

against them, unless he had adjudged this 6000 merks for his relief in case of distress, which he has neglected to do. *2do, Esto* it had been a part of the price (which is denied,) yet the said cause is now quite innovated and passed from, by his granting a bond of borrowed money without relating to the price.

REPLIED for Edward,—That Mr Thomas Skene's creditors can be in no better case than he would have been in ; and, if he had been pursuing for this 6000 merks, it would have been a good defence, "I cannot pay you, till you, in the terms of your bond, purge the incumbrances ;" for, *in personalibus*, the assignee is in no better condition than the cedent, except *quoad modum probandi*. And that this bond was a part of the price is instructed by a holograph missive letter of Mr Thomas's, acknowledging the same. And therefore he may lawfully retain till they be purged ; even as a debtor, being charged on a liquid bond, may justly allege, "I am cautioner for you in the equivalent sum, and must have retention till I be relieved."

DUPLIED,—This allegiance behoved to be either compensation or retention *ob causam datam causa non secuta*. Compensation it could not be, for that is *de liquido in liquidum*, and must be commensurable ; but here the one is for a liquid sum, and the other for a fact, to purge incumbrances. And it can as little be resolved into retention ; for, *esto* it had been originally a part of the price, yet the same is plainly innovated by turning it into a bond of borrowed money, without the least relation to the price : whereby Edward has followed Mr Skene's faith that he would fulfil his obligation ; otherwise he would have made the one obligation the mutual correlative cause of the other. And the missive letter is not probative though it were holograph, as it is not ; for *nunquam probat suam datam*, and so is presumed to be on death-bed, when he could not prejudge creditors. See 26th November 1674, *Panton* against *Stirling*.

The Lords were tender in deciding this point, both the parties being *in damno vitando* : and, wherever the preference fell, there would be an evident loss to the other party ; seeing Mr Skene's creditors must either want their money or Edward Marjoribanks must pay a part of the lands of Halyards twice. Therefore, before determining, they named some of their number to try a settlement betwixt the parties.

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1705. June 22. ALEXANDER HIGGENS, Fiscal of the Admiralty, against JOHN MATTHIE, ROBERT HOG, DAVIDSON, &c.

MR Alexander Higgens, Procurator-fiscal to the High Court of Admiralty, against John Matthie, Robert Hog, Davidson, and others, skippers in Prestons. The fiscal having pursued them for exportation of wool, linen yarn, and money, out of the kingdom, contrary to law, and having taken out a decret against Matthie for £300 sterling, and the rest for lesser quantities, they present a bill of suspension, on thir reasons: *1mo*, That they were harassed and convened upon stretches of old and obsolete laws, contrary to the claim of right : And it was a very questionable problem, whether the exporting money was truly prejudicial to the republic (for Sparta thought not so ; ) and what was the nation benefited by taking it from poor men and giving it to Mr Higgens? *2do*, Denying all export of money, but only of our native product of goods, to barter

with foreign commodities they were to import, the 10th Act of Parliament, 1663, discharging the exportation of money, does not simply prohibit it, but prescribes the manner:—that there shall be an office erected by the Treasury, where all skippers shall appear, and make faith anent what they carry with them. Now, that office being never established, they cannot be liable. *3tio*, The said act bears an express allowance for each skipper to export as much as will be sufficient for making their voyage: and they are ready to depone they carried no more; but that the most of their effects outward was goods more than money. *4to*, Some of them are decerned for exporting five guineas; whereas, the Act allows any to carry L.5 sterling with him: And, though it speaks only of passengers, yet that is not in contradistinction to seamen, and so cannot exclude them.

ANSWERED,—The decret, holding them as confessed, is opponed. And the laws against exporting of money are so far from being in desuetude, that they are still *in viridi observantia*, though contravened. *Et non refert* whether that office was erected or not, seeing it may be still proven by their oaths, *ad civilem effectum*, though it be a delinquency and penal: and, under the pretence of taking away no more than what is necessary to ply their voyage and defray their exigencies, they shall never be liable; for this were *fraudem legi facere*.

The Lords at first repelled the reasons, and refused their bill of suspension; but afterwards, on a new application, they allowed them to be further heard.

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1705. *June 26.* STEWART of TORRENCE *against* WALTER STEWART of PARDOVAN.

THE Lords decided the competition betwixt Stewart of Torrence and Walter Stewart of Pardovan, creditors to Cornwall of Bonhard. Pardovan raises an adjudication of an heritable bond for L.10,600 Scots, granted by Bonhard to George Dundas, and executes the same. Three days after this citation, Torrence arrests the said debt, but Pardovan obtains his decret of adjudication before Torrence gets his decret of forthcoming.

ALLEGED for Torrence,—He ought to be preferred; because the term of payment of the sum arrested not being come at the time he laid it on, it was moveable, and consequently arrestable; and not the subject of adjudication, which is only of heritable rights. And if the creditor in this bond had died before the term of payment, the sum would have belonged to his executors, and not to his heir; as was found, *29th June 1624, Smith against Anderson's Relict*. And if he had been denounced to the horn, it would have fallen under his single escheat; and so arrestment was the only habile and competent diligence to affect this subject, which is such a *nexus realis* as gives a right to the subject, and transmits the property.

Pardovan ALLEGED,—That the bond bearing an obligation to infest was a *seudum fixum*, and in its own nature heritable; and so only the proper subject of an adjudication, though the term of payment was not come; as was found, *8th January, 1624, Hendersons against Murray*; and *31st July 1666, Gray against Gordon*, observed by Dirleton. And arrestment is not such a *nexus*