

prisoned, *civiliter*, for damages arising *ex delicto*, it has, in no case, been given where the pursuer has been imprisoned by the sentence of a Judge, which must be literally carried into execution, unless it be altered by a superior court.

No 113.

Answered; Imprisonment awarded, till payment of a sum of money, whether to a private party or public prosecutor, takes place, not *in modum pœnæ*, but is the consequence of poverty, and therefore the case comes to be the same as where damages, arising *ex delicto*, are awarded in a civil action, and the defender is imprisoned, in the ordinary course of diligence, in which case the benefit of *cessio* is undoubtedly competent; 18th February 1764, Small, No 101. p. 11782. 5th March 1791, M'Dowall, No 110. p. 11793. 15th January 1794, Douglas, No 112. p. 11795.

Upon advising notes of precedents for the parties, the Court came to be of opinion, that there was no room for making any distinction between a fine to a private party and damages awarded to him *civiliter ex delicto*; and that, upon the principle of the decision Douglas against her Creditors, there was so far no ground for refusing the *cessio*; but they seemed disposed to refuse it, or, at least, to order further argument, on account of the fine to the Procurator-fiscal, upon which the pursuer's agent paid the fine at the Bar.

THE LORDS unanimously decerned in the *cessio*, and dispensed with the habit.

Act. *Inglis*.Alt. *W.-Baird*.Clerk, *Colquhoun*.

D. D.

Fac. Col. No 191. p. 462.

1798. March 9.

JOHN SMITH *against* his CREDITORS.

JOHN SMITH having been imprisoned, at the instance of one of his creditors, immediately executed a summons of *cessio bonorum*. The creditor consented to his liberation after he had been about a fortnight in prison. He, however, remained there, (having got another creditor to arrest him, on diligence which turned out to be wholly inept), and persisted in the action.

Some of his creditors, *inter alia*, objected, That the process was incompetent, as the diligence against him had been withdrawn before he had been a month in prison; Act Sed. 18th July 1688.

The pursuer *answered*; That, in the course of the preceding year, he had been six times imprisoned by his creditors; who, on purpose to harass him, and at the same time prevent him from getting a *cessio*, had always consented to his liberation before he had been a month in prison; but that, as the summons, in this case, had been executed before the consent was given, the objection was ill-founded; 3d February 1779, M'Kenzie against his Creditors, No 106. p. 11791.

THE COURT, upon advising a condescence, objections, &c. thought that, in the circumstances of this case, the process was incompetent. It was, at the

No 114.

An action of *cessio bonorum* is incompetent, where the creditor has consented to the liberation of the debtor before he has been a month in prison.

No 114. same time, observed, that if the debtor had been fairly in prison for a month, a consent to his liberation after that period would not have barred the action.*

Act. *Moncrieff Thriepland.*
D. D.

Alt. *W. Stewart.*

Clerk, *Menzies.*

Fac. Col. No 69. p. 159.

1799. July 11. JAMES DUNLOP *against* HIS CREDITORS.

No 115.

A cessio bonorum is incompetent at the instance of a debtor within the sanctuary of the Abbey of Holyroodhouse, who has been imprisoned in the jail of the Abbey, by warrant of the Bailie of it, for a debt contracted there.

JAMES DUNLOP having retired to the sanctuary of Holyroodhouse, in consequence of diligence executed against him by the Managers of the Royal Bank of Scotland, he was incarcerated in the jail of the Abbey for a debt of L. 10, contracted during his residence there; but, in consequence of a certificate from a physician, that his health was in danger from confinement, he was immediately liberated on caution; and he returned to his lodgings in the Abbey.

In these circumstances, he brought an action of *cessio bonorum* against his whole creditors. The summons narrated his imprisonment, and that he was 'in danger of being arrested in prison at the instance of the following persons, his real or pretended creditors, viz. Hugh Auld, ironmonger in Glasgow, Alexander Allan, merchant there,' &c.

Appearance was made for the Royal Bank, and James Christie, who, as preliminary objections to the competency of the action, besides stating that the imprisonment of the pursuer was wholly collusive, which was denied on his part, contended,

1mo, That the prison of the Abbey was not of the description required by the act of sederunt 18th July 1688.

2do, That the pursuer's being within the sanctuary, of itself precluded the action.

On the *first* point, the pursuer gave a deduction of the titles to the Abbey of Holyroodhouse; from which he concluded,—The abbots had a jurisdiction of regality over the whole property belonging to them, comprehending a burgh of regality, in which the present site of the Abbey prison was included. When what is now called the burgh of Canongate, and the barony of Broughton, were given off from the Abbey, a corresponding jurisdiction only was disposed, while the original right remained with the abbots over the part retained. It reverted to the Crown with the Abbey at the Reformation; and is now held by the Bailie of the Abbey, in virtue of a commission from the Duke of Hamilton, having right by grant from the Crown; Maitland's Hist. of Edin. vol. 4. p. 323.

* Smith, on the 21st March 1798, was again arrested in prison by another creditor; and having, in the summer Session, applied again, and produced a new certificate, from which it appeared, that he had been *bona fide* in prison for more than a month, the Lords (10th July 1798) found him entitled to the benefit of the *cessio*.