

1787. December 7. DAVID CLARK *against* ALEXANDER JOHNSTON and WILLIAM SCOT.

PRISONER.

How far a person imprisoned for nonpayment of a fine to the private party and to the public prosecutor, is entitled to the benefit of the Act of Grace.

[*Faculty Collection*, X. 18 ; *Dictionary*, 11,818.]

JUSTICE-CLERK. Here there is a fine to the private party ; this is for damages, and is a civil debt : how can the party be refused aliment on such a debt.

HENDERLAND. A fine ought not to have been imposed when the party was not able to pay. The judgment was wrong. I do not see how the county ought to pay aliment in consequence of so wrong a judgment. [He did not advert that no cognisance could be taken as to the merits of the judgment, for they were not before the Court. The only question was as to the effect of that judgment.]

JUSTICE-CLERK. I spoke only as to the consequences of a fine in name of *damages* to the private party. But fine for delict ; I can make no distinction between a procurator-fiscal and the king's advocate. Suppose the king's advocate were to pursue, and a fine to be imposed, with imprisonment until payment, would he be obliged to aliment the criminal ? The law will not require this ; and the case does not fall within the statute 1696. It is asked, " Must then the man starve ? " God forbid ; he must be alimented, either by the burgh or the county. The burden must lie where it did before the Act 1696, which has not provided for this case.

ESK GROVE. Decisions are various and hardly reconcilable. The fine given as damages to the private party may be considered as a private debt ; the Act 1696 contrasts what is due to an *individual*, and what is due to the *public*. An individual is not bound to commit for damages any more than for a private debt. But this does not apply to the procurator-fiscal.

BRAXFIELD. The case of *M'Lesley* in 1738 is in point ; but I doubt as to the principles of that decision. There is no such thing in the law of Scotland as the starving of a criminal. Before the Act 1696, the boroughs and counties were liable for the aliment of persons committed on account of debts, as well as of delicts. The prisoner was considered as a rebel, and could not be freed without letters of relaxation. But the Act of Parliament thought this was unreasonable, and provided a remedy for the borough. When a man is imprisoned, convicted, and then imprisoned *in modum pœnæ*, the boroughs and counties must aliment him : but when the fine is awarded, in name of damages, he to whom *that* is awarded must aliment ; and the same also is the case as to the procurator-fiscal, so far as his interest respects expenses.

JUSTICE-CLERK. This is against the Act of Parliament.

MONBODDO. The fine is a sum of money ; and he who is entitled to receive it must aliment.

On the 7th December 1787, on a Saturday, with a thin or weak bench, and during the absence of the Lord President, The Lords gave judgment, in terms of Lord Braxfield's conclusions, in opposition to every precedent.

*Reporter, Alva.*

*N.B.* This was the first time at which I felt the consequence of our being deprived of the President. I may live to see many more examples of the like nature. *Deus providebit !*

1787. December 12. ARCHIBALD HAMILTON *against* JOHN WOOD, &c.

#### HYPOTHEC

Does not take place on Ships for repairs, made in home ports.

[*Faculty Collection, X. 65 ; Dictionary, 6269.*]

BRAXFIELD. My judgment went upon the supposition, that in practice there was such a bottomry right ; but, on principle, I think that there ought to be no such lien, as tending to cramp trade.

ESK GROVE. The practice of the Court of Admiralty has gone otherwise : this was founded partly on the civil law, and partly on a mistake as to the sense of Lord Stair.

HAILES. The sense of Lord Stair was plainly misunderstood, and so has been the sense of Mr Erskine : both of them speak of *foreign* contractions. I do not value the opinion of Scottish merchants in general, or of the practice of the merchants on the Clyde in particular ; what I look to is the judgment of the courts of the greatest commercial nation that ever existed, proceeding on general principles and practice.

JUSTICE-CLERK. We have now clear evidence of the practice in England ; and we ought not to adopt and sanctify any hypothesis contrary to that practice.

On the 12th December 1787, the Lords, "after having heard the opinion of Dr Winne, found that the furnishers in this case had no preference ;" altering the interlocutor of Lord Braxfield.

*Act. Mat. Ross. Alt. Ed. M'Cormick.*