

the goods confirmed to pay the debts wherein he was bound.—THE LORDS sustained his confirmation, providing he produced a right to the debt, or a discharge thereof before extracting.

Fol. Dic. v. 1. p. 126. Fountainball, MS.

No 52.
right to the debt, or discharge of it, before extract.

1685. November 20.

BURNET against VEITCH.

ROBERT BURNET, writer to the signet, seeking an adjudication against Veitch of Dawick's lands, and the clerk scrupling, he moved it to the Lords, that the ground of it was a bond of relief, and as yet there was no distress. THE LORDS allowed the extract of the decret of adjudication to go out, with this quality, that it should not take effect till distress. This was opposed by Pitmedden and others, as informal, seeing in effect it was no debt till there was distress or payment, and is but a conditional obligation, *et dies incertus*, which cannot be the ground of any diligence; yet he might lose his relief, being prevented by others, unless he came in *pari passu* with them on his bond, or else cause the creditors, to whom he is bound, adjudge; which they may refuse, as being sufficiently secured.

Fol. Dic. v. 1. p. 126. Fountainball, v. 1. p. 376.

* * See This case by President Falconer, No 12. p. 140.

No 53.
A decree of adjudication in relief was allowed to be extracted before distress, but under the quality, that it should not take effect till distress.

1686. November.

DICKSON against GOVAN and MYLNE.

JOHN PETER of Whitsleid as principal, and John Bonar as cautioner, having granted bond to Mr John Aitchison for 2000 merks, as also John Peter being due to John Bonar other 500 merks, upon which John Bonar is infest in an yearly annualrent out of a tenement of land in Edinburgh; and he having obtained a decret of pointing of the ground for four year's annualrent, upon which he appraised the tenement; and George Dickson, as having right by progress to an adjudication of the same tenement, pursues a reduction and improbation against James Govan and Alexander Mylne, as heir to John Bonar, of the foresaid apprising; and the terms being run, and the pursuer having craved certification, *contra non producta*; alleged for the defenders, That they had produced sufficiently to exclude the pursuer's title, the apprising being prior to the pursuer's adjudication, and so there could be no certification *contra non producta*. Answered, That the decret of pointing of the ground, whereupon the apprising proceeded, was only in absence, and is intrinsically null; for the bond being only a bond of relief, as to the 2000 merks, there could have been no decret of pointing of the ground as to the annualrent of that sum, unless John Bonar had been distress, and had actually made payment of the annualrent to Aitchi-

No 54.
An apprising found null because led, not by the creditor, but by the cautioner upon his bond of relief; before he was either distressed or had made payment.

No 54.

son the creditor; and albeit he might have taken a decreet, and apprised for the 500 merks that was due to himself, yet he could not have taken a decreet for relief of the annualrent of the 2000 merks; so that the apprising is null, as being led for the annualrent of greater sums than was due at the time by the principal debtor to John Bonar; for John Peter, the principal debtor, neither was, nor could be debtor in the 2000 merks to John Bonar the cautioner, until he ceased to be debtor to Aitchison the creditor, which could not be unless Bonar had made actual payment, and either had obtained a discharge, or assignation to the debt: And the reason is evident, for, if Bonar the cautioner might have affected John Peter's estate, and uplifted the rent thereof before he made payment to Aitchison the creditor, then Peter the principal would have been liable in double payment; once to his cautioner who had affected his estate, and paid himself by intromitting with the rents; and again to Aitchison the creditor when pursued by him; and even in so far as concerns the four years annualrent of the 500 merks, the infestment of annualrent can only affect the tenement, but not the apprising, which is intrinsically null; and John Bonar was much more than satisfied and paid, not only of the annualrent of the 500 merks, but likeways of the principal sum, having possess the tenement since the year 1653, which paid 400 merks yearly; and, upon these grounds, he had raised a reduction of the apprising, which he now repeated. *Replied*, That the defender having produced a right which did exclude the pursuers' title, they were not obliged to debate the validity of that right before the production was closed, and avisandum made, and the cause came to be called by the course of the roll; and the bond for relief of Bonar the cautioner was not a simple bond of relief, but did bear an obligation, for the cautioner's relief, and more sure payment of the sum, to infest him in an yearly annualrent effeiring to the said whole sum of 2500 merks. *Duplied*, That where the defender, in a reduction and improbation, makes a production, and *alleges*, that he has produced sufficiently to exclude the pursuer's title, it is then competent to the pursuer to repeal his reduction and grounds of nullity against that right, by which the defender would exclude the pursuer's title. But if the defender will pass from the defence, that his right excludes the pursuer's title, and allow certification to be granted *contra non producta*, the pursuer shall not make use of his reduction before there be an avisandum made with the writs produced, and the cause come to be called by the course of the roll. And albeit the bond, upon which the decreet of adjudication proceeded, is not only a simple bond of relief, but likeways a security for payment, that can only be understood *in terminis juris*, that in case the cautioner be distrest and make payment, that he may make use of his right for his payment and relief of the sum; but it is inherent in the nature of all bonds of relief, that they do not take effect unless actually payment be made by the cautioner; and was expressly so decided in the case of the Laird of Kinfauns *contra* the Earl of Northesk*. And for the more effectual

