

No 142. and in a short time would eat up their own heads, he craved the arrestment to be loosed upon sufficient caution.—THE LORDS finding the arrestment was laid on by virtue of a decret, and the suspension posterior thereto, they could not loose it upon caution; but they fell on this *medium*, if he would consign the full sums in the decret charged on, they would ordain the same to be loosed, especially seeing the suspender would be reponed against the decret, when the cause came to be discussed. See a singular case recorded by Stair, 16th July 1661, College of St Andrew's, No 128. p. 791.

*Fol. Dic. v. 1. p. 59. Fount. v. 2. p. 681.*

1705. July 31.

ANDREW M'FARLAN, Merchant in Edinburgh, *against* ALEXANDER COWIE.

No 143.

An arrestment upon a registered contract was loosed upon caution, the obligation in it being general and illiquid.

ANDREW MACFARLAN and Alexander Cowie having, in September 1704, by a contract of copartnery, mutually obliged themselves to stock in equally in money and goods to a certain value, to be employed in trade for their joint use, and to be equal gainers and losers; and their affairs falling into disorder in December thereafter, so as they were forced to retire to the Abbey for sanctuary: M'Farlan, after they had compounded with their creditors, caused regiftrate the contract, raised horning thereon, and arrested all Cowie's effects: Which arrestment, though proceeding on a regiftrate contract, that was a kind of decret, the LORDS allowed to be loosed upon caution; because the charge being general, and for no liquid sum, is of the nature of a depending action.

*Fol. Dic. v. 1. p. 59. Forbes, p. 39.*

1707. July 18.

MARGARET CRICHTOUN, Relict of THOMAS MOFFAT, *against* Mr JOHN BORTHWICK of Cruickstoun.

No 144.

An arrestment is effectually loosed, though the letters of loosing be not intimated to the arrester.

THOMAS MOFFAT having, as creditor to James Tweedie, in the sum of L. 342, arrested the like sum in the hands of Mr John Borthwick of Cruickstoun, and afterwards disposed the debt and diligence to Margaret Crichtoun, his spouse: She pursued a furthcoming, wherein Cruickstoun *alleged*, That he ought to be assilzied, because he had paid conform to letters for loosing the arrestment produced.

*Replied* for the pursuer:—That if Cruickstoun had paid, he had paid unwarrantably, the letters of loosing never having been executed against the arrester: For the letters bear, 'That intimation be made to the arrester, that the arrestment is loosed, and caution found,' otherwise the arrestment to remain unloosed. The reason of this stile is, because, if the loosing be not intimated, the arrester

cannot know from whom to seek his payment, nor how and when to do diligence against the cautioner, who *medio tempore* may prove insolvent.

*Duplied* for the defender:—*Imo*, Before the act 17th Ja. VI. 1617. (as appears by the narrative thereof) messengers were entrusted with the loosing of arrestments, taking caution, and intimating the same to the parties by tickets or schedules: But that course not being safe to the lieges, it was ordained by the said act, That all caution for loosing of arrestments be found in the books of Session, and received by the clerks before giving out the letters; yet no intimation or execution of the letters is required. For the arrester is secure by the caution found, and the letters under the signet are a publication thereof. *2do*, It was not necessary to execute the letters of loosing the arrestment against the arrester, seeing they bear *caution to be found*; and the will of the letters of arrestment is only *to secure the subject ay till caution be found*; and the stile of the letters of loosing arrestment seems only to have been introduced as a warrant to certiorate the arrester not to proceed after he was secured by the caution found, of which he might be certiorated at the bill-chamber, and signet-office, which are public records patent to all the lieges: And for the sufficiency of the caution the clerks are liable.

*Triplid* for the pursuer:—That the act 1617, makes more for him than for the defender: In so far as it expressly requires the intimating the loosing of an arrestment to the arrester, which was also necessary before the said act, though through an abuse it had been omitted.

THE LORDS found the arrestment to have been effectually loosed; though the letters of loosing were not intimated to the arrester.

*Eol. Dic. v. 1. p. 59. Forbes, p. 184.*

\* \* \* Dalrymple reports the same case thus:

MOFFAT, as creditor to James Tweedie, arrests in the hands of Mr John Borthwick; and Margaret Crichton, relict of the said Moffat, as his assignee, pursues a furthcoming, in which Borthwick, the defender, depones he was debtor the time of the arrestment, but had paid conform to letters of loosing arrestment; and, for instructing the quality of his oath, produced an extract of the said letters, bearing that caution had been found in the books of Session, whereupon the defender was *in bona fide* to make payment to Tweedie the debtor.

It was *answered*: That letters of loosing are not sufficient, unless the same had been executed against Moffat the arrester, personally, or at his dwelling-house, and thereby intimation made to him that the arrestment was loosed, and caution found; which the stile of the will of letters loosing arrestment bears; which execution only could render the debtor *in bona fide* to pay.

It was *replied*: That letters of loosing need no execution after the 17th act of the Parliament 1617: By the narrative of which act, it appears, that messengers were antiently intrusted with the loosing of arrestments, and taking caution, and intimating the same to parties by tickets or schedules; which practice not being found safe for the lieges, it was thereby statute and ordained, that all cau-

No 144. tion in loosing of arrestments, should be found in the books of Council and Session, and the clerks of the bills to receive the same before giving out of letters of loosing: After which act, it is plain, that no intimation or execution of the letters are required; but by the caution found, the arrester is secure, and the letters under the signet are the publication thereof. And as to the style of letters of loosing, the same has been fixed before the said act of Parliament, and has continued since, without adverting to the effect of that act which rendered the foresaid execution useless; and, in practice, the same hath been neglected, as is well known, and may more clearly appear by the later style of the letters of arrestment, laid on upon depending processes, which only are loosable, and bear, 'that the sums or goods belonging to the debtor should remain under sure fence and arrest, ay and while caution be found acted in the books of Council and Session;' which style is conform, and hath been adapted to the foresaid act of Parliament; though the style of letters of loosing hath continued more by inadvertency, than any good reason.

'THE LORDS found the defence relevant and proven, that caution was found acted in the books of Session, and thereupon letters expedite under the signet, conform to the said act of Parliament, without any necessity of further execution.'

*Dalrymple, No 84. p. 106.*

1728. February 27.

Competition SIR JOHN MERES and ROWLAND AINSWORTH, with the YORK-BUILDINGS COMPANY.

No 145.

Arrestment of rents for security of a sum, not payable till four years after the arrestment, found loosable on caution.

SIR JOHN MERES and ROWLAND AINSWORTH, being creditors to the York-Buildings Company in several bonds, not payable till the year 1732, upon their several depending processes before the Court of Session, arrested the whole rents and effects of the Company in Scotland. Against these arrestments the Company offered a petition, craving, that they might be loosed without *caution* or *consignation*, as irregular and unlawful diligences. And, in the *first* place, it was observed, that bonds are generally taken payable at the next term after their date, or at farthest, the next term after that; and when the term is approaching, though not precisely come, custom has allowed arrestment of rents, payable at or about the same time that the debt itself falls to be due; but there was never an instance that arrestment was allowed of current rents, where the debt, for security of which the arrestment was laid on, was not payable for many years after. It was observed, *2do*, That there is a difference betwixt an arrestment of rents and an arrestment of a principal sum; on this account, that if a principal sum be not arrestable, there the stock on which the creditor lender did rely may be carried off; but as to the profits of any such stock, and particularly as to the rents of lands, which are understood to be daily consumed, it is not possible to imagine the cre-