

1716. July 31.

LORD ROYSTOWN *against* BRYMER.

No 168.

Found in conformity with Brodie against M'Lellan, No 166. p. 316.

THE Lord Roystown having become cautioner for the deceased Lord Prestonhall in several bonds, and also for M'Kenzie of Frazerdale, his son, intents action upon his father's bonds of relief against him, upon the passive titles, and also upon his own bonds of relief, and upon the dependence, arrested in the hands of Mr John Paterfon; and having obtained decret pursues a furthcoming, having in the mean time obtained assignation from the common debtor; in which action there was compearance for one Brymer, a creditor of Frazerdale, who contending, that, notwithstanding his arrestment was posterior to the Lord Roystown's, that yet he ought to be preferred:

Because, *imo*, He had *paratam executionem* upon his debt; whereas the Lord Roystown was but a naked cautioner, without distress or payment. *2do*, That the obligation and decret to relieve him was allenarly *ad factum præstandum*, and consequently no ground for a poinding; and therefore, that his Lordship could have no decret of furthcoming, as was found, 9th February 1704, Drummond of Megginsh against the Lord Prestonhall, Fount. v. 2. p. 221. *voce* CAUTIONER.

Answered for the Lord Roystown, *imo*, That, though a simple cautioner cannot insist against the common debtor for payment till he himself have paid, or be distressed; yet a cautioner may arrest in order to secure the subject for his own relief, just as well as he may inhibit or adjudge; besides, that an arrestment upon a bond of relief is not in the same case with an arrestment upon a dependence; for where there is only a depending action, it does not appear till decret, whether there be a ground of debt; but it is otherways in this case, where the claim of being relieved is fixed, and does not want to be ascertained by a posterior sentence. *2do*, That an obligation or decret to relieve is not like an obligation *ad factum præstandum*, properly speaking, where it does not appear what loss the creditor has by the non-performance of the bond, and so the claim is not liquid, as in the present case it is; besides, that there is a vast difference betwixt a cautioner having an implied action of relief, and a cautioner that hath an express obligation to free, relieve, and skaithless keep; which difference is noticed by the Lord Stair, Inst. page 148. *3tio*, That the Lord Roystown having not only an obligation for relief, but a decret for that effect against Frazerdale, is in the same case (with respect to *parata executio*) as if he had been distressed, or had paid.

It was further *urged* for Brymer, That, at this rate, a cautioner might uplift the money of the common debtor, and squander it without applying it for his relief.

Answered for the Lord Roystown, That the same could be done by a cautioner after distress, or a cautioner having assignation to the subject competed for; yet both have a power to uplift the subject arrested or assigned, and to apply the same towards their own relief.

No 168.

In respect the Lord Royftown's arrestment was prior to Brymer's, and that he had a decret upon a dependence before the competition, as also an assignation from Fraferdale to the subject arrested; therefore, the LORDS preferred the Lord Royftown. (*See CAUTIONER.*)

Aft. Col. M'Kenzie & Ro. Dundas.

Alt. ———

Clerk, Sir James Justice.

*Fol. Dic. v. 1. p. 60. Bruce, No 23. p. 44.*1724. *January.*NAIRN *against* BROWN.

No 169.

A DEBTOR in a furthcoming having made payment, was decerned to pay over again to a prior arrefter, who obtained no decret of furthcoming till after the said payment.

*Fol. Dic. v. 1. p. 61.*1728. *January 2.*

Competition RICHARD WATKINS with MR THOMAS WILKIE.

No 170.

IN a competition among arresters, the LORDS found, in general, That arresters are to be preferred; according to the priority of their arrestments and their diligences thereon, albeit some of the arrestments were laid on before the term of payment of the debt arrested. As also, that they are to be preferred, according to the dates of their arrestments and diligences, when the term of payment of the debts, on which arrestments are used, are past at the time of the competition; notwithstanding that, at the time of laying on the arrestments, the terms of payment of some of the arresters debts were not come; or notwithstanding some of the arrestments were on dependencies, which were closed, and the debts liquidated before the competition.

*Fol. Dic. v. 1. p. 61. Rem. Dec. v. 1. p. 193.*1729. *February 15.*CAMPBELL *against* HOG.

No 171.

Arrestment on a bill, although bearing only *value in account*, preferred to arrestment on a dependence.

IN a competition betwixt two arresters, the one upon a dependence, the other upon a bill of exchange, the LORDS preferred the arrestment upon the bill, though the bill did not bear *value received*, but only *value in account*, because such a bill creates a valid obligation, and has *parata executio*; but found that the arrester must instruct that he is creditor to balance, and that his preference is to be restricted to the balance not exceeding the sum in the bill.

Fol. Dic. v. 1. p. 61.