

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.

No 44.  
on a horning  
denounced  
and registered  
at the in-  
stance of the  
cedent.

and registered, they assigned to James Young, who presented a bill upon the narrative of the assignation, craving a caption in his own name. But the Clerk to the Bills having refused to write upon it, Lord Eskgrove verbally reported the question to the Court, who ordered the diligence to be issued in the name of the assignee.

D. D.

Fac. Col. No 107. p. 245.

### SECT. VI.

Arrestment upon a debt *in diem*.—Upon a dependence.

1628. *January 12.* DOUGLAS and ACHESON *against* GILBERT.

No 45.  
In a competi-  
tion of arrest-  
ments, a ci-  
tation before  
the term of  
payment of  
the debt ar-  
rested, gave  
no preference.

IN two actions to make arrested goods forthcoming betwixt Douglas and Gilbert Acheson, two creditors to Michael Gilbert, minister of North Berwick, who arrested in the goodman of North Berwick's hands some moneys addebted by him to the said debtor, and some victual for his stipend, and desiring him to make the same forthcoming; the LORDS preferred Acheson to Douglas, albeit Douglas had intented his action against North Berwick before Acheson, and had cited him before the other; likeas the day of compearance in his summons was past, before the other party had raised his summons, which the LORDS found not to be any cause of his preference, as the party alleged it ought to be; the reason whereof was, because this priority of his action was not found to be any more timely diligence than the other parties was, which was done after him; seeing that first diligence was raised, executed, and done before the term of payment came of the debt arrested, and the other posterior in time was found to have done all lawful diligence, which could be required, seeing immediately after the term of payment was come, he arrested, and upon the morrow thereafter he raised his summons; and now being in this action as far advanced as the other party was in his summons, that prior *nimia diligentia* could not give the preference to the other, who had omitted to do nothing, but had used all lawful diligence in due time, which could be profitably and effectually done; and therefore seeing his debt was anterior to the other creditor's debt, and his term of payment before the other party's term of payment, and that he had arrested first, and before the arrestment made by him who first cited; the LORDS preferred him, as said is, and had no respect to the said first citation. In this process many of the Lords were of the mind and opinion, that an action