

# APPENDIX.

## PART I.

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### PRISONER.

1801. *March 11.* HUGH MACWHINNIE *against* JOHN MACFADZEN.

NO. 1.

HUGH MACWHINNIE having been imprisoned in the jail of Ayr for a debt of L. 49, 16 s. due to John Macfadzen, he applied to the Magistrates for alimēt, in terms of the act of grace.

A prisoner, who has obtained the benefit of the act of grace, is not liable in jail fees.

The Magistrates appointed 10 d. a-day to be paid to him by the incarcerating creditor, who having brought the sentence under review by a bill of advocacy, the Lord Ordinary remitted the case to the Magistrates, with instructions to limit the alimēt to 8 d. *per* day.

Macwhinnie presented a reclaiming petition against this judgment, in which he stated, *inter alia*, that he was obliged to pay the jailor 4 d. a-day of fees, so that he would have only 4 d. remaining for his subsistence, which was altogether inadequate.

The Court expressed, in strong terms, their opinion of the illegality of the jailor's making any charge whatsoever against a prisoner in the petitioner's situation, and refused the petition, upon the ground, that he was not in future to be liable to any such exaction. (See No. 87. p. 11769.)

Lord Ordinary, *Balmuto.*

For the Petitioner, *James Ferguson.*

*R. D.*

*Fac. Coll. No. 228. p. 518.*

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1804. *May 29.* MERCER, *against* TASKER AND OTHERS.

NO. 2.

RICHARD MERCER, a native of Ireland, who had resided for some years in this country, brought a process of *cessio bonorum* against his creditors, It is no objection to the

NO. 2. He had been engaged in extensive concerns in Ireland, where his debts had been contracted. Soon after his arrival in Scotland, Mrs Susannah Tasker, one of his Irish creditors, obtained a warrant of incarceration against him *tanquam in meditatione fugæ*, (See APPENDIX, PART I. *voce* CAUTIO JUDICIO SISTI, No. 2. ;) in consequence of which he retired to the sanctuary. He was afterwards incarcerated upon a debt due to a creditor in the Abbey. Upon this, he raised a process of *cessio*, and no opposition being made, obtained a decree in the usual terms.

competency of the action, that the pursuer of a *cessio* is a foreigner, and that his debts were chiefly contracted in a foreign country.

Mrs Tasker presented a petition against the interlocutor of Court, discerning in the *cessio*, which was advised with answers; and some doubts having arisen how far the pursuer, being a foreigner, and having contracted nearly the whole of his debts in another country, could insist in such a process, the Lords appointed the case to be stated in memorials.

The pursuer

Pleaded: The law of Scotland, authorising the remedy of *cessio bonorum* to unfortunate debtors, is not confined to those who are natives of this kingdom, or whose creditors reside in this country. Being intended to remove the hardship of personal diligence in cases of innocent misfortune, it may apply wherever personal diligence may be used. By his residence in this country, the pursuer became amenable to the diligence of the law, and, being liable to the hardship of diligence, is entitled to all the benefits which the law affords to persons in that situation. He was accordingly entitled to take refuge in the sanctuary, to raise a process of *cessio*, or to adopt any other measure competent to debtors by the law of Scotland. The opposing creditor has availed herself of the diligence of this country, and therefore must submit to the restrictions imposed upon the application of it; for it is unreasonable to hold the pursuer amenable to the laws, so far as they may be used against him, and not entitled to the benefit of them when they are in his favour.

There is no reasonable ground why a *cessio bonorum* should be withheld from foreigners. It may indeed be more difficult, when the debts are contracted in a foreign country, for the debtor to show that his losses arose from innocent misfortune. This is a difficulty under which the pursuer must labour, in satisfying the Court upon the merits; but it is no objection to the competency of the action. Accordingly, it does not appear that there was any limitation in the application of the *cessio bonorum* in the civil law, from which it was originally derived; *Voet, arg. § ult. Inst. de Act. ; L. Legis Juliae, 4. C. Qui bonis cedere poss.*

The courts of this country are not bound to regard a foreign decree, unless in so far as it is equitable; Erskine, B. 4. Tit. 3. § 4. Far less are they entitled to inflict a greater degree of severity in favour of Irish creditors, than what Scots creditors could demand. If this objection were to be re-

cognised, it would be impossible for a merchant of extensive dealings, who must necessarily have many debts in foreign countries, ever to obtain the benefit of the *cessio*.

The opposing creditor answered: The process of *cessio bonorum*, though founded in principles of humanity, is liable to great abuse, and ought to be regarded with great circumspection. Accordingly, various requisites have been introduced, to prevent persons from instituting such a process on inadequate grounds, to enable the Court to obtain satisfactory information with regard to the state of their affairs, and the manner in which insolvency was occasioned, and to secure the creditors an effectual transference of the remainder of the property. For this purpose, it is necessary that all the creditors be summoned as defenders. But in this case that is impossible, as almost the whole of the creditors are foreigners, who are not liable to the jurisdiction of the courts of this country; Forrest against Funstone, 20th February 1789, No. 36. p. 4823; and who therefore cannot be legally cited.

When a person comes to reside in Scotland, after having contracted all his debts abroad, it is not possible for him to produce such proof of the causes of his insolvency, as to entitle him to the *cessio bonorum*. And it is beyond the power of the Court to furnish the opposing creditors with the necessary compulsitors to obtain a proof in foreign countries, to show that the statements of the pursuer are incorrect or fabricated.

The performance of obligations is in every case to be regulated by the construction put upon them in the country where they are undertaken and made exigible; Fulks against Aikenhead, November 1731, No. 61. p. 4507.; Rocheid against Scott, June 30. 1724, No. 94. p. 4566.; Christie against Straiton, November 4. 1746, No. 96. p. 4569.; Watson against Renton, January 21. 1792, No. 100. p. 4582. In Ireland the process of *cessio* is unknown. A creditor, therefore, who advances money in that country, does it upon the faith of the law as there established, and, of course, cannot have in view this mode of extinguishing the obligation. To give the benefit of the *cessio* in such a case, would be to put a construction on the rights of parties different from what was understood by them when the obligation was entered into. Although the opposing creditor may have availed herself of the diligence of the law of Scotland, she has done nothing more than what she would have been entitled to do by the law of her own country. But the pursuer is endeavouring to obtain a privilege which that law does not recognise.

There are many distinctions in the law of Scotland as to the privileges of natives and of foreigners; Count Leslie against Gordon, June 8. 1749, No. 2. p. 4636.; Collins against Boyd, February 6. 1759, No. 10. p. 4648.; O'Haggan against Boyd, July 31. 1761, No. 6. p. 4644.; Miller against Allen, June 8. 1792, No. 12. p. 4651.; Keir against Dickey, May 27. 1802,

NO. 2. APPENDIX, Part I. *voce* BANKRUPT, No. 17. It is easy to see that innumerable frauds would ensue, if the benefit of the process of *cessio* were to be communicated indiscriminately to persons of all countries, and that it would be an inducement to swindlers to resort to Scotland to free themselves at once from the obligations due to their creditors.

The Court, upon advising the memorials, repelled the objection to the competency of the action, and ordained the pursuer to give in a special condescendence of his debts and losses, according to the usual mode of procedure in cases of *cessio bonorum*.

In this case there were a variety of special objections urged by the opposing creditor to the statement of his affairs given by the pursuer, which it is not necessary to notice ; and upon the general point there was a considerable difference of opinion on the Bench, several of the Judges thinking that it would be a bad precedent to authorise this process in cases when the pursuer was a foreigner, and when his dealings had been in another country : That in such cases there was an utter impossibility of investigating into the debtor's affairs. It