

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.

No 56. liquid bond. *Replied*, His arrestment was not only raised on a registrate bond of relief, but likewise on an action intented on that bond, and before the competition in the forthcoming, his bond of relief was both liquidate and purified; for he had made payment, and taken assignation to the debt; and cautioners would be in a very bad condition if they might not affect their debtor's means by arrestment on their obligations of relief; and it is now *triti juris* that adjudications may proceed for relief even before distress, as was sustained to the Duchess of Lauderdale against the Earl, (*See HUSBAND and WIFE.*), and the Justice-Clerk's arrestment can never compete with him, not only because of its posteriority, but that it is not laid on upon a registrate bond, which is a decret, and has *paratam executionem*, but on a bond unregistrate, which is no better than a libel or a dependence: And it cannot be denied but an arrestment on a bond of relief would put the debtor *in mala fide* to pay, and make him liable in the breach of arrestment, though he could not be decerned to make forthcoming till first the subject were liquidate by a distress or payment; but here Megginch had paid the debt, and was made assignee thereto. *Duplied*, A forthcoming is an executive process, wherein nothing can be of new constituted, that was not in being at the laying on of the arrestment; so that if the ground of the arrestment was not then pure and liquidate, no decret of forthcoming can follow thereon; but the creditor in the relief, after he has paid the debt, must lay on a new arrestment, upon that clear and simple ground of debt, and then a valid action of forthcoming will properly follow.—THE LORDS thought an illiquid fact was not a ground whereupon an arrestment could be used; but if it were made liquid before the forthcoming, the arrestment stood good; and therefore Megginch having paid and acquired in the debt (for which he had the bond of relief) before the competition in the forthcoming, that liquidation was retrotracted to validate his arrestment, as much as if the debt had been liquid at the time he laid on his arrestment; but allowed my Lord Justice-Clerk to be heard on this point, whether his arrestment intervening before Megginch's liquidation, that was a *medium impedimentum* to hinder its drawing back, so as to give the Justice-Clerk's arrestment the preference.

*Fol. Dic. v. 1. p. 127. Fountainball, v. 1. p. 221.*

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No 57. 1715. February 22. BOWLES against JOHNSTON.

A CAUTIONER having paid the debt, in a competition between him and the donatory to the principal debtor's bastardy, the LORDS found, that the penalty of the bond must be restricted to the sum really paid out by the cautioner to the creditor.

*See* The particulars No 28. p. 2098.