

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.

The trustees having declined to advance the money, the pursuer stated, That he was one of seven nephews and nieces to whom legacies were left; but the only one to whom an annuity was given, because, from the facility of his disposition, his uncle did not think him capable of providing for himself; and further,

No 111.

*Pleaded*; The annuity was evidently intended for the pursuer's aliment. Besides, it is so small, that the pursuer, who was not bred to any handicraft, is entitled to retain it, as coming under the *beneficium competentiae*; 11th July 1778, Reid against Donaldson, No 5. p. 1392.; 5th August 1788, Pringle against Nielson, No 6. p. 1393. If the creditors should continue to confine him, they would be obliged to give him a greater allowance; and they are evidently interested in his being at liberty and subsisted, as his reversionary interest in his uncle's estate depends upon his surviving other persons.

On advising a condescence, with a minute and answers, it was

*Observed* on the Bench; The trustees cannot be compelled to advance the capital; and as the annuity is very small, and was evidently intended for the pursuer's aliment, and not to be liable to the diligence of creditors, he ought to be allowed to retain it.

The Court unanimously found, That the pursuer was not obliged to assign his annuity.

Act. Patison.

Alt. Gay.

Clerk, Home.

D. D.

Fol. Dic. v. 4. p. 138. Fac. Col. No 99. p. 220.

1794. January 15. HELEN DOUGLAS against Her CREDITORS.

HELEN DOUGLAS, widow of James Baillie, Esq; having been imprisoned by Elizabeth Chalmers, for damages and expenses awarded in an action at her instance, for defamation, brought a process of *cessio bonorum* against her creditors.

In the summons, she stated, that her chief fund for paying her debts, was a life-ent provision settled on her by her contract of marriage; and she concluded, that she should be allowed a part of it for her aliment.

The sums due to the other creditors were trifling; and opposition was made only by Elizabeth Chalmers; who contended, That the pursuer's insolvency having arisen *ex delicto*, she was not entitled to the benefit of the *cessio*.

THE COURT, after hearing parties, ordered memorials; in which, the defender

*Pleaded*; By the rules of common law, a debtor in an obligation of any sort can only be liberated on specific performance, or the voluntary discharge of the

No 112.

A person imprisoned for damages and expenses awarded in an action of defamation, found entitled to the benefit of a *cessio bonorum*, and allowed to retain a part of her jointure for her aliment.