

1775. February 11.

MESSRS KERR and LOWRIE, ANDREW HANA & Co., and ROBERT M'LINTOCK,  
Creditors of ALEXANDER WHYTE, Merchant in Falkirk, Petitioners.

UPON the 25th of October 1773, Alexander Whyte was incarcerated in the tolbooth of Stirling, at the instance of Kerr and Lowrie for a debt which he owed them. In the beginning of November 1773, he raised and executed a summons of *cessio*, and he was allowed a proof of his libel, &c. in common form. He did not, however, lead any proof, nor indeed take any step whatever in the process of *cessio*; but he made application to the Magistrates of Stirling, upon the act of grace; intimation of which being made to the said Kerr and Lowrie, the incarcerating creditors, and an aliment decerned for, they presented a bill of suspension thereof, in which, after mentioning the process of *cessio bonorum*, which was then in dependence, they observed, that, though in this process, Whyte had given in a condescendence and inventory of his bills, shop-goods, &c. yet, as the effects themselves were still in his own hand, and that no disposition thereof had been granted, it was *pleaded*, That he had sufficient funds for his maintenance, and that, while these funds remained, no aliment ought to be allowed. To this bill answers were given in for Whyte, in which he, on the contrary, alleged, that, by giving in the condescendence and inventory, he had entirely divested himself of any property in the effects therein mentioned; and that, as his whole subjects, in consequence of the proceedings in his process of *cessio*, were locked up in the hands of the Court, he insisted, that the aliment should be sustained, or that he should be liberated in terms of the statute 1696. Upon advising of this bill with the answers and replies, the bill was refused; and the debt due to the incarcerating creditors being in itself not very considerable, they did not think it worth their while to submit to the expense of alimentering him in prison; and, upon their having failed to do so, Whyte was liberated upon granting a disposition *omnium bonorum* to the said Kerr and Lowrie, and his whole other creditors.

The petitioners, after premising the foregoing detail, set forth, that they were considerable creditors to him; but, as the disposition was not only to the said Kerr and Lowrie, but likewise to the whole other creditors, so they were doubtful how far they were entitled to prosecute any of Whyte's debtors, or to take any other step for the recovery of his effects, without the concurrence of all concerned. They, for some time, entertained hopes of being able to obtain either a meeting, or at least such a concurrence of all the creditors as might authorise them to carry on the measures requisite for their common interest. They soon found, however, that this was impossible, by reason of the great number of Whyte's creditors, many of whom are for very small sums, and their places of residence unknown. Whyte himself might indeed have assisted them much in extricating matters, and bringing about the concurrence and co-operation of the whole creditors; but they are sorry to say they did not find him much disposed to give them any aid or assistance.

No 104.  
1. Whether, after instituting a process of *cessio*, lodging a condescendence and inventory of the pursuer's effects, and a proof allowed him, an application for the benefit of the act of Grace is competent? And whether in case of the aliment being sustained, notwithstanding the opposition of the creditor-incarcerating, and, on his default to pay the same, of the pursuer being liberated, on granting a disposition *omnium bonorum*, a summary application to the Court, in name of the creditors, to appoint a factor, is competent, on the ground of the process of *cessio* being still in dependence, and of the bankrupt's effects being in *manibus curie*, or, at least, under the special circumstances of the case?

No 104.

In this situation, the petitioners are laid under the necessity of troubling the Court with the present application.

The funds disposed by Whyte, even supposing them to be made effectual, are very inadequate to the debt which he owes. There is, besides, pretty good reasons to believe, that these funds will fall very much short of the value put upon them; and particularly there is great reason to suspect, that, unless measures are speedily followed for recovering the debts due to him by bills and open accounts, they will not prove of much value. That this may be done, they now presume to apply to the Court, hoping that, considering the peculiar circumstances of the case, they will either authorise the petitioners to act as factors, or name some other persons to act in that capacity upon the bankrupt's effects, and to proceed to the management thereof, so that they may be converted into cash, and distributed in payment amongst the creditors. The petitioners are desiring nothing but what is evidently for the benefit of the whole creditors, and likewise for Mr Whyte himself, if he means fair things; and they are extremely willing, that any person who shall be authorised to act as factor, shall find good security for that management, and to account for every shilling he shall receive.

