

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.

No 112.

creditor, and must remain subject to legal compulsion, till the one or other is obtained; *Aul. Geb. Noct. att. lib.* 20. c. 1.; Stat. 2. Rob. I. c. 19. § 5.

The privilege of *cessio bonorum*, which is borrowed from the Roman law, and which is known only in those countries which have adopted its system, (Blackst. vol. 2. p. 473. 475.) is to be viewed as an exception, introduced from considerations of equity. With us, as with the Romans, it is competent only when the insolvency has been occasioned by innocent misfortunes; but is denied, not only where, as in the present case, it has arisen from delinquency, and particularly when the application is opposed by the person against whom the offence has been directed, Voet. lib. 42. tit. 3. § 5., D. l. 1. § 3. De pœnis; ib. l. 35. de inj. et fam.; ib. l. 37. § 1. De min., 19th November 1751, Malloch, No 99. p. 11774. 9th August 1781, Stewart against M'Glashan, No 107. p. 11792. 19th December 1789, Shaw,* but even where it has been occasioned by gross folly and neglect, 12th July 1785, M'Cubbin, No 108. p. 11793. 10th March 1786, Frazer, No 109. p. 11793.

Upon this principle, although the act 1696, c. 32. obliged creditors to alimēt indigent prisoners, it was under the express exception, that prisoners for criminal causes should be in the same state as formerly, 24th February 1768, Wright against Taylor, No 131. p. 11813. 23d November 1738, M'Leslie, No 128. p. 11810.

Answered; Imprisonment for debt is permitted by the law of Scotland, solely with the view of forcing a fair surrender of effects, and can be continued no longer than is absolutely necessary for that purpose; Stair, b. 4. tit. 52. § 31.; Kames's Principles of Equity, 3 edit. vol. 2. p. 26. The privilege of *cessio bonorum* has accordingly been recognised from the earliest periods; Quon. Att. c. 7. § 3. Stat. Gulielmi, c. 17. It is not competent to those whose insolvency is occasioned by fraud or gross negligence; because those who have thus dissipated the money of others are, in law, presumed still to have it in their possession. It is not competent to persons ordered to prison till payment of a sum, although to an individual; but this does not arise from the right of the creditor, but because the sentence of the law must be literally fulfilled in that case, in the same manner as if it had ordained a corporal punishment. But wherever there is no concealment of effects, either real or presumed, and the debtor is imprisoned on ultimate diligence, at the instance of his creditors, he is entitled to the benefit of the *cessio*, whether the ground of debt has arisen *ex contractu*, or *ex delicto*; 18th February 1764, Small against Sir James Clerk, No 101. p. 11782. 5th March 1791, M'Dowall against Moliere, No 110. p. 11793. If the Judge had been of opinion that the offence merited imprisonment as a punishment, he would have inflicted it, and limited its duration according to the magnitude of the offence. The law will not allow a creditor, in order to

* Not reported.

gratify his resentment, to inflict an imprisonment limited only by the life of his debtor.

No 112.

The act of grace has little connexion with the present subject. Its sole object was to free the public from the expense of maintaining persons imprisoned at the instance of individuals; and all in that situation are entitled to its benefit, whatever may have been the cause of their imprisonment; 7th December 1787, Clark against Johnston and the Procurator-fiscal of Mid-Lothian, No 135. p. 11810. Even fraudulent bankrupts are entitled to it; 27th May 1790, Aitkin against Gray, No 136. p. 11819.

Observed on the Bench; When a person is imprisoned *in modum pœnæ*, he cannot be entitled to the benefit of the *cessio*; but where damages are awarded against him *civiliter*, though arising *ex delicto*, the decree puts the parties into the situation of debtor and creditor to each other. The debt is a civil one; and the refusal of the *cessio* could only be justified on the supposition that the offence warranted perpetual imprisonment. When the pursuer of a *cessio* has used the money of his creditors, he must account to them for the manner in which it has been employed; and he will not be allowed to state, in his condescence, any loss occasioned by smuggling, or other illegal means. But the pursuer in this case has no property of creditors to account for. Upon this principle, the case of Moliere was decided.

The act of grace applies wherever the imprisonment is at the instance of an individual, whatever be the ground of the obligation. In some early cases, this seems not to have been sufficiently understood.

THE COURT unanimously found the pursuer entitled to the benefit of the *cessio*.

Against the pursuer's claim for aliment, the defender

Pleaded; The pursuer of a *cessio bonorum*, even in the most favourable cases, must assign to his creditors all the transferable property of which he is possessed; and will be allowed to retain a part for his aliment, only where such reservation is necessary for the performance of professional duty.

Answered; As the pursuer's fund for payment of her creditors depends upon her life, and she is unfitted, both by age and education, from earning her subsistence by labour, she must be allowed to retain a part of her income for her aliment.

It is now completely understood, that an officer on half pay, or, in general, any person who has a certain rank in society to support, is entitled to do so; and that the creditors cannot attach what the donor has declared to be alimentary. As the pursuer is the widow of a gentleman, and her funds are intended for her aliment, she cannot be in a worse situation.

Observed on the Bench; When the fund of payment depends upon the life of the debtor, creditors will not be allowed to act emulously and contrary to their own interest, by depriving him of the means of subsistence.

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. Fergusson, James
Clerk, Home.

D. D.

Fol. 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 incarcerating creditor was for damages	L. 100	0	0
The expenses of process	-	-	-
Expense of extract	-	-	-
		106	13 8
		<hr/>	
		L. 894	13 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 pœnis; 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, M'Cubbin, No 108. p. 11732.; And although, in some late cases, the benefit has been extended to persons im-