

Act. H. Dundas. *Alt.* A. Wight. *Diss.* as to number of cruives,—Gardenston, Kennet, Justice-Clerk, Coalston, Barjarg, President; [who could not vote, as numbers unequal.]

Non liquet, Kaimes.

1769. November 17. ROBERT FULTON *against* ROBERT POLLOCK.

ACT OF GRACE.

A Debtor, liberated upon the Act of Grace, may be again incarcerated at the instance of the same creditor, a process of *cessio bonorum* being the proper remedy.

[*Fac. Col. V.* p. 6; *Dictionary*, 11,815.]

PITFOUR. By constant practice, whenever a debtor is liberated on the Act of Grace, he disposes his effects to his creditors; so that the creditor comes to have a right in them. If a man is once liberated upon disposing every thing, shall the creditor have a power next day to take him up again? No decisions are necessary to prove this, nor any decision capable of proving the contrary. The decision, *Law*, 1709, is in point, for support of this opinion. The decision, *Abercrombie*, points the other way; but that was a singular case: the debtor was a contentious, profligate person, who would rather be alimeted in prison than earn three shillings a-day by his work. He had the audacity to bring a process of wrongous imprisonment against the creditor who re-committed him. The court assoilyied from the wrongous imprisonment. The interlocutor mentions also the finding the letters orderly proceeded: but the debate was as to wrongous imprisonment. [This decision seems not well accounted for.] But, at any rate, this single decision will not alter the law. Can Fulton say that Pollock is possessed of more effects at this moment than he was when set at liberty? If he cannot, what pretence has he for renewing his diligence?

AUCHINLECK. According to Fulton's doctrine, if a man is let out to-day, he may be taken up next day; let out the third; and so on, *ad infinitum*. This would be oppressive, and could serve no lawful purpose.

KENNET. The Act of Parliament was made for the relief of the magistrates of royal burghs. The judgment of the court, in the case of *Abercrombie*, was my rule.

KAIMES. A man's coming out on the Act of Grace, is for the relief of magistrates in royal burghs. There is nothing to hinder the creditor from committing him the next day. As long as a debtor got out without executing a disposition, there was some reason for allowing such second commitment; but now, as a disposition is always required, the creditor ought not to commit again unless he can show new funds.

GARDENSTON. The fraud of debtors is at present a more universal evil than the cruelty of creditors. When a creditor is willing to aliment, the Act of

Grace is out of the question. If the debtor is not satisfied to remain in prison, he may bring a *cessio bonorum*. We must not confound the two reliefs,—that of the Act of Grace and that of the *cessio bonorum*.

COALSTON. Feelings of humanity draw one way; the rigour of the law possibly draws the other way. There are two decisions quoted: the earliest, the most merciful. I would follow it. But here a concealment is alleged, which implies fraud, and would remove every plea of favour.

AUCHINLECK. This is a distressing case. If Fulton has let Pollock out from oversight, he may be allowed to recommit him; but I would not allow recommitment, unless upon an obligation to aliment, until the debtor brought a *cessio*.

KAIMES. If a creditor shows any malevolence in repeating the commitment, the Court may interpose, and require an oath *de calumnia*.

JUSTICE-CLERK. There is no law so favourable to misfortunate debtors as the law of Scotland; no Court which gives a more summary and less expensive relief of *cessio bonorum* than the Courts of Scotland. That is the proper process for doing justice both to Pollock and his creditors. If a disposition, in order to obtain an Act of Grace, is to be equivalent to a *cessio bonorum*, the consequences will be fatal.

COALSTON. The granting the prayer of the petition will not discharge the diligence of other creditors, nor even the diligence of this creditor; for, *causa cognita*, he may still insist for committing his debtor.

On the 17th November 1769, “the Lords found the letters orderly proceeded, reserving to Pollock to liberate himself in an action of *cessio bonorum* ;” adhering to Lord Kennet’s interlocutor.

N.B. A reclaiming petition was ordered to be answered; and the cause was privately adjusted.

Act. W. Wallace. *Alt.* J. Dalrymple.

Diss. Coalston, Pitfour. [Auchinleck did not vote, being in the chair.]

1769. November 22. ROBERT STEWART *against* JAMES MITCHELL.

HUSBAND AND WIFE.

Donation, though a consideration given, which in some measure gave it the appearance of a transaction, yet, being very much to the wife’s prejudice, held to be revocable.

[*Faculty Collection*, V. p. 8; *Dictionary*, 6100.]

BARJARG. From the whole circumstances of the case, this seems a transaction rather than a donation, and I do not see such an inequality in the transaction as is sufficient to set it aside.

HAILES. I consider this as a donation. The wife gave up her probable expectation of £1500 for £250. Even as a transaction there is an excess, and the mutual contract, *stante matrimonio*, will not bind. The difficulty is as to the ratification and implement, by payment of £30 to her niece; that sum was