

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.