

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*

*realis* ; but, if a creditor intervene and poind *medio tempore*, he carries away the right of the arrested goods, and the arrestment evanishes. Yea, if a posterior arrester do more timeous diligence, and the other be *in mora*, he will thereby come to be postponed, and the posterior arrester preferred.

ANSWERED for Torrence,—That citations upon blank summonses of adjudication can never affect the subject so as to exclude a posterior arrestment. It is true, the Act of Parliament in 1672 declares a citation on an adjudication equivalent to a denunciation on a comprising ; but that is only to put the debtor *in mala fide* to do any voluntary deed to the prejudice of the adjudger, who is *in cursu diligentiae*, and nowise to stop legal diligences by arrestment or otherwise. And was so decided 1st February 1684, *Anderson* against *Creighton*, marked by President Newton ; and siclike, an arrestment before the term of payment was preferred to an apprising before the same term, 2d July 1667, *Litster* against *Aiton*.

The Lords considered, that, by the 51st Act of Parliament 1661, heritable sums, before infestment actually taken, were as well capable of arrestment as adjudication ; and that it was the interest of creditors to have as many ways as law can allow to affect their debtors' estates : Therefore, they found this heritable bond (though before the term of payment) adjudgeable as well as arrestable ; and that Pardovan's inchoate diligence, by citing on his adjudication, being prior to Torrence's arrestment,—and his consummate diligence, by obtaining a decret of adjudication, being also prior to Torrence's decret for making forthcoming,—therefore they preferred Pardovan's adjudication to Torrence's arrestment, as being *prior tempore*, and so *potior jure*.

Then ALLEGED,—That Torrence's adjudication being within year and day of Pardovan's, must, by the 62d Act 1661, anent debtor and creditor, come in *pari passu*. ANSWERED,—You are nowise in the case of that act ; which only relates to subjects adjudged, whereon infestment has followed. REPLIED,—Though that case be stated by way of example, yet the *ratio et anima legis* is the same, to introduce an equality among all the creditors, that one may not prevent another in diligence who lives at a great distance, and may not hear of his debtor's condition so soon as others do.

The Lords found the clause general, and comprehended all apprisers ; and therefore brought them all in *pari passu*, who had apprised within year and day of the first.

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1705. June 28. GEORGE SUTTY against BARBARA ROSS.

LORD Minto, probationer, (in the place of Lord Phesdo, deceased,) resumed the case debated in presence, betwixt George Sully and Barbara Ross ; being a competition betwixt two arresters, both laid on in one day ; and the one pursued his forthcoming before the Lords of Session, and the other before the commissaries. Sully craved preference ; because he offered to prove his copy of arrestment was given some hours before the other ; and he had tabled his action before an unquestionable jurisdiction ; whereas Mrs Ross had pursued before the commissaries, who were nowise competent to such actions on arrestments.

ANSWERED,—Where there was a concurrence of diligences in one day, striving