

1785. July 12.

WILLIAM MACCUBBIN *against* THOMSON and Others, his Creditors.

MR MACCUBBIN, when suing for the benefit of the law in the process of *cessio bonorum*, was opposed by his Creditors, on this ground, That though there had not arisen any suspicion of fraudulent concealment of his effects, yet that his insolvency had proceeded, not from unforeseen losses, but merely from an expensive style of living, unsuitable to his income, and inconsistent with any reasonable prospect of paying the debts he contracted.

The majority of the Court considered the above as a sufficient reason for with-holding that *febile remedium*; and therefore,

THE LORDS found, "That the pursuer was not entitled to the benefit in question."

Act. Honyman.

Alt. H. Erskine.

S.

Fol. Dic. v. 4. p. 140. Fac. Col. No 220. p. 347.

No 108.

The benefit refused, if the bankruptcy be occasioned by extravagance.

1786. March 10. WILLIAM FRASER *against* HIS CREDITORS.

FRASER, a trader, who brought an action of *cessio bonorum*, acknowledged, on being required to produce his books of account, that he had not kept any such; upon which it was

*Observed* on the Bench; That he had thus rendered it impossible to prove, in terms of law, that his bankruptcy had been occasioned by innocent misfortunes; and therefore,

THE LORDS found the pursuer not entitled to the benefit in question.

Act. Corbet.

Alt. Nairne.

S.

Fol. Dic. v. 4. p. 140. Fac. Col. No 269. p. 416.

No 109.

A person in trade who omits to keep account-books, not entitled to the benefit of *cessio*.

1791. March 5. MACDOWAL *against* MOLIERE.

IN an action of damages for seduction, instituted by Catharine Moliere against Macdowal, the Court found her entitled on that account, to a certain sum of money, for which she used ultimate diligence against him. Having been incarcerated at her instance, he raised a process of *cessio bonorum*, in which she appeared, and maintained, that he ought not to receive this benefit to her prejudice, to whom he owed a debt *ex delicto*, for reparation of the injury she had sustained from him.

The Court took notice, that in cases of this kind, there had occurred some contrariety in the decisions. In the case of Malloch, 19th Noyember 1751,

No 110.

One imprisoned for a claim of damages, tho' *ex delicto*, entitled to the benefit of *cessio*, if the bankruptcy arose from other causes.

No 110. No 99. p. 11774, the benefit of *cessio bonorum* was denied to a person whose imprisonment was on account of a debt in name of assythment; and in that of Stewart, 9th of August 1781, No 107. p. 11792, it was in like manner denied, the pursuer having been incarcerated for damages arising *ex delicto*; besides that, in the analogous question concerning the act of grace, a person in prison for damages, Macleslie, 23d November 1738, No 128. p. 11810, and another for statutory penalties, No 134. p. 11817, were found not entitled to that benefit. On the other hand, a person imprisoned until payment of money decreed against him for penalty and damages, was found entitled to the benefit of *cessio bonorum*, 18th February 1764, Small *contra* Clerk, No 101. p. 11782. But it was *observed*, That a principle which had been adopted with respect to people who had been engaged in illicit trade tended to regulate all cases of this nature. If bankruptcy had been the result of smuggling adventures, the bankrupt was refused the benefit in question; whereas, if his situation had been produced by other causes, that circumstance was not deemed sufficient to prevent him from obtaining it. On the same principle, it was added, as in this case the pursuer's insolvency was not owing to the present demand, resulting *ex delicto*, but to a variety of other debts, his action ought to be sustained.

THE LORDS repelled the defence, and found the pursuer entitled to the benefit of the *cessio bonorum*.

A petition reclaiming against this judgment was refused without answers.

Act. *Honyman*.

Alt. *Dean of Faculty*.

Clerk, *Colquhoun*.

S.

*Fol. Dic. v. 4. p. 139. Fac. Col. No 174. p. 356.*

No 111.

1794. *January 25.*

MACKAY *against* HIS CREDITORS.

The pursuer of a *cessio bonorum* allowed to retain a small annuity for his aliment, altho' the donor had not declared it alimentary.

ROBERT MACKAY, a shopkeeper, having become bankrupt, brought a process of *cessio bonorum*.

His chief property consisted in a reversionary interest in the estate of an uncle, which depended upon his surviving certain other persons, and in an annuity which the uncle had left him, under the management of trustees, with power, if they should think it for his interest, (of which they were to be the sole judges,) to advance either the whole or a part of the capital. The annuity had been originally L. 12, but had been reduced to L. 9, in consequence of advances made to him by the trustees.

The creditors contended, that if the trustees should refuse, and the Court should not think proper to compel them to advance the remainder of the capital, the pursuer should be obliged to assign to them the annuity, as the donor had not declared it to be alimentary, or free from the diligence of his creditors.