No 112.

THE COURT unanimously ordained the pursuer to give in a disposition omnium bonorum, with the reservation of L. 45 yearly out of her annuity for her aliment, until her debts be paid.

Act. Dean of Faculty Erskine, Cullen, Tait, D. Douglas.

Ferguson, junior.

Alt. Geo. Ferguson, James Clerk, Home.

Clerk, Home.

Pol. Dic. v. 4. p. 140. Fac. Col. No 88. p. 195.

*** In estimating the quantum of aliment, the court had in view both the extent of the pursuer's funds, and of the debt due by her.

Her funds consisted of L. 372: 10s., with some interest due upon it, and of L. 115 per annum, during her life.

The debt due to the incar	cerati	ng cre	ditor was	for dam	ages	L. 100	0	0.
The expenses of process		-	-	-	-	6 88	0	,0
Expense of extract	-	-	-	-	**	. 106	13	8
•						L. 894	13	<u></u> 8

The Court had found Mr Baillie, the pursuer's husband, conjunctly liable with her for the expense of process, and of extract, No 299. p. 6083.; but, in consequence of a remit from the House of Lords, the obligation against him was restricted to L. 500 of the expense of process, and a proportional part of that of extract. L. 100 was afterwards deducted, on account of certain counter claims which he had against the defender. The question of aliment was determined on the 8th February 1794.

1795. December 12.

WILLIAM LAW against DANIEL DEWAR and WILLIAM SPROTT.

No 113.

A person found entitled to the benefit of a cessio bonorum, who was imprisoned by the sentence of a Judge till payment of a fine to a private party.

Daniel Dewar, with concurrence of William Sprott, Procurator-fiscal of the city of Edinburgh, presented a complaint to the Magistrates against William Law for an assault. The Magistrates fined Law L. 5 to the private complainer, and L. 2 to the Procurator-fiscal, and ordered him to be imprisoned till payment.

Law afterwards brought a process of cessio bonorum, which was opposed by Dewar and Sprott, his only creditors, who

Pleaded; Strictly speaking, a cessio bonorum is competent only where the bankruptcy has been occasioned by innocent misfortune; l. 1. § 3. D. De pænis; l. 35. D. De injur. et fam. lib.; l. 37. D. De minor. Voet ad pandect. lib. 42. tit. 3. § 5.; Acts Sed. 1st December 1685; Bank. b. 4. t. 40. § 3.; Ersk. b. 4. tit. 3. § 27.; 19th November 1751, Malloch, No 99. p. 11774.; 9th August 1781, Stewart, No 107. p. 11792.; 12th July 1785, McCubbin, No 108. p. 11732; And although, in some late cases, the benefit has been extended to persons im-

No 113.

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.

Answered; Imprisonment awarded, till payment of a sum of money, whether to a private party or public prosecutor, takes place, not in modum pænæ, but is the consequence of poverty, and therefore the case comes to be the same as where damages, arising ex delicto, are awared 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, Colquboun.

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 condescendence, objections, &c. thought that, in the circumstances of this case, the process was incompetent. It was, at the

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