first year it could.

ARRESTMENT beand maid upon cornis growand upon ony landis, or upon peittis, turvis, divettis, or ony fewell castin in ony ground, the famin on na wayis fall be loosit, nor the landis lettin to borch to ony person, gif it be the first zier of the riving furth, tilling and sawing of the said cornis, or casting and winning of the said fail divettis and fewall; but the famin fall remane arrestit upon the ground quhill the ground richt be decidit, and cognitioun be takin quha has just richt thairto: But gif it be not the first time, nor the first zeir's crop, the famin ar- restment aucht and sould be loosed, he at quhais instance it is loosed findand cau- tioun to answer thairanent as law will.

*Balfour, (ARRESTMENT.) p. 538.*

1619. *January 15.*GORDON *against* BRODIE.

No. 125.

Found, That arrestment being loosed, the party in whose hands the money is arrested may lawfully pay.

*Kerse, MS. (ARRESTMENT.) fol. 235.*

No. 126.

A cautioner, in loosing ar- restment, found liable to pay to the arrester, after his debt was constituted a- gainst the common debtor, and that without further dis- cussion of the persons in whose hands arrestment was used.

1626. *June 21.*Lo. BALMERINO *against* L. LOCHINVAR.

IN an action at the Lord Balmerino's instance against L. Lochinvar, who was pursued to make a sum of money furthcoming to him, which was arrested in Den- miln's hands, as owing by him to the L. Balfour, who was decerned to pay to the Lo. Balmerino a sum of money decerned against him, and for payment of the which sum, decerned by that sentence to be paid to the pursuer by the L. Balfour, that sum was arrested in Den-miln's hands, and he pursued to make it furthcoming; for loosing of the which arrestment, the L. Lochinvar became acted cautioner, and who as cautioner was convened for payment of that sum arrested.—In this pro- cess the LORDS found the L. Lochinvar could not be pursued as cautioner foresaid, while it was first tried, and found by sentence that Den-miln, in whose hands the arrestment was laid, was debtor to the Laird Balfour in the sums arrested; for if he was not addebted the time of the said arrestment, in the sums to the Laird Balfour, the becoming of Lochinvar cautioner at the loosing of the arrestment, could not make him to be debtor; and so the LORDS found no process against him, as cautioner foresaid, while sentence was recovered, finding the person debtor, in whose hands the arrestment was made.

In this process the LORDS found, and were of the mind, That the loosing of the arrestment, by finding caution, freed the person in whose hands the arrestment

was made, of all actions which the arrester could move against him upon that arrestment; and that by the loosing thereof, he remained not subject to the arrester, but might pay the debt arrested to his creditor, notwithstanding of the said arrestment, albeit it was in his hands at the time of the arrestment, seeing the loosing thereof could have no other effect, but to remove that impediment anent the arrestment, which only staid the payment; which being removed, he might lawfully pay the same; and the arrester had only action competent against the cautioner. But in these cases it is considerable, that the party arrester may be greatly eluded and prejudged, if an irresponsal cautioner be received, and the principal debtor being otherways *non solvendo*; seeing by our law there is no subsidiary action against the judge or clerk who receives the caution.

