

No 42.

1766. December 2. STEWART *against* FOGGO.

A BILL having been indorsed to a merchant in London, for 'value in account,' was protested in his name for not payment, and returned to the indorser, who charged the acceptor with horning, and executed a poinding, after receiving advice that the indorsee had died at London some days before the date of charge.

"THE LORDS reduced the poinding;" though it was pleaded that, in the case of indorsations for value in account, the substantial interest remains in the indorser.

And they repelled the plea of retention argued for the poinder, upon the authority of the decisions, 10th December 1707, Lees *contra* Dinwoody, No 14. p. 3831.; and 14th July 1745, Creditors of Glendinning *contra* Montgomery, No 51. p. 1449. and No 34. p. 2573.

In both these cases, there was a *bona fides*, which did not occur in this case.

Act. Sinclair.

Alt. Armstrong.

G. F.

Fac. Col. No 48. p. 277.

No 43.

A pardon having been granted to a criminal sentenced to transportation, on condition of his enacting himself to banishment after being set at liberty, personal diligence at the instance of creditors not thereby precluded.

1790. March 3. EBENEZER GARDNER *against* THOMAS HALL.

HALL being convicted, before the High Court of Justiciary, of the crime of swindling, sentence of transportation was passed against him. The punishment however was afterwards remitted, he having obtained a pardon from the Crown, 'under the condition of his enacting himself to banishment from his Majesty's European dominions, within 20 days from his being set at liberty, for the term of seven years.'

Having been, prior to his conviction, arrested in prison by his Creditors, he now presented a bill of suspension and liberation, and

Pleaded; It is obvious that the claims of a private creditor must ever yield to public justice, when it inflicts punishment on the debtor. If he be possessed of a lucrative life-estate, his death will not be prevented, though a certain loss result from it to his creditors. Nor is the transportation of a felon to be impeded by his creditors' arresting him in prison.

Such is truly the situation of the complainer. Though he has received the royal pardon, his punishment is not completely remitted, but only commuted; sentence of transportation being changed into his enacting himself to banishment, in the same manner as transportation is often substituted for capital punishments. He is therefore to be viewed in the same light as if the latter had been the original sentence.

In England many similar cases have occurred, and the same rules must in this matter prevail in both kingdoms. Thus, a pardon being granted to a felon

on condition of his going beyond seas within a time prefixed, his creditors moved the Court of King's Bench for leave 'to charge him with civil actions;' but the motion was denied, because it would defeat the effect of the pardon, by rendering the party incapable of accepting the condition of going beyond seas. *Raymond, v. 2. p. 848.* See also p. 1572.

No 43.

Answered; By a pardon, every effect of the condemnatory sentence being done away, the party, both in respect of his rights, and of the obligations he had come under, is restored to his former situation. Bacon's Abridgement, *voce PARDON, v. 3. p. 809.* A pardon, it is evident, may be conditional as well as absolute, and, in the present instance, a condition has been annexed; but that condition is not to be considered as a substituted punishment. The power of sentencing to punishment belongs not to the King; nor would it be more lawful when inflicted in the way of commutation, than if it had been decreed in the first instance. Yet the contrary must be supposed, before one mode of punishing by banishment can be understood to have been substituted for another.

The complainer's person then may be attached at the instance of his creditors; in the same way as, if, in the interval between being set at liberty and going into banishment, he had contracted other debts, he would have become liable to diligence on that account; of which there can be no more doubt, than that, if in the same interval he had committed a new crime, he would have subjected himself to a new punishment.

It is granted, that he is not to be deprived of the benefit of his pardon; but he ought nevertheless to enjoy it consistently with the rights of other parties, *Bankton, b. 3. tit. 3. § 84; Erskine, b. 4. tit. 4. § 105.* The condition of the pardon is only to take place after 'he is set at liberty;' and this again ought not to happen, until his creditors shall have been allowed to employ the legal means of compelling him to do justice to them, which it is not to be supposed that the Sovereign intended to obstruct. Their proceedings, therefore, will not create any forfeiture of the pardon; and thus the present case is distinguished from that mentioned above, where the condition of the pardon was limited to a certain day, the time being prefixed.

The Lord Ordinary on the bills reported the cause, when the COURT appointed memorials; on advising which they were of opinion, that the plea of the complainer should be repelled, and the bill refused.

Reporter, *Lord Stonefield.* For the Suspenders, *Hamilton.* Alt. *Cullen.*
S. *Fol. Dic. v. 3. p. 381. Fac. Col. No 124. p. 240.*

1799. January 24. JAMES YOUNG against ARTHUR BUCHANNAN, and Others.

ARTHUR BUCHANNAN and others granted a bond for L. 400 to Sir William Forbes, James Hunter and Company, which, with a horning on it denounced

No 44.
Caption may
be issued in
name of an
assignee, &c.