

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.

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ment, in virtue of the statute of 1696, cap. 32. The Magistrates having awarded an aliment, Aitkin preferred a bill of advocation, which was passed, and

Pleaded, By our ancient law, a person confined for debt was to be maintained on bread and water, at the expense of his creditor, stat. 2. Rob. 1. c. 19. But if he was imprisoned for some criminal matter, in which the public at large was held to be chiefly interested, he was to be maintained at the public expense, or, what is the same thing, out of the funds appropriated to royal boroughs, for this and other necessary purposes. This distinction has been kept up by the statute of 1696. Those who are imprisoned for a civil debt or cause, may require the party at whose suit they are detained, to give them a moderate allowance, otherwise they are to be released; but the situation of prisoners for criminal causes, is declared to be the same as formerly. In the construction of this statute it has been held, that persons confined for any illegal proceeding, in consequence of which they are liable in damages to a private party, cannot be benefited by it. Surely then it cannot be thought that any indulgence ought to be shown, where the cause of imprisonment is a fraud of so palpable a nature, as to preclude the guilty person from the benefit of the *cessio*. Erskine, B. 4. Tit. 3. §. 28.

Answered, The distinction pointed out in the statute, is evidently between criminals confined to prison, either in order to trial, or for undergoing some public punishment, and debtors imprisoned for non-performance of an obligation, for which they may be sued in the civil courts. Even although this obligation may have arisen from some culpable act, still, if, in consequence of his poverty, the prisoner is unable to provide for his own support, the Legislature seems to have thought that the loss arising from thence ought rather to fall on those who have occasioned his confinement, than on the royal boroughs, who must otherwise be subjected to it. Although a different construction has sometimes been given to the statute, this ought not to exclude a determination more agreeable to its true meaning*.

The Lord Ordinary remitted the cause *simpliciter*, and found expenses due.

And after advising a reclaiming petition, with answers, the LORDS affirmed the judgment of the Lord Ordinary.

Ordinary, *Lord Stonefield*. Act. *Maconochie*. Alt. *Tait, Wemyss*. Clerk, *Sinclair*.

G. *Fol. Dic. v. 4. p. 140. Fac. Col. No. 134, p. 263.*

* See 7th December 1787, Clark *contra* Johnston and others, No 135. p. 11818.

See DELINQUENCY—ABBAY OF HOLYROODHOUSE—SANCTUARY—APPENDIX.