No 97. gress of writs, and ratified this right. But if the pretence of estates being under factories were enough, it would be a protection to the most part of the bankrupts in Scotland.

Fol. Dic. v. 2. *p.* 173. *Fountainhall, v.* 1. *p.* 650.

1707. *November* 4. DR SCOT *against* His CREDITORS.

No 98. DR ROBERT SCOT, late Dean of Hamilton, craves a suspension against several of his creditors, on this reason, he had made a general disposition *omnium bonorum* in their favours of all his estate, both real and moveable; upon which most of them had given him a supersedere not to trouble his person, seeing he was hopeful to recover a coal on his lands of Kinglassie, that would satisfy all his debts. *Answered*, We never accepted of your disposition, nor have any benefit by it; neither are we consenters to the supersedere, and so the reason can never militate against us. THE LORDS thought this a protection on the matter, and therefore refused the bill, as they did also to Cornwall of Bonhard, against Janet Pitcairn and others of his creditors, for the same reason. If they had offered caution, it is likely their bills of suspension might have been granted, for the creditors thereby got an additional security; but they were both craved on juratory caution, and were therefore refused.

Fol. Dic. v. 2. *p.* 171. *Fountainhall, v.* 2. *p.* 390.

1751. *November* 19. MALLOCH, Petitioner.

No 99.
A *cessio bonorum* refused, so far as it related to an assythment for murder.

DAVID MALLOCH, who, by the sentence of the Court of Justiciary, was convicted of the murder of John Fulton of Auchinbathy, having obtained a remission, the Court of Justiciary refused to admit the same until caution should be found for such assythment as should be modified by the Exchequer; and that Court having modified L. 100 Sterling, for which he *alleged* disability to find caution, he pursued a *cessio bonorum* before the Court of Session, in which the widow of the deceased compeared and *objected* to the *cessio*, so far as the same might relate to the assythment.

And accordingly, the LORDS found, "That the *cessio bonorum* could take no place, in so far as concerns the assythment;" and refused a petition against that interlocutor without answers.

The *cessio bonorum* is a privilege only granted to debtors in civil debts, and not to such as come under debts for their crimes. The act of grace also proceeds upon the same analogy. If a *cessio* should extend to such a case, a beggar might *impune* commit such crimes as only infer damages, as he might, next breath after sentence, get free by a *cessio bonorum*. In like manner, the order-

ing insolvent persons to find caution in a lawburrows would be of no effect. It was also *observed*, That the very reason of the Court's requiring caution was to supply the debtor's insolvency. What the case might be, were caution found, and both he and his cautioner should become insolvent after the remission were admitted, is not so clear; but at present there was no doubt, for, besides what has been observed in general, till caution is found, the assythment is not so properly a debt, as it is a quality or condition of the remission. No 99.

N. B. At pronouncing the sentence of death in the Justiciary, and while there was no thought of a remission, a question was stirred, Whether the escheat ought not to be burdened with an assythment? Which passed in the negative, as a thing quite unprecedented and irregular.

Fol. Dic. v. 4. *p.* 139. *Kilkerran,* (BANKRUPT.) *No* 17. *p.* 66.

*** D. Falconer reports this case:

DAVID MALLOCH, an excise officer, was condemned to death for the murder of John Fulton of Auchinbathy; and having obtained his Majesty's pardon, the Lords of Justiciary, upon his *pleading* it, committed him to prison, till he should find caution to pay to the relations of the defunct an assythment, to be modified by the Barons of Exchequer; which they modified to L. 100 Sterling.

David Malloch pursued an action of *cessio bonorum*, calling the relict and children of Auchinbathy.

