

therefore could not be extended to this debt, which arose *ex delicto*; as was found 28th November 1738, William Leslie, supplicant, No 128. p. 11810. For, with respect to such debts, it is a maxim, *qui non habet in ære, luat in pelle*; and prisoners for criminal causes are expressly excepted from the benefit of the act.

No 129.

2do, The other part of the decret being *ad factum præstandum*, the act could not extend to it; for it was in Alexander Will's power to have obtempered that part of it long before his incarceration.

Answered for Alexander Will, That the exception in the act respects only the case of criminals in order to trial, or those who are incarcerated by a sentence *in modum pœnæ*; neither of which is his case; he being incarcerated by the ordinary form of personal diligence for a debt, and therefore ought to have the benefit of the act, from whatever cause the debt arose. And as to that part of the decret appointing him to ask pardon in the church of Fraserburgh, he was willing to enact himself to obtemper it, if sufficient time be allowed to him for that purpose.

"THE LORDS found, that the act of Parliament does not take place in commitments for delicts; but, in respect that Alexander Will offered to obtemper the Commissary's decret, found, that Patrick Urquhart ought either, on Alexander Will's enacting himself under the penalty of L. 5 Sterling, to obtemper the said decret as to the *palinodea*, to set him at liberty, or otherwise to alimment him."

Act. ———.

Akt. Rob. Macintosh.

B.

Fol. Dic. v. 4. p. 141. Fac. Col. No 95. p. 145.

1759. June 19. ROBERT ABERCROMBY *against* JAMES BRODIE.

ROBERT ABERCROMBY engaged to serve James Brodie, saddletree-maker in Glasgow, as his journeyman for a term of years; but after borrowing from his master L. 10 Sterling, for which he granted a bill, Abercromby deserted his service, and went to Edinburgh. Brodie raised a caption on the bill, and caused him to be apprehended and imprisoned in the 1753; and after being confined some time, and alimmented by Brodie, he was liberated in terms of the act of Parliament 1696, commonly called the act of grace.

In 1757, Abercromby returned to Glasgow, and worked with other masters, without paying his debt to Mr Brodie; who thereupon again imprisoned him upon the same caption.

Abercromby got a bill of suspension and liberation passed without opposition; and commenced a process of wrongous imprisonment against Brodie, concluding for the penalties imposed by act 6th 1701; which process, and the suspension, came to be discussed together.

No 130.

Found that a debtor liberated from prison on the act of grace, may be again imprisoned on the same diligence.

See No 132.

No 130.

Pleaded for Abercromby, The purpose of allowing a creditor to imprison his debtor upon a caption, is to operate payment of his debt, but not to starve a poor debtor who is altogether unable to pay. Hence it is provided by the act of Parliament 1696, That, upon the prisoner's making oath, that he is not able to aliment himself, the creditor must either aliment him, or the Magistrates of the burgh may set him at liberty.

Here the pursuer Abercromby was liberated on his deponing to that purpose, and making a disposition *omnium bonorum* to the defender and his other creditors. The defender, by refusing to aliment him, tacitly consented to that liberation; and as the act could afford no benefit to the prisoner, if he might be immediately recommitted, it follows, from the nature of the case, that the creditor must be barred from again apprehending his person on the same diligence, until at least the circumstances of the debtor are so far altered, that the creditor can reasonably expect thereby to operate his payment. As to that alteration, the creditor is not to determine, but there must be a cognition, by a competent Judge, before he again proceeds to apprehend and imprison the debtor; as was found in a case observed by Forbes, 10th December 1709, *Law contra White*, No 117. p. 11803.

Answered for Brodie, Every diligence issued by the Court of Session may be lawfully executed, unless it is suspended by the same Court. The act 1696 does not declare the debt or diligence to be discharged by a liberation upon it, but only introduced a remedy in favour of the royal burghs, which were overcharged with maintaining poor debtors who were cast in prison. If the creditor refuses to give aliment, the Magistrates may liberate the debtor; but the act does not absolutely prohibit the creditor to imprison him again, even *sine causa cognitione*; nor does it declare or imply, that such liberation by an inferior Magistrate, shall be equivalent to a suspension issued by the supreme Court. Had a cognition been intended before a recommitment, the method of taking it would have been directed; but the act is silent in that respect; nor is that defect supplied by any other rule or practice; so that a creditor cannot know how he is to have the matter examined, or by whom, supposing he were disposed or obliged to take that previous precaution. Besides, the law has pointed out the way in which a debtor may obtain a personal protection from all his creditors, namely, by a regular process of *cessio bonorum*; and the legislature could never mean to give a liberation on the act of grace an equal effect; which, however, is the tendency of the pursuer's plea. Nor can the circumstance of the pursuer's having granted a disposition *omnium bonorum* upon his liberation alter the case; for the act 1696 does not require the debtor to grant such a deed; and although the Magistrates (as in this case) commonly think fit to take such a disposition from the debtor; yet the creditor having been no party to the transaction, nor taken any benefit from it, cannot be thereby prejudiced in his legal rights and privileges. Finally, should the pursuer prevail, it would be fatal to all the labourers and poor people in the country, who

would get no credit; for having nothing wherewithal to pay, but the fruit of their bodily labour, if once released on this act of grace, they would remain free, as it scarce ever happens, that among such people, any material alteration of their circumstances could be alleged. And as to the decision *Law contra White*, in 1709, No 117. p. 11803., it is a single one, and not observed in the collections of President Dalrymple and Lord Fountainhall during that period.

No 130.

The Court at first found it irregular in Brodie to commit Abercromby to prison upon the same caption a second time, *sine causæ cognitione*; but, upon a review of the case, the interlocutor was altered. It was *observed* on the Bench, That although a liberation on the act 1696 does not legally discharge the diligence, or restrain the creditor from again putting it in execution; yet if he commit a moral wrong, by using that diligence in an oppressive manner, he is censurable in equity, and the debtor may obtain relief by suspension.

“THE LORDS found, that Brodie was at liberty to put his diligence in execution against Abercromby a second time, and to incarcerate him thereupon, notwithstanding of his former liberation upon the act of Parliament 1696, for the aliment of poor prisoners; and therefore assoilzied from the process of wrongous imprisonment, found the letters orderly proceeded, and decerned; but found no expenses due.”

For Brodie, *Geo. Wallace.*Clerk, *Kirkpatrick.*

D. R.

Fol. Dic. v. 4. p. 141. Fac. Col. No 186. p. 332.

1768. February 24.

WILLIAM WRIGHT, MARY GRAHAM, and JAMES TOWER, Procurator-Fiscal,
against KATHARINE TAYLOR.

No 131.

A YOUNG woman having been guilty of an atrocious battery, was found liable by the Sheriff in a fine, damages, and expenses; and by a warrant in the sentence was committed to prison till payment. The Magistrates having refused her the benefit of the act of grace; the question was brought before the Court of Session, and the sentence of the Magistrates affirmed, it being the opinion of the Court that this was not a civil debt or cause to entitle it to the benefit of the statute.

Fol. Dic. v. 4. p. 140. Sel. Dec. No 261. p. 334.

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

THE pursuers obtained a decret against the defender for certain sums as a fine, damages, and expenses, upon account of an assault upon the person of Mary Graham. The sentence contained a warrant to imprison till payment; in virtue of which the defender was committed to the prison of Stirling, and