Neither can the petitioners perceive, that their present summary mode of application is improper or incompetent; for, in the *first* place, it is apprehended, that, in the circumstances of the present case, the effects of the bankrupt may be considered as under the protection and direction of the Court. Whyte the bankrupt, as well as all his creditors, are properly still in Court, as his process of *cessio* is still in dependence; he, in that process, gave in a condescendence of his whole funds, consisting of the very articles contained in the inventory referred to in his disposition *omnium bonorum* granted when he was liberated upon the act of grace. Nay, farther, he did actually produce in the process of *cessio* the whole bills belonging to him, and which are accordingly still in Court. After this, it is apprehended, he had it no longer in his power to dispose of, or put away any other part of his effects. Any attempt of the bankrupt to withdraw or secret them, would be the just foundation of a summary application for redress.

Had the case been, that Mr Whyte had obtained a decree in his process of *cessio*; and, after being out of Court, had refused to deliver his effects in terms of his disposition, it might be very doubtful how far a summary application to make him deliver his effects might be competent; and such seemed to have been the sentiments of the Court, in a case mentioned by Lord Fountainhall, 28th July 1687, Lauder against Trotter\*. It is apprehended, however, that the present case is altogether different from that now quoted; there, the

\* The following are Lord Fountainhall's words relative to this case; Colin Lauder, George Mosman and William Paton, their bill against Janet Trotter was read, craving up the goods disposed by her since she had taken a *cessio bonorum*, on her consigning the said disposition, and that she ought not *lucrari* by retaining these goods. THE LORDS ordained her to be pursued by way of action, v. 1. p. 472.

bankrupt himself was no longer in Court, the process of *cessio* having been finally concluded. Here, however, both the bankrupt and his creditors are properly in Court, his process of *cessio* being still in dependence, and his effects are in some measure in *manibus curiæ*, his books and bills being actually lodged in process, and his whole effects being under the protection of the Court.

No 104.

But, in the *second* place, even supposing that the particulars now mentioned should not be considered as placing the effects of the bankrupt under the direction of the Court; yet the peculiar circumstances of the present case do most justly merit the equitable interposition of the Court, by appointing the petitioners, or any other person that may be thought more proper, factor upon the effects of Whyte, pursuer of the process of *cessio bonorum* above mentioned, and upon the said factor's finding sufficient security for his management, appointing the bills and other vouchers of debt due to Whyte, produced in the process of *cessio*, to be delivered up to him the said factor; and further, authorising him to take all other measures necessary and proper for the management of the bankrupt's funds for the benefit of all concerned.

"THE LORDS refused this application as incompetent;" seeing the bankrupt has already granted a disposition to his creditors *omnium bonorum*, therefore a meeting of the creditors may be called by themselves, and the majority of such meeting may choose a factor.

For Petitioner, *R. Cullen.**Fac. Col. No 156. p. 26.*

1775. November 17. DICK against MORISON and Others.

No 105.

DICK pursued a *cessio*, which some of his creditors opposed, pleading, that he was not entitled thereto; but, at any rate insisting, as upon perusing the proof which he has brought, it appeared his losses, all except some trifles, had been occasioned by smuggling, he must be obliged to wear the dyvour's habit if he shall get out of prison without satisfying his creditors, agreeably to the authority of Mr Erskine, B. 4. tit. 3. § 27, and the decisions in similar cases there cited.

"THE LORDS decerned in the *cessio*, but refused to dispense with the wearing of the habit."

Act. *Geo. Ferguson.* Alt. *J. Boswell.* Clerk, *Tait.**Fol. Dic. v. 4. p. 138. Fac. Col. No 198. p. 135.*

1779. February 3. M'KENZIE against HIS CREDITORS.

No 106.

Tho' the imprisoning creditor consent to the bank...

M'KENZIE was, on the 12th November 1778, incarcerated at the instance of BROWN, and, on the 13th December, executed a summons of *cessio bonorum*.