

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-

ditor had any view of security therefrom. This being premised, it was represented as inconsistent with common sense, where a debtor pactions, that the money shall not be payable, but at a distant term of years, that nevertheless immediate distress shall be competent by arrestment, the very next day after the bond, against the rising profits of his estate; for why supercede the term of payment, but that in the *interim* the debtor may have the free administration of his estate, that out of it he may raise a fund for his creditor against the term of payment? If it be said, *He may find caution*; this is no remedy, at least a remedy worse than the disease. Many a man will give his bond who will not give a cautioner: Where such a one pactions that the payment be at a distant day upon his own credit, the creditor accepting of his security as sufficient, is it to be allowed, that the creditor shall have it in his power to force him next day to give a cautioner, by arresting his whole effects? Many a one will give a bond payable at a distant day, with this very view, that although at present he cannot answer the bond, or find caution, he will be able at the day of payment; and may foresee a reasonable way, and give satisfaction thereof to the creditor; but if distress may immediately proceed by arrestments, then indeed the scheme is blown up, and the intention of parties quite disappointed. In the *next* place, granting the Company could find caution, the absurdity is not removed; might not this cautioner again arrest for his relief? And so would not this be endless? What was the intention of the stipulation for a distant day of payment?

It was yielded by the creditors, as an unreasonable and malicious thing in any party to use diligence for security of a sum payable at a distant term, if the debtor remains in good credit; but if he begins to dilapidate, or other creditors proceed to diligence, there is all reason for using the legal remedies, to prevent other creditors from running away with the subject of payment. And thus, in the noted case of Easter-Ogle's creditors*, the Lords found, 24th January 1724, 'That diligence might proceed upon the daughter's bond of provision, though the term of payment was not till her age of eighteen,' ten years after the competition: And in the ranking of the creditors, they 'sustained the diligence by adjudication, preferable to such creditors who had not adjudged within year and day.' Now, in the present case, not only are diligences going on against the Company's estate in Scotland; but, since the arrestments laid on, they have given an universal infestment over the whole to certain annuitants, for above L. 10,000 Sterling *per annum*. Can it then be supposed, though the delay of payment was agreed to in favour of the Company, that it was the intention of parties, at contracting, that they, in face of the sum, might alien their means and estates; and the creditors who granted the favour be obliged to stand with their arms across, without power to keep the least hold of the effects, from which only they can hope for payment? It is surely a good answer to the inconveniencies urged by the debtors, that arrestment can be loosed, upon finding sufficient caution; for though a cautioner was not originally granted, the supervening circumstances make it reasonable now to insist upon it. Nor is it new in the law of Scotland,

No 145. in allowing diligences to go out against a debtor, that regard is had to his present circumstances. An inhibition offered against a man of an opulent fortune, for a small debt, is often stopped as an effect of malice; and if Sir John Meres, or any other of the creditors to the Company, had proceeded to arrestment, when their credit was entire, and no other creditor doing diligence, it is not improbable the judges might have interposed; but as it is believed, the parties themselves will not take upon them to affirm that such is their case, there appears to be neither law nor equity for the demand made in the petition.

'THE LORDS refused the desire of the petition.' (See LEGAL DILIGENCE.)

Fol. Dic. v. 1. p. 59. Rem. Dec. v. 2. No 106. p. 205.

No 146. 1739. July 4. HERIOT against FORBES.

WHERE an arrestment is laid on, upon a depending action for a great sum libelled at random, the event of which process, and extent of the true claim, is uncertain, the LORDS, *ex arbitrio*, modify a sum, upon finding caution for which, they find the arrestment loofeable; and did so in this case.

Fol. Dic. v. 3. p. 44. Kilkerran, (ARRESTMENT.) No 5. p. 37.

No 147. 1741. July 22. MARGARET WHITE, Petitioner.

SUSPENSION having been obtained of a decret-arbitral, after arrestments had been used thereupon, and the suspender applying for letters of loofing the arrestments, the LORDS were of opinion, that wherever a decret is suspended, arrestments on it are loofeable, though laid on before the suspension; and therefore granted warrant for letters of loofing, but upon new caution.

Fol. Dic. v. 3. p. 44. Kilkerran, (ARRESTMENT.) No 9. p. 40.

No 148. 1753. June 16. ELIZABETH BANNERMAN, Supplicant.

Arrestment found effectually loofed on caution, though the letters of loofing were not intimated to the arrester. See No 144. p. 798.

BANNERMAN having arrested certain sums in the hands of James Salmon, due by him to her debtor, obtained decret of furthcoming. Salmon, in a suspension, *pleaded*, That he had lawfully paid the debt, for that the arrestment in his hands had been loofed upon caution.

Answered: Intimation of loofing the arrestment had not been made to the arrester; therefore the payment unwarranted: For that, *imo*, The will of letters of loofing arrestments uniformly is, that the executor thereof intimate the loofing of the arrestment to the arrester, and deliver to him a copy, containing the day of loofing of the arrestment, witnesses present thereat, and cautioner found therein; otherwise that the arrestment stand and remain unloofed.