

No 100.

THE LORDS were of opinion, that seeing the losses were occasioned by so pernicious a practice, they could not dispense with the strictest interpretation of the act of Parliament.

“ They refused to dispense with the habit.”

Act. *And. Pringle.*

Clerk, *Kirkpatrick.*

S.

Fac. Col. No 4. p. 7.

* * * Kilkerran also reports this case :

IN the *cessio bonorum* pursued by the said Drysdale, the LORDS refused to dispense with the habit, in respect, the losses in trade, condescended on by him, were losses in the smuggling trade, which could not be considered as an innocent misfortune.

Kilkerran, (BANKRUPT.) No 18. p. 66.

1764. *February 18.*

THOMAS SMALL *against* Sir JAMES CLERK of Pennycuik, Bart.

No 101.

Debtor incarcerated on a decree for a penalty incurred by transgressing a prohibition, not excluded from the benefit of a *cessio*.

THOMAS SMALL, when in Loanhead, a village belonging to Sir James Clerk, in 1761, imported, and vended there, great quantities of ale brewed without the barony, to the prejudice of the brewer licensed by Sir James.

Upon this, the baron-bailie issued a prohibition, which Small not having regarded, Sir James preferred a complaint against him to the Sheriff, concluding for L. 20 Sterling damages, sustained by the importations already made, and for a prohibition in time coming, under a penalty of L. 20 Sterling; for all which he obtained decret in absence.

Small offered a bill of suspension, which was passed as to the damages, but refused as the prohibition; however, he continued to sell ale as formerly, and Sir James again complained of him to the Sheriff as before. Small appeared, and proponed defences against this complaint, which, upon taking a proof, were over-ruled, and he was decerned to pay Sir James L. 5 of restricted penalty, for importing and vending.

Small attempted a suspension of this judgment; but the bill was refused; and as he, notwithstanding, continued to sell foreign ale, Sir James incarcerated him upon the Sheriff's decret.

Small presented a bill of suspension and liberation, which was refused. He then applied to the Magistrates of Edinburgh for the benefit of the act of grace, which they would not grant, thinking him *debitor ex delicto*; but Small complained by an advocacy, which was reported by the Lord Ordinary on

the bills, and the Court remitted to the Magistrates to allow him an aliment; upon which they modified him 4d. a-day.

No 101.

Small thereafter insisted against Sir James Clerk and others in a process of *cessio*, which was opposed only by Sir James, who *pleaded*, That the pursuer had not become insolvent by misfortunes, but by his own perverse and litigious behaviour, and had been imprisoned, not for a civil debt, but for open contempt of authority, and a penalty arising *ex delicto*, consequently that he ought not to be found entitled to a *cessio*, it being an established point, that no person decreed in penalties or fines, on account of delinquencies, is entitled to that benefit; l. r. § ult. D. De pœnis; Voet comm. ad Pand. lib. 42. tit. 3. § 5; Lord Bankton, vol. 3. p. 18. § 3.; 23d November 1738, William M^cLeslie, Section 3. b. t.

At the same time, Sir James did not insist that the pursuer should be detained in prison, (where he cost him 4d. a-day), but only, to prevent his being afterwards troubled with him, that he should find caution, or judicially enact himself not to keep a house, nor import or vend ale in Loanhead, or any other part of Sir James's estate.

Pleaded for Small; That he was originally bred, and had for many years wrought as a journeyman taylor in Edinburgh; but, being disabled by sickness, was obliged to take a house and yard in Loanhead, where he sold ale, which he at first bought from Sir James's brewer, but afterwards from others in the neighbourhood, who supplied him with better and cheaper liquor. The retailing ale was certainly innocent and lawful, and his being unable to understand, or unwilling to acknowledge the exclusive privilege claimed by Sir James, was neither a crime or a delict, or otherways every man who succumbed, and was decreed in costs of suit, would be debtor *ex delicto*, and excluded from a *cessio*. The authorities quoted by Sir James do not apply; for they all refer to proper crimes or delicts, for which a pecuniary punishment had been inflicted in place of a corporeal one; but it will not be pretended, that the pursuer has done any thing for which he could have been pilloried, whipped, or banished, much less perpetually imprisoned, which must be the consequence of dismissing this process. It is a mistake, to say he was committed by the Sheriff for contempt of authority; he was thrown into jail by Sir James, in virtue of diligence done in the ordinary way on the Sheriff's decret, and the sum for which decret was obtained against him is, L. 5 of restricted penalty, that is, L. 5 of liquidate damages, which are a civil debt, and do not, like a fine, arise *ex delicto*; and, if Sir James's arguments were good, every person imprisoned on a charge for the penalty of a tack, bond, or contract, might be detained for ever in prison, upon pretence of being debtor *ex delicto*; and, as to Sir James's demand of caution, or an enactment, that the pursuer shall not live in any place on his estate, it is new and unreasonable, the pursuer having done nothing to merit banishment from any part of Scotland.

No 101. "THE LORDS, in respect, that the sum for which the pursuer is imprisoned, was not imposed upon him as a fine for a delict, but is a civil debt, adhered to their former interlocutor, and refused the desire of the petition."

Act. *M^rLaurin.*Alt. *Rae.*Clerk, *Pringle.*

J. M.

Fol. Dic. v. 4. p. 139. Fac. Col. No 135. p. 316.

1768. March 5.

JAMES GRIERSON *against* CAMPBELL and Others, His Creditors.

No 102.

Whether half-pay must be assigned to creditors in a *cessio bonorum*.

JAMES GRIERSON, a Lieutenant in the Navy, upon half pay, having brought a process of *cessio bonorum*, some of his creditors insisted that he should surrender his half-pay.

Pleaded for the Creditors; The benefit of the *cessio bonorum* is introduced into our law from the civil. The text of that law allowed of no exception from the surrender by the bankrupt; and the only exception admitted by the commentators is his wearing apparel. Adeo autem (says Voet) bonis omnibus cedere debitorem oportet, ut jure quidem civili nihil omnino sibi servet, præter vestem viliores et quotidianam. De cætero non præsentia tantum bona cedi necesse est, sed et futura, si modo talia sint quæ jam spe acquisivit; Voet, De cessione, bon. § 7. He had indeed the beneficium competentiæ; but this was only of any effects he might afterwards acquire. Cedit debitor creditoribus (says Struvius) omnia sua bona, ita ut ipsi nihil præter vestes quotidianas, sub quibus et lectum comprehendunt, relinquatur: Ne quidem alimenta necessaria, quæ tamen ipsi ex bonis postea quæsitis conceduntur.; Synt. jur. civ. ex. 44. § 30.

The ancient Scots law agrees with the civil in both respects. "He who should be made hairman, (*i. e.* liberated upon insolvency) shall swear in court that he has na gudes nor gear attour 5 shillings and an plack. He shall not retene to himself of all his winning and profit, frae that day in anie time coming, but twa pennies for his meat and claith, and he shall give ilk third penny for payment of his debt;" Stat. Will. cap. 17.

It does not appear that the ancient law has been altered; nor is any exception allowed by the writers on our law, from the general disposition by the bankrupt.

It is true, this sum is not arrestable; but it does not from thence follow, that it may not be assigned by the debtor. Sums due by bills of exchange, the future profits of land or money, are not arrestable; yet there is no question, that the creditors are entitled to a conveyance of these.

At any rate, the pursuer ought to assign his half-pay, so far as it may exceed what is necessary for aliment. It was found, that, though an officer's subsistence money was not arrestable, yet the arrears were; 26th January 1715, Captain Brodie, No 45. p. 709. And, as a debtor must convey even certain