

No 132.

being carried into effect. The present age furnished more examples of fraudulent debtors than of rigorous creditors; and if any creditor should be wantonly rigorous, and incarcerate his debtor, not with a view to obtain payment but to oppress, the debtor might obtain his relief by a *cessio bonorum*. Relief upon the act of grace ought not to be substituted in place of relief by a *cessio*; the one passed in a summary manner without expiscation before the Magistrate of a burgh, merely upon a neglect or refusal to aliment; the other was a regular process, competent only before the supreme Court, always discussed in presence and with solemnity. The decision 19th June 1759, Abercromby *contra* Brodie, No 130. p. 11811, was directly in point; it was not given solely in a process of wrongous imprisonment, as there was a suspension conjoined with that action, in which the letters were found orderly proceeded.

Several things were alleged against the conduct and character of Pollock, particularly that, notwithstanding of his having sworn he was unable to aliment himself, and of his having granted a disposition *omnium bonorum* to his creditors, he was still possessed of effects, and, since his liberation, had paid away several sums to some of his creditors who had threatened to distress him. These allegations were denied, and a motion was made from the Bench to have them enquired into. Two of the Judges of weighty authority were for altering; but the majority were of opinion that the act of grace afforded a very different indulgence from a process of *cessio bonorum*, which was unquestionably the proper remedy. THE COURT accordingly adhered to the Lord Ordinary's interlocutor, and thereafter refused a reclaiming petition without answers.

Lord Ordinary, *Kennet*.
Clerk, *Tait*.

For Pollock, *John Dalrymple*.
For Fulton, *W. Wallace*.

R. H.

Fac. Col. No 2. p. 6.

No 133.

1776. January 18. JOHN SMITH *against* JAMES CHRISTIE.

SMITH, serjeant and sutler in the 66th regiment of foot, while that regiment was quartered in the Castle of Edinburgh, contracted a debt, by open account, to James Christie grocer in Edinburgh, at whose instance he was incarcerated in the prison of Edinburgh, as *in meditatione fugæ*, on the regiment being ordered to Ireland. He made application to the Magistrates for an aliment, which being refused, he presented a bill of advocation, on which the following deliverance was given:

“THE LORD ORDINARY, after advising with the Lords, refuses this bill, but remits the cause to the Magistrates of Edinburgh, with this instruction, that they modify an aliment to the complainer, under this express condition, that he makes

over a disposition of all he has, and particularly his pay he shall be entitled to receive as a serjeant during the time he shall be alimanted."

No 133.

Clerk of the Bills.

Fol. Dic. v. 4. p. 140. Fac. Col. No 214. p. 163.

1783. February 5.

Sir JOHN STEWART, BARONET, *against* POOR ALEXANDER LESLIE.

By statute 5th Geo. III. c. 46. persons selling exciseable liquors in Scotland without a licence, are made liable to a penalty of 30s. for the first offence, of 40s. for the second, and of L. 5. for every subsequent one; to be recovered before the Sheriff or Bailie courts, or before any two or more Justices of the Peace; and to be made effectual, either by the usual execution of the law of Scotland, or by distress and sale of the offender's goods, under the authority of the Judge before whom the conviction took place.

No 134.
Act of grace,
whether ap-
plicable to
persons im-
prisoned for
penalties im-
posed for the
security of
the revenue?

Alexander Leslie was, in consequence of letters of caption, incarcerated for a contravention of this statute; and he having applied to the Magistrates of the burgh where he was imprisoned for an alimant, in terms of the statute 1696, usually called the act of grace, the question occurred between him and Sir John Stewart, solicitor of his Majesty's stamp-duties, whether that act related to confinements of this sort.

Pleaded for the prisoner; Where an action, not immoral in its own nature, is prohibited under the sanction only of a civil penalty, the sums exacted from the transgressor, like the penalties in a bond for borrowed money, are to be viewed merely as civil debts, and their legal effects to be governed by the same rules; Erskine, book 4. tit. 4. § 4.

Here this principle seems peculiarly applicable.—The penalties in question are leviable in Scotland by the same forms of diligence which are competent for the recovery of a civil debt. The relaxations, therefore, from the rigour of personal execution, it may be justly inferred, are the same in both cases. In England, too, where the benefit of the *cessio bonorum*, and of the act of grace, is unknown, the endurance of imprisonments following upon this statute is limited to one, two, or three months. From the omission of a similar provision with regard to Scotland, it must follow, that the remedies above mentioned are here competent; otherwise the same transgression which in England is attended only with a temporary confinement, would in Scotland be punished by imprisonment for life.

Answered; By a variety of decisions, founded on the correctory nature of the act 1696, and supported by analogy from the benefit of the *cessio bonorum*, its effects are limited to such confinements alone as arise from a prisoner's ina-