

1724. June 23.

LUDOVICK BRODIE, Writer to the Signet, *against* GEORGE DUNBAR, Merchant
in Edinburgh.

No 23.
Found directly contrary to
Blackburn against Brown,
No 20. p. 689.

MR BRODIE being bound as co-principal with Sir James Sinclair of Dunbeath, and John Sinclair of Ulbster, in the year 1719, to Bruce of Clackmannan, they granted him a bond of relief, 'Obliging themselves to relieve him betwixt and the term of Lammas thereafter, and for that effect to pay the money to the creditor betwixt and the said term, and to retire the bond, or deliver to him a sufficient discharge of it.' And, by another clause in the bond, 'Mr Brodie had power, in case of their not paying or relieving him, as said is, to raise and execute all manner of diligence personal or real against them, even though he should not happen to be distressed for payment.' This bond was registrate by Mr Brodie, and thereupon he raised and executed letters of horning; and, upon the 22d of July 1723, he arrested in the hands of one Dempster, who was debtor to Sir James.

George Dunbar being creditor to Sir James, in bonds of borrowed money, did registrate the same, and raised letters of horning, in virtue of which he likewise arrested in Dempster's hands upon the 14th of August, year foresaid.

In an action of furthcoming, preference was craved for Mr Brodie, as having the prior arrestment.

On the other hand, it was *pleaded* for Mr Dunbar, That though his arrestment was posterior, yet he ought to be preferred, in respect that the ground of it was a liquid debt, for which he had ready execution by pouding or otherwise, whereas the ground of Mr Brodie's arrestment was a bond of relief *ad factum prestandum*, and not for any liquid sum; so that he could have no *parata executio*, since both his debt and arrestment were in effect conditional, and remained so, till either he was distressed or had made payment, neither of which had happened: And though, by a clause in the bond, he was allowed to use all manner of diligence after the term of relief, whether he was distressed or not, yet that clause was only exegetic of the former, and gave him nothing new; and if the bond must be considered as a simple bond of relief, he could only charge Sir James with horning, and take him with caption, till he was relieved, but could not proceed to poud his effects, for which the letters of horning gave no warrant.

Answered for Mr Brodie, That the ground of his arrestment was equally liquid, since his bond of relief did liquidate the sum to be paid, and Sir James was thereby obliged to relive him betwixt and a certain day; which, he contended, was as strong an obligation, and should have the same effect, as if Sir James had bound himself to pay the sum, in the bond to Clackmannan, to him the cautioner, in order to operate his relief betwixt and that time; for this was no more than a clause of stile, and is implied in the nature of the thing, otherwise bonds of relief might be easily rendered ineffectual: And a bond of relief, upon which arrestment has

ARRESTMENT.

695

followed, is as liable a ground for a decret of forthcoming as any other liquid debt.

No 23.

The LORDS preferred the first arrester.

For Brodie, *Pat. Grant.* — *Att. Jo. Sinclair.* Clerk, *Dalrymple.*
Fol. Dic. v. 3. p. 39. Edgar; p. 54.

1743. December 14.

LORD HOLYROODHOUSE and SIR ROBERT STEWART of Tillicultry, competing.

SIR ROBERT STEWART, as creditor to Alexander Pitcairn, having arrested upon a bond of relief, conceived in the following terms: 'That the said Pitcairn should relieve, harmless and ~~harmless~~ keep, the said Sir Robert, from all payment of the sum; and, for that effect, he and his forefairs should be bound and obliged, either to pay the said principal sum to the creditor against Whitsunday 1738, and retire from him the said bond, &c. or otherwise to pay the said sum to Sir Robert against the said term, with a penalty in case of failzie, to the effect Sir Robert might pay the sum and relieve himself thereof.' And Lord Holyroodhouse having, as a creditor to Pitcairn, thereafter arrested upon a bond of borrowed money, Sir Robert was preferred upon his prior arrestment, in respect of the clause in the bond of relief, obliging the debtor to pay to Sir Robert the cautioner, at a term certain, Sir Robert finding caution to apply the money in terms of the bond of relief.

No 24.
 Arrestment found competent upon a bond of relief.

Fol. Dic. v. 3. p. 39. Kilkerran, (ARRESTMENT.) No 12. p. 42.

What Subjects Arrestable.

1502. March 9. ROBERT FRANCIS N. against EARL of MONTGOMERIE.

CORNS growand upon ony man's landis may on nowayis be arrestit on the ground for ony annuelrent auchtand furth of the famin landis be ony man.

Balfour, (ARRESTMENT.) p. 537.

No 25.
 Corns growing could not be arrested for annual rent due out of other lands than those on which they grew.

1615. December 4. MOWATT against CREDITORS of RICHARDSON.

IN an action of quadruple pointing, pursued by Alexander Mowatt against the creditors of John Richardson, the LORDS found, that ~~the said Richardson~~ could not make arrestment, because the time of making thereof his bond was heritable, and fasine was given to him of an annualrent for his sum. And albeit, there was a provision of the bond that it should be lawful to charge for the principal without registra-

No 26.
 Arrestment found incompetent, while a bond remained heritable, before a charge was given.