* See GENERAL LIST OF NAMES.

payment and relief of the sum, being assigned to the mails and duties of the lands, and having pursued a poinding of the ground, and for mails and duties, in order to his relief; the LORDS found that he could do no diligence upon the bond of relief, unless he could instruct he was distrest, and had made payment; and that he could only have relief in so far as he had made payment. THE LORDS found the apprising null as to the annualrent of the 2000 merks, in respect Bonar the cautioner was not distrest, nor had made payment before the leading of the apprising.

No 54.

Fol. Dic. v. 1. p. 126. Sir P. Home, v. 2. No 828.

1687. February 1.

WILLIAM MONTGOMERY, and ——— his Assignee, *against* MILNE and BALLANTINE.

WILLIAM MONTGOMERY, President Lockhart's servant, (who removed in this cause, though he might sit, being only his master, and cousin), and ——— his assignee, pursue Milne and Ballantine, heirs to John and James Bonnars, to count and reckon for the mails and duties of a tenement in Edinburgh, disposed by John Peter to John Bonnar, for relief of a cautionry wherein Bonnar stood bound for Peter.—THE LORDS, on Harcarse's report, found it was no title whereon to enter to the possession or to adjudge, so as to possess by it; unless they would instruct that they had paid the debt, and so had purified the conditional infestment; and would not burden the pursuer to prove, that John Peter, the principal debtor, had paid it, seeing the cautioner could not instruct he was distressed since 1650, (which was its date), and the bond of relief did not bear, that they might enter to the possession ay and while they were paid; and *esto* it did, what security had the granter of the relief that his rents should be applied to the payment of this debt? so that he should be still obnoxious to his creditor, and also be frustrate of the rents of his lands.

Fol. Dic. v. 1. p. 126. Fountainball, v. 1. p. 444.

1704. February 9.

DRUMMOND *against* LORD JUSTICE-CLERK.

IN the competition betwixt Adam Drummond of Megginch and Prestonhall, Lord Justice-Clerk, both creditors to Sir Thomas Stewart of Balcasky, and arresters in Blairhall's hands, Megginch craved preference as the first arrester, being *prior tempore* he was *potior jure*. *Answered* for the Justice-Clerk, Though your arrestment be prior, yet being upon a bond of relief, that can never be a sufficient legal ground of arrestment, obligations *ad factum præstandum* neither being liquid nor commensurate to the debt; whereas he had arrested on a clear

No 55.

A tenement was disposed for relief of a cautioner. This found no title of possession until the condition of paying the debt should be purified, or that he was distressed. There was no clause entitling to enter into possession until paid.

No 56.

An arrestment, upon a bond of relief, was held to be good in competition with another arrestment, the cautioner having paid before forthcoming.