Pleaded in defence; The action of *cessio bonorum* is derived from the civil law, by which it is not competent to any who is *debitor ex delicto.*

The right of assythment is to be deduced from the manners of the northern nations, amongst whom a large liberty was indulged of private resentment; as persons not subject to any common government are necessitated to resent their own injuries, so even under government it was difficult to hinder this in a rude warlike people; and it was a modification of this licence, that the injured behoved to be appeased on the payment of a valuable consideration. Tacitus de moribus Germanorum, says, " Suscipere tam inimicitias, seu patris seu propinqui, necesse est; nec implacabiles durant; luitur enim etiam homicidium certo armentorum ac pecorum numero; recipitque satisfactionem universa domus." Assythment was amongst us called *Cro*; so says Skene on that word; " *Cro* is an satisfaction or assythment for the slaughter of ony man;" and the *Cro* of the several orders of men is settled by a number of cows, L. 4. c. 36. Reg. Maj. That the assythment is not the damage, but the price of the resentment, that is indulged to the party, is clear from this, that no assythment is due when punishment is inflicted; and this being the right of the party, hence the King could not grant any remission, unless he was satisfied, act 46. Parl. 2. Ja. I.; act 74. Parl. 14. Ja. II.; act 94. Parl. 13. Ja. III.; act 7. Parl. 3. Ja. V.; act 136. Parl. 8. Ja. VI.; act 135. Parl. 12. Ja. VI.; act 169. Parl. 13. Ja. VI.;

No 99. act 174. ibid. The manner of securing this right is differently modelled by these acts; sometimes the remission is not to be granted till he is satisfied; afterwards it was to be null, unless satisfaction were made; and though by the present custom, the capital punishment is not executed, yet the person pardoned has not the full benefit of it, but is kept in prison till he assyth the party. The pursuer is committed by the Court of Justiciary till he find caution; and the Court of Session cannot vary their judgment, by liberating him upon a *cessio bonorum.*

Answered, The nature of this right, as it makes part of our present law, is rather to be gathered from the civil law, which we have adopted into ours, than from these antiquated barbarous customs. By that law, besides the public prosecution of a crime, there was competent to a party lesed an *actio in factum* for the reparation of his damage; and that assythment is of this nature, appears from the act 94. Ja. II. which is for the assythment only of theft and spoliation. The pursuer is detained till he obtemper the law for his debt; and this he does, either by payment or the *cessio bonorum;* so there is no impinging by one court on the jurisdiction of another; if the words of the commitment were to be so strictly interpreted, payment would not be sufficient, for it is made till he find caution.

Observed, That if the defender had pursued an *actio in factum*, and obtained decreet, perhaps a *cessio bonorum* would have been competent; but here the prisoner was committed till he should find caution, and the Court could not liberate him: That it might be questioned whether any action could be pursued; for there was no instance of any, except after bond and caution given, which made a debt; but here there was no debt, but the assything the party was a condition of the pardon, the benefit of which was not to be allowed the prisoner till he obtempered it.

THE LORDS, 12th November, found that the process of *cessio bonornm* could not take place against the claim of the defenders, which was an assythment; and this day refused a bill and adhered.

Act. *H. Home* & *Lockhart.* Alt. *W. Grant* & *Miller.* Clerk, *Gibson.*

D. Falconer, v. 2. *No* 130. *p.* 279.

*** Lord Kames also reports this case:

DAVID MALLOH, officer of excise, being tried before the Court of Justiciary for the murder of John Fulton, was found guilty, and sentence of death was pronounced against him. Having obtained the King's pardon, the same was presented to the Court of Justiciary, and admitted in common form. But an application having been made to the Court for an assythment, at the instance of the relict and children of the deceased, David Malloch was appointed to be carried from the bar to the Castle of Edinburgh, there to remain till he should find caution for the assythment. And, in the same interlocutor, there was a

remit to the Barons of Exchequer, to modify the assythment. The Barons having modified L. 100 Sterling, without regard to the prisoner's circumstances, he was forced to bring a *cessio bonorum* against all his creditors. The relict and children appeared, and proponed the following defence: That the process of *cessio bonorum* is not competent against them as creditors for the assythment. The point being new, produced a hearing in presence; and an interlocutor was given, finding, That the process of *cessio bonorum* cannot take place against a claim of assythment. The pursuer reclaimed, and *insisted* upon the following topics. No 99.

