

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 alimeted."

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 applicable to persons imprisoned for penalties imposed 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 alimēt, 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-

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.

No 135.

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