

payment and relief of the sum, being assigned to the mails and duties of the lands, and having pursued a pointing 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 distrest 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 distrest. 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.