

No 114. same time, observed, that if the debtor had been fairly in prison for a month, a consent to his liberation after that period would not have barred the action.*

Act. *Moncrieff Thriepland.*
D. D.

Alt. *W. Stewart.*

Clerk, *Menzies.*

Fac. Col. No 69. p. 159.

1799. July 11. JAMES DUNLOP *against* HIS CREDITORS.

No 115.

A cessio bonorum is incompetent at the instance of a debtor within the sanctuary of the Abbey of Holyroodhouse, who has been imprisoned in the jail of the Abbey, by warrant of the Bailie of it, for a debt contracted there.

JAMES DUNLOP having retired to the sanctuary of Holyroodhouse, in consequence of diligence executed against him by the Managers of the Royal Bank of Scotland, he was incarcerated in the jail of the Abbey for a debt of L. 10, contracted during his residence there; but, in consequence of a certificate from a physician, that his health was in danger from confinement, he was immediately liberated on caution; and he returned to his lodgings in the Abbey.

In these circumstances, he brought an action of *cessio bonorum* against his whole creditors. The summons narrated his imprisonment, and that he was 'in danger of being arrested in prison at the instance of the following persons, his real or pretended creditors, viz. Hugh Auld, ironmonger in Glasgow, Alexander Allan, merchant there,' &c.

Appearance was made for the Royal Bank, and James Christie, who, as preliminary objections to the competency of the action, besides stating that the imprisonment of the pursuer was wholly collusive, which was denied on his part, contended,

1mo, That the prison of the Abbey was not of the description required by the act of sederunt 18th July 1688.

2do, That the pursuer's being within the sanctuary, of itself precluded the action.

On the *first* point, the pursuer gave a deduction of the titles to the Abbey of Holyroodhouse; from which he concluded,—The abbots had a jurisdiction of regality over the whole property belonging to them, comprehending a burgh of regality, in which the present site of the Abbey prison was included. When what is now called the burgh of Canongate, and the barony of Broughton, were given off from the Abbey, a corresponding jurisdiction only was disposed, while the original right remained with the abbots over the part retained. It reverted to the Crown with the Abbey at the Reformation; and is now held by the Bailie of the Abbey, in virtue of a commission from the Duke of Hamilton, having right by grant from the Crown; Maitland's Hist. of Edin. vol. 4. p. 323.

* Smith, on the 21st March 1798, was again arrested in prison by another creditor; and having, in the summer Session, applied again, and produced a new certificate, from which it appeared, that he had been *bona fide* in prison for more than a month, the Lords (10th July 1798) found him entitled to the benefit of the *cessio*.

Crawford's Peerage, p. 185.; 26th February 1695, Watson against Baird, No 34. p. 6963. 26th July 1707, 16th June 1708, Tailors of Edinburgh, No 58. p. 1917. 12th June 1708, Cockburn, No. 2. p. 1. The Bailie has accordingly been accustomed, under the title of Bailie of the Regality of Holyroodhouse, to exercise the different branches of jurisdiction competent to the Magistrate of a regality; 12th June 1741, Hamilton against Hallyburton, No 4. p. 3.; Court-book of Holyroodhouse. The prison of the Abbey, therefore, belonging to a burgh of regality, is precisely in terms of the act of sederunt 1688, requiring the pursuer of a *cessio* to have been previously confined to the prison of a burgh; and, at any rate, prisons of burghs are mentioned in the act of sederunt merely by way of example; and the same effects must arise from confinement in any legal prison for debtors.

The defenders, on the other hand, *maintained*; The only jurisdiction of regality ever conferred on the abbots of Holyroodhouse is now either abolished, or vested in the burgh of Canongate, the prison of which is the only legal one of the district, in terms of the act of sederunt; Maitland, p. 147. 149. 151.; Edinburgh Council Register, f. 390. The Duke of Hamilton, being merely keeper of the palace, with the privileges connected with it, can confer no jurisdiction on his bailie or deputy beyond what is necessary for maintaining the police of the place; under which, imprisonment for debt there contracted may, by custom, have come to be included. The Bailie cannot enforce the regulations with regard to bankrupts which the act of sederunt imposes on the Magistrates of burghs, in whose prisons the pursuer of a *cessio* must be previously incarcerated.

The higher acts of jurisdiction exercised by the Bailie, like the title assumed by him only since 1771, are unwarranted, and have passed without objection.

On the *second* point, the pursuer

Pleaded; Supposing the requisite of previous imprisonment to have been complied with, there is neither reason nor authority for contending that the privilege of the sanctuary should deprive the pursuer of the common law right of applying for a *cessio*. On the contrary, it has been obtained in similar circumstances, June 1798, Lindley, 19th June 1798, Donaldson, 9th March 1799, Mackenzie.* If the objection were well founded, it would go far to destroy the privilege of the sanctuary, by condemning persons imprisoned for debt contracted within it to perpetual confinement.

Answered; The pursuer of a *cessio* must be liable to be arrested in prison at the instance of his whole creditors. This is always narrated in the summons, and is even adopted in the present case, though the fact does not warrant it; and he must be subject to future confinement by them, if he fail in his action. The process is, therefore, inconsistent with the privilege of the sanctuary; nor

* None of these cases are reported; and the general question was not discussed in them.

No 115. is there any hardship in this. Retiring to the sanctuary is a voluntary act on the part of a bankrupt; and if he be imprisoned there, and wish to obtain a *cessio*, he may get himself transferred to the Canongate prison, where he will meet his creditors on equal terms.

THE LORDS (1st June 1799) dismissed the action.

A reclaiming petition was followed with answers; and, after a hearing in presence, as part of the trials of Lord Probationer, Hermand, the Court thought both defences well founded; but the decision was rested chiefly on the second.

THE LORDS unanimously adhered to the former interlocutor.

Act. Lord Advocate Dundas, M. Ross, Ja. Ferguson. Alt. Solicitor-General Blair, H. Erskine,
Ar. Campbell. Clerk, Pringle.

D. D.

Fac. Col. No 139. p. 312.

* * See another report of this case, No 9. p. 7, *voce* ABBEY OF HOLYROODHOUSE.

S E C T. III.

Act of Grace.

No 116.

A person imprisoned till he perform an act in his power cannot demand the benefit of the act of grace.

1709. December 2. TURNER against Ross.

WILLIAM TURNER, notary in Birse, having intromitted with the means of one Middleton, by virtue of a testament, afterwards found null, and being pursued by Ross of Tillisnaught to refund the money, and decret being obtained against him, he is thereupon imprisoned in the tolbooth of Brechin; and having required the Magistrates either to modify an aliment to him, (in regard he made faith he was not able himself), or else to liberate him, in terms of the act of Parliament, 32,1696, they declined; whereon he gave in a complaint against them and Tillisnaught. To which it was *answered*, That he was not in terms of that act of Parliament, which was only conceived in favours of poor debtors who were incarcerated for debts and sums of money which they were naturally incapable to pay; but he was imprisoned for not exhibiting and producing the bonds and other writs of Middleton's executry, which he acknowledged, by his oath produced, were in his own hands. And this being *conditio potestativa*, which he could purify when he pleased, the act could never protect him, obstinately and maliciously to refuse what was in his power. THE LORDS, finding the grounds of imprisonment not being a debt, but a fact prestable by himself, they refused to modify any aliment, or to set him at liberty till he first