*February 2. 1627.* In an action betwixt the Lo. Balmerino and L. Lochinvar, the case thereof was, That arrestment being made at the instance of the Lo. Balmerino in the hands of the Lo. Burghlie and Den-miln, of sums of money addebted by them to the L. Balfour in Ireland, for satisfying of a debt owing by him to the pursuer; for loosing of the which arrestment, Lochinvar having become cautioner, and the debt being declared against the L. Balfour, for the which the arrestment was laid on. Now by this pursuit the Lo. Balmerino pursues Lochinvar, as cautioner foresaid, for payment of the sums arrested, as said is, and loosed by his becoming cautioner. And in this process the Lo. Burghlie and Den-miln are conveyed only for their interest, nothing being concluded against them, but only that it might be tried, that the time of the arrestment they were debtors to the L. Balfour, and consequently that Lochinvar the cautioner should pay so much as they were then owing. And the L. Lochinvar *alleging*, That this order could not be sustained against him who was a cautioner only, while the principal parties, in whose hands the arrestment was laid on, were first discussed; and that it were first tried by process that they were then debtors to the L. Balfour. This allegiance was repelled, and this same order of process sustained, without any necessity of other precognition or process, or first sentence against Balfour and Den-miln, seeing in this same process the pursuer was astricted to prove, that they were debtors the time of the arrestment to the L. Balfour, which was found enough, albeit this summons craved no decret to be given against them for that debt, but only against Lochinvar the cautioner; and found, that the said debt owing by them the time of the arrestment, might be proven either by writ, or by the oaths of Burghlie or Den-miln; albeit it was alleged, that it could not be proven by their oaths against Lochinvar, but only by writ; for he *alleged*, That they might constitute themselves debtors by their oaths, but not to burden him as cautioner; which was repelled, in respect of his trust, by becoming cautioner; and there was less danger in proving by their solemn oaths, than if they had granted a bond thereupon in writ, which they might more easily have done (if fraud were intended) than to swear by their oaths; and the Lords found, That Lochinvar could be decerned to pay no more than the quantity,

No. 126.

which upon their oaths they should depone was then resting addebted, albeit more was arrested. And albeit some were of the mind, that he should be holden to pay the whole debt arrested, seeing the arrestment was loosed by his being cautioner, whereby he had undertaken the whole debt arrested, and had so engaged himself *suo facto* therein, which was repelled by the LORDS, and found, that in such cases of loosing arrestments, the cautioners are only subject to, and in hazard to pay the sums truly owing at the time of the arrestments, albeit greater sums be arrested.

Act. *Hope, Stuart & Lermont.* Alt. *Nicolson, Aiton & Belsbes.* Clerk, *Hay.*

*Fol. Dic. v. 1. p. 60. Durie, p. 204. & 267.*

\* \* \* The same case is thus reported by Spottiswood :

SIR JAMES BALFOUR being addebted in 4000 merks to my Lord Balmerino, my Lord arrested as much in my Lord Burley's and Michael Balfour of Denmiln's hands, that they were owing to Sir James. This arrestment was loosed by the Laird of Lochinvar, who acted himself caution for the same sums to Balmerino; he afterwards pursued Lochinvar therefor, by way of action to see himself concerned as cautioner foresaid, to pay the same.—It was *alleged* by him, That this being a subsidiary action, he behoved first to have decret against them in whose hands he had arrested, that it might be known that they were duly owing so much to Sir James.—*Replied*, That the arrestment was loosed, so that he had no further action against them, but the cautioner became his debtor in all *eo ipso tempore*, that he had loosed the arrestment.—*Duplied*, That he was no more obliged but as law would.—THE LORDS found, That the cautioner had place to propone any thing that they in whose hands it was arrested might have done; either that it was paid to Sir James before the arrestment, or that there was not so much owing in their hands: For they thought that there might be collusion betwixt the creditor and his principal debtor, or them in whose hands he had arrested in prejudice of the cautioner.

*Spottiswood, (ARRESTMENT.) p. 16.*

1661. July 4. REITH OF EDMONSTON *against* the LAIRD OF NIDDRIE.

No 127.

Arrestment an a dependence was loosed on caution. The common debtor afterwards assign-ed the sum. The assignee

JOHN BOYD merchant in Edinburgh, as assignee constituted by the Laird of Wolmet, to a decret obtained at his instance, against Niddrie, for payment of the sum of 7000 merks, for which he gave bond to umquhile Wolmet for James Reith of Edmonston, his good-brother, as an asyhtment for the mutilation of the Laird of Wolmet by Edmonston, who cut off Wolmet's left hand. Niddrie suspended on double pointing, called the said John Boyd, Jean Douglas, umquhile Wolmet's relief, and the said James Reith.—It was *alleged* for Niddrie and the