

N. B. The present case can seldom occur, if Judges act according to law, which is to modify the assythment in proportion to the circumstances of the criminal. But oversight in the Barons of Exchequer modifying L. 100 without regard to Malloch's circumstances, brought on this intricate question.

No 99.

Rem. Dec. v. 2. No 126. p. 266.

1752. February 20. JOHN DRYSDALE, Merchant, in Alloa, Supplicant.

By act of Sederunt, 18th July 1688, it is declared, that the dyvours habit is not to be dispensed with, except in the case of innocent misfortune, liquidly libelled. And, by act 5th, Parl. 1696, the Court is discharged to dispense with the habit, unless the bankrupt's failing through misfortune, be libelled, proved, and sustained. In a *cessio bonorum*, the pursuer condescending that he became insolvent by smuggling; and craving to have the habit dispensed with, without a proof, because the fact was well known to his creditors, who made no opposition; it occurred to the Lords, that a bankruptcy occasioned by smuggling, is far from being an innocent misfortune; and, upon that medium, they refused to dispense with the habit. They did the like, 6th December 1768, in a *cessio bonorum*, John Creighton *contra* His Creditors. See APPENDIX.

No 100.
The dyvour's habit cannot be dispensed with, where the man who has obtained a *cessio*, has become bankrupt by smuggling.

Fol. Dic. v. 4. p. 138. Sel. Dec. No. 2. p. 3.

* * * This case is reported in the Faculty Collection :

JOHN DRYSDALE, a merchant, became bankrupt, and being laid in prison for debt; he brought a *cessio bonorum*. His creditors did not oppose him, neither did they make any objection to the condescence of losses given in by him, or to the honesty of his character: But a doubt being moved by the Court, whether his wearing the dyvour's habit could be dispensed with, unless he should bring a proof of his losses; he was allowed to bring a proof of the verity of the condescence; upon which, he applied to the Court, setting forth, that his insolvency was chiefly occasioned by seizures of his smuggled goods; but that if a proof of this was required, the Court could not expect a very accurate one, because dealers in smuggled goods use so much art to conceal their property in such goods, that it becomes next to impossible to prove their property. However, upon the footing that his allegations were true, he hoped, his concern in smuggling would not alone be a sufficient reason for refusing to him, what was never refused to any bankrupt, where the creditors did not, upon just suspicion of fraud, insist on a strict interpretation of the act of 1696, William, Sess. 6. cap. 5. That this was the more reasonable, as he produced certificates of an honest character in other respects.

No 100.

THE LORDS were of opinion, that seeing the losses were occasioned by so pernicious a practice, they could not dispense with the strictest interpretation of the act of Parliament.

“ They refused to dispense with the habit.”

Act. *And. Pringle.*

Clerk, *Kirkpatrick.*

S.

Fac. Col. No 4. p. 7.

* * * Kilkerran also reports this case :

IN the *cessio bonorum* pursued by the said Drysdale, the LORDS refused to dispense with the habit, in respect, the losses in trade, condescended on by him, were losses in the smuggling trade, which could not be considered as an innocent misfortune.

Kilkerran, (BANKRUPT.) No 18. p. 66.

1764. February 18.

THOMAS SMALL *against* Sir JAMES CLERK of Pennycuik, Bart.

No 101.

Debtor incarcerated on a decree for a penalty incurred by transgressing a prohibition, not excluded from the benefit of a *cessio*.

THOMAS SMALL, when in Loanhead, a village belonging to Sir James Clerk, in 1761, imported, and vended there, great quantities of ale brewed without the barony, to the prejudice of the brewer licensed by Sir James.

Upon this, the baron-bailie issued a prohibition, which Small not having regarded, Sir James preferred a complaint against him to the Sheriff, concluding for L. 20 Sterling damages, sustained by the importations already made, and for a prohibition in time coming, under a penalty of L. 20 Sterling; for all which he obtained decret in absence.

Small offered a bill of suspension, which was passed as to the damages, but refused as the prohibition; however, he continued to sell ale as formerly, and Sir James again complained of him to the Sheriff as before. Small appeared, and proponed defences against this complaint, which, upon taking a proof, were over-ruled, and he was decerned to pay Sir James L. 5 of restricted penalty, for importing and vending.

Small attempted a suspension of this judgment; but the bill was refused; and as he, notwithstanding, continued to sell foreign ale, Sir James incarcerated him upon the Sheriff's decret.

Small presented a bill of suspension and liberation, which was refused. He then applied to the Magistrates of Edinburgh for the benefit of the act of grace, which they would not grant, thinking him *debitor ex delicto*; but Small complained by an advocacy, which was reported by the Lord Ordinary on