Personal execution in our law rests upon no other foundation, but the jealousy the law entertains of concealment; and the sole purpose of it is to force the debtor, *squalore carceris*, to make a full discovery of his effects. This is the very language of Lord Stair, B. 4. tit. 52. § 31. of his Institutions; whence it appears to be a necessary consequence, that if upon trial taken, it be found, that there is no concealment, but that the prisoner is really bankrupt and unable to pay his debts, he must of course be entitled to his personal liberty. The *cessio bonorum*, therefore, is a remedy at common law, arising from the very nature of personal execution; and accordingly, it appears to be of a very old standing, mention being made of it in our oldest law-books as a known and established remedy; for which see Quon. Attach. c. 7.; Stat. King William, c. 17. Hence liberation, in this case, is not to be put upon the footing of compassion, which the Judges may listen to or not, according to circumstances. Imprisonment *per modum pœnæ* stands by itself; but every man who is detained in prison for no other cause but inability to perform his engagements, is entitled to be liberated upon the principles of common law.

And here it must be observed, that all the arguments drawn from the Roman law to this case, are misapplied. By the law of the Romans, the person of the debtor was subjected, like his effects, to execution; he became the creditor's property if he had not other effects to satisfy; he could be sold like any other slave, and nothing was more common in the early ages of the republic than to detain a debtor *in privato carcere*, and to whip and torture him, upon the slightest surmise of concealment. This severe law, fit only for a barbarous age, lost its force gradually as manners improved, though it was never formally abrogated. The *cessio bonorum* among the Romans was one of the remedies invented to soften the rigour of their common law; which therefore, in its beginnings, was only admitted where the circumstances were favourable; though afterwards, gaining strength by degrees, it was more easily indulged. But still being a remedy contrary to the common law, it is no wonder that distinctions were made, and the privilege refused where personal objections lay against the prisoner of any weight.

But to shew that our law stands upon a very different footing, the act 5th Parl. 1696 is appealed to, discharging to dispense with the dyvor habit, except in the case of innocent misfortune liquidly libelled and proved. Hence it is no

No 99. good defence against the *cessio bonorum*, that the prisoner was a squanderer, and entrapped creditors by borrowing money after he knew himself to be bankrupt, though these facts are undoubtedly criminal. These facts might subject the criminal to wear the dyvor habit, but they could afford no good defence against the *cessio bonorum*. And so says Lord Stair, Book 4. tit. 52. § 34. speaking of the dyvor habit: "The reason of which severity is to deter decocters who lavishly spend their estates, and continue trade when they know themselves absolutely broken. And therefore the law exeems some from wearing this habit, upon their proper knowledge or famous testificates, that they became poor without such faults." And indeed, from the nature of the thing, such transgressions are not to be regarded in a *cessio bonorum;* these transgressions may produce criminal proceedings, which is a separate matter; but where a man stands imprisoned for failing to pay his debt, nothing else is to be regarded in the *cessio*, but whether there be any concealment. If it be found that the prisoner is really a bankrupt and has no means, he is of course entitled to his liberty; because imprisonment in common cases is only a tentative remedy to force a debtor *squalore carceris* to make a full discovery of his effects. And by the way, this is the foundation of the act of sederunt 18th July 1688, declaring, that this process shall not be sustained unless the debtor has been a month in prison, which is judged a sufficient time to make him discover his effects, if he have any. The pursuer proceeded to the objections stated for the defenders, the first of which was, that the pursuer is imprisoned *per modum pœnæ*, to which case the *cessio bonorum* reaches not; and that he can have no legal means of acquiring his liberty, other than paying the sum modified in name of assythment. To this it was *answered*, That the crime and the punishment were done away by the pardon; nor was it in the power of the Court of Justiciary, after admitting the pardon, to inflict any punishment whatever for that crime. It is true, the pursuer was remitted to prison till he should find caution to satisfy his party; and most justly, because, as the relict and children had his person secure for their claim, the Court could not withdraw that security from them; there was really no more done in this case than if the pursuer had been arrested in prison for a civil debt; in which case, the Court would not have liberated him upon payment of the assythment, but would have returned him to prison till he should also satisfy the other creditor, leaving him to obtain his liberty in the common course of law.

