

No 134. bility to implement obligations originating *ex contractu*, or *ex quasi contractu*. In cases, therefore, where diligence is used to enforce the performance of facts in the debtor's power, or where it is the consequence of an illicit act, whether prohibited by the law of nature, or by municipal laws, the situation of parties is the same as if the statute had never existed; 5th January 1754, Will *contra* Urquhart, No 129. p. 11810.; 24th February 1768, Wright *contra* Taylor, No 131. p. 11813.; Bankton, book 4. tit. 40. § 4.; Erskine, book 4. tit. 3. § 14.

That the present case is of the latter description, does not seem to admit a dispute. The cause of confinement was the transgression of a public law, necessary for the support of the revenue, and guarded by a penalty not commensurated to the injury done to the state, but to the obstinacy of the offender. The action by which the prisoner was pursued is by the statute termed a prosecution, the charge brought against him an offence, the judgment by which he is condemned a conviction, and he himself an offender against the law. Nor from the substitution of the Scots form of personal attachment, as best understood in Scotland, can an intention be presumed to give delinquents the benefit of the statute 1696, by which the statute under consideration would be rendered altogether nugatory.

The Lords, considering the confinement in question to have arisen *ex delicto*, were of opinion that it did not fall under the enactment 1696. And it was suggested, that the proper mode for the prisoner's obtaining relief, was by offering a bill of suspension and liberation.

THE LORDS, therefore, found the application incompetent.

Reporter, Lord Gardenston.

Act. Solicitor-General Murray.

Alt. Coy, and Lawyers for the Poor.

Clerk, Home.

Fol. Dic. v. 4. p. 140. Fac. Col. No 91. p. 140.

1787. December 7.

DAVID CLARK *against* ALEXANDER JOHNSTON and the PROCURATOR-FISCAL of Mid-Lothian.

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How far a person imprisoned for non-payment of a fine to the private party, and to the public prosecutor, is entitled to the benefit of the act of grace?

THE Justices of the Peace of the county of Mid-Lothian, before whom a prosecution had been brought by Johnston against Clark, for an assault and battery, "fined and amerced Clark in L. 6 Sterling; L. 3 whereof to be paid to Johnston, and the other L. 3 (after deduction of expenses), to the procurator-fiscal; and ordained the defender to find caution to keep the peace for one year, under the penalty of 200 merks Scots." Having failed to pay and perform what this sentence ordained, Clark was incarcerated in the prison of Ca-nongate; and, soon after, he applied for the benefit of the act 1696.

The Magistrates having "found the prisoner entitled to no aliment," he presented a bill of advocacy, in which it was stated, that a fine or damages, though resulting *ex delicto*, were nevertheless a civil debt, and the imprisonment

in question, it being for that cause, such as by the express terms of the statute entitled the complainer to the benefit claimed. To this plea was opposed the judgment of the Court in the case of Macleslie, 23d November 1738, No 128, p. 11810, where it was found, that all damages arising *ex delicto*, were comprehended under the exception of the statute respecting "prisoners for criminal causes," whom it declares "to be in the same state as formerly."

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The Lord Ordinary on the bills reported the bill and answers to the Court, who were unanimously of opinion, that the precedent in the case of Macleslie ought to be departed from; and that damages, though *ex delicto*, awarded to a private party, were, in the sense of the statute, "a civil cause of imprisonment."

Some, though not a majority of the Judges, thought that the fine decreed to the procurator-fiscal was to be viewed in the same light. As to "the caution for keeping the peace," there was no doubt entertained of the borough being bound to aliment the prisoner while confined on that account.

In consequence of the opinion of the Court, the Lord Ordinary pronounced this interlocutor: "Refuses the bill; but remits to the Bailies of Canongate, with these instructions; *imo*, That they find, that if the private party detain the complainer in prison for payment of the three pounds awarded to him, he must aliment him in prison while he is so detained; *2do*, With respect to the forty shillings of expenses, that they find, that if the procurator-fiscal shall detain Clark in prison for payment of that sum, he shall be obliged to aliment him in prison while he is so confined; and, *3tio*, With respect to the one pound of fine, independent of the expenses foresaid, that the procurator-fiscal shall be at liberty to detain the complainer in prison till that sum be paid, without being obliged himself to pay him aliment while so detained."

Reporter, Lord Alva. Act. Solicitor General. Alt. J. Anstruther, jun.

C. Fol. Dic. v. 4. p. 141. Fac. Col. No. 10, p. 18.

1790. May 27. ROBERT AITKIN *against* WILLIAM GRAY.

GRAY, in consequence of an application by Aitkin, from whom he rented a farm, stating, that he had fraudulently disposed of his effects, for the purpose of disappointing Aitkin's right of hypothec, was committed to prison by the Judge-Ordinary, there to be detained until he should find security for the rent due by him.

Gray was afterward arrested in prison by another creditor. Having brought a process of *cessio*, he was opposed by Aitken; and the Court considering his conduct to have been extremely culpable, dismissed the action. He then applied to the Magistrates of the borough in which he was confined, for an ali-

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A person to whom a *cessio bonorum* had been refused, admitted to the benefit of the act of grace.