



prisoned, *civiliter*, for damages arising *ex delicto*, it has, in no case, been given where the pursuer has been imprisoned by the sentence of a Judge, which must be literally carried into execution, unless it be altered by a superior court.

No 113.

*Answered*; Imprisonment awarded, till payment of a sum of money, whether to a private party or public prosecutor, takes place, not *in modum pœnæ*, but is the consequence of poverty, and therefore the case comes to be the same as where damages, arising *ex delicto*, are awarded in a civil action, and the defender is imprisoned, in the ordinary course of diligence, in which case the benefit of *cessio* is undoubtedly competent; 18th February 1764, Small, No 101. p. 11782. 5th March 1791, M'Dowall, No 110. p. 11793. 15th January 1794, Douglas, No 112. p. 11795.

Upon advising notes of precedents for the parties, the Court came to be of opinion, that there was no room for making any distinction between a fine to a private party and damages awarded to him *civiliter ex delicto*; and that, upon the principle of the decision Douglas against her Creditors, there was so far no ground for refusing the *cessio*; but they seemed disposed to refuse it, or, at least, to order further argument, on account of the fine to the Procurator-fiscal, upon which the pursuer's agent paid the fine at the Bar.

THE LORDS unanimously decerned in the *cessio*, and dispensed with the habit.

Act. *Inglis*.Alt. *W.-Baird*.Clerk, *Colquhoun*.

D. D.

*Fac. Col. No 191. p. 462.*

1798. March 9.

JOHN SMITH *against* his CREDITORS.

JOHN SMITH having been imprisoned, at the instance of one of his creditors, immediately executed a summons of *cessio bonorum*. The creditor consented to his liberation after he had been about a fortnight in prison. He, however, remained there, (having got another creditor to arrest him, on diligence which turned out to be wholly inept), and persisted in the action.

Some of his creditors, *inter alia*, objected, That the process was incompetent, as the diligence against him had been withdrawn before he had been a month in prison; Act Sed. 18th July 1688.

The pursuer *answered*; That, in the course of the preceding year, he had been six times imprisoned by his creditors; who, on purpose to harass him, and at the same time prevent him from getting a *cessio*, had always consented to his liberation before he had been a month in prison; but that, as the summons, in this case, had been executed before the consent was given, the objection was ill-founded; 3d February 1779, M'Kenzie against his Creditors, No 106. p. 11791.

THE COURT, upon advising a condescence, objections, &c. thought that, in the circumstances of this case, the process was incompetent. It was, at the

No 114.

An action of *cessio bonorum* is incompetent, where the creditor has consented to the liberation of the debtor before he has been a month in prison.