Some old statutes concerning remissions were strongly insisted on; the last of which only was taken under consideration, because the rest are all temporary. It is the 178th act, Parl. 1593, enacting, "That no respite or remission be granted hereafter to any person at the horn for theft, reif, slaughter, or burning, until the party skaithed be first satisfied; and if otherways granted, to be null by way of exception or reply." And from this statute it was inferred, that the assything the party is a statutory condition of the pardon, which cannot be effectual without it; and therefore, that the pursuer must still be un-

derstood to be in prison *per modum pœnæ* till the sum modified for assythment be paid. This argument, by proving too much, proves nothing at all; for, at that rate, though the pursuer has obtained his Majesty's pardon, and though the same stands admitted in the Court of Justiciary, and all officers of law discharged to put the sentence in execution; yet all these proceedings are to have no effect; the pardon is null in law, and the pursuer lies open to have the criminal sentence inflicted upon him. Nay further, if this argument hold, it would not be sufficient that the pursuer had found caution in terms of the interlocutor of the Justiciary Court; for if the cautioner had become bankrupt before the modification, or after it before payment, the pardon would be null, because the act says that the pardon shall have no effect till the party be first satisfied. And still further, the pardon would be null, suppose the pursuer had found caution as appointed by the Court, and was ready, with his money in his hand, to pay the sum modified; for the act expressly bears, that no remission be so much as granted till first the party's skaith be satisfied. These points, coming all of them under the words of this statute, are certainly not held at present to be the law of Scotland; and therefore, the pursuer may with confidence plead, that this statute is in desuetude; which he has the better reason to affirm, when it is considered that none of the remissions that have been granted for many years past, are in terms of the statute. No 99.

In the next place, supposing the statute in force, it will not aid the defenders. For it is specially required in the statute, that they appear in Court to plead the nullity; the objection must be moved by way of exception or reply; and therefore, if the defenders have allowed the pardon to be admitted, without moving the exception, it is now too late to move it. There is no form known in the law of Scotland for overturning the proceedings of the Court upon such a pretext, much less for moving this objection in another Court, as is done at present. And were this exception still entire, and competent to be proponed in the Court of Session, neither of which are true, what would be the consequence? Why, that the Lords should find a pardon, admitted by the Court of Justiciary, to be void and null, and that the pursuer still lies open to have the sentence of death executed against him.

And now, if it cannot be maintained that the pursuer remains in prison *per modum pœnæ*, there is an end of the question. For it was the opinion of the Court, that had the pursuer once obtained his liberty upon finding caution, and been again imprisoned upon a decree taken against him for the assythment, he would in that case be entitled to the benefit of a *cessio bonorum*. The claim of assythment, therefore, has no peculiar privilege that can get the better of common law; and if the pursuer be not in prison *per modum pœnæ*, the *cessio bonorum* must have its effect. And for illustration's sake, the following case was put. By the law of Scotland assythment is due upon casual homicide, and even upon homicide for self-defence; let us suppose a man tried for murder, while in prison, but at last acquitted upon self-defence; yet the Judges would

No 99. remand him to prison, till he should find caution to assythe the party. Surely it will not be pleaded, that in this supposed case, the claim of assythment would be a good defence against a *cessio bonorum*; yet this in effect is the same case with the present; for, by the pardon admitted in the Criminal Court, the pursuer is as effectually acquitted as he would be by the sentence of the Court, in case an exception of self-defence had been sustained to him and proved.

The pursuer in the last place *insisted*, That *esto* he were in prison *per modum pœnæ*, he would, notwithstanding, be entitled to his liberty upon a *cessio bonorum*. Upon that supposition, his case would be the same with that of a delinquent, who is incarcerated till he pay a fine; and he endeavoured to prove that this man has the benefit of a *cessio bonorum*. A fine or amerciament, from its nature, ought to be in proportion to the man's substance, so as not to touch his heritage, Reg. Maj. lib. 2. cap. 74. § 7. because otherwise it would in effect be a greater punishment than is intended; and at the same time, a punishment upon the poor not upon the rich. When then a delinquent is imprisoned till he pay a fine, nothing is less intended than perpetual imprisonment; the fine being proportioned to his substance, it is understood to be in his own power to liberate himself from imprisonment. And therefore, if, by misfortune, he become bankrupt while he is in prison, so as not to be able to pay the fine, he ought, even in that case, to be admitted to a *cessio bonorum*; otherways this absurdity must follow, That a sentence, by which only a temporary imprisonment was intended, shall, without the fault of the prisoner, be converted into perpetual imprisonment, the severest of all punishments.

This petition was refused without answers.

As the Judges seemed not to agree in their notions of this case, it is not easy to say what ought to be considered as the *ratio decidendi*. If the judgment is according to law, it must stand upon the following foundation, That by the original law of this land, the party injured is entitled to take revenge at his own hand, unless the delinquent give satisfaction by paying a sum commonly known by the name of *Vergelt*. Therefore, if the sum be not paid, the right to be avenged of the criminal remains entire, which may be exercised by keeping the criminal under perpetual imprisonment; the party injured being barred by the pardon from avenging himself in any other manner.

This reasoning might have been well founded two centuries ago, but is scarce agreeable to the manners of a civilized nation. The King's pardon takes away the crime with regard to the public. By the very nature of the law of vergelt, the party injured ought to accept a moderate satisfaction in money conformable to the circumstances of the criminal; and therefore, upon the same principle, ought to give up his resentment altogether, if the criminal be a beggar and have nothing to pay. And the brutality of detaining a poor wretch under perpetual imprisonment, for no better reason than that he is a beggar, ought not to be indulged.

N. B. The present case can seldom occur, if Judges act according to law, which is to modify the assythment in proportion to the circumstances of the criminal. But oversight in the Barons of Exchequer modifying L. 100 without regard to Malloch's circumstances, brought on this intricate question. No 99.

Rem. Dec. v. 2. No 126. p. 266.

1752. *February* 20. JOHN DRYSDALE, Merchant, in Alloa, Supplicant.

No 100.
The dyvour's habit cannot be dispensed with, where the man who has obtained a *cessio*, has become bankrupt by smuggling.

BY act of Sederunt, 18th July 1688, it is declared, that the dyvours habit is not to be dispensed with, except in the case of innocent misfortune, liquidly libelled. And, by act 5th, Parl. 1696, the Court is discharged to dispense with the habit, unless the bankrupt's failing through misfortune, be libelled, proved, and sustained. In a *cessio bonorum*, the pursuer condescending that he became insolvent by smuggling; and craving to have the habit dispensed with, without a proof, because the fact was well known to his creditors, who made no opposition; it occurred to the Lords, that a bankruptcy occasioned by smuggling, is far from being an innocent misfortune; and, upon that medium, they refused to dispense with the habit. They did the like, 6th December 1768, in a *cessio bonorum*, John Creighton *contra* His Creditors. See APPENDIX.

Fol. Dic. v. 4. p. 138. Sel. Dec. No. 2. p. 3.

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

JOHN DRYSDALE, a merchant, became bankrupt, and being laid in prison for debt, he brought a *cessio bonorum*. His creditors did not oppose him, neither did they make any objection to the condescendence of losses given in by him, or to the honesty of his character: But a doubt being moved by the Court, whether his wearing the dyvour's habit could be dispensed with, unless he should bring a proof of his losses; he was allowed to bring a proof of the verity of the condescendence; upon which, he applied to the Court, setting forth, that his insolvency was chiefly occasoned by seizures of his smuggled goods; but that if a proof of this was required, the Court could not expect a very accurate one, because dealers in smuggled goods use so much art to conceal their property in such goods, that it becomes next to impossible to prove their property. However, upon the footing that his allegations were true, he hoped, his concern in smuggling would not alone be a sufficient reason for refusing to him, what was never refused to any bankrupt, where the creditors did not, upon just suspicion of fraud, insist on a strict interpretation of the act of 1696, William, Sess. 6. cap. 5. That this was the more reasonable, as he produced certificates of an honest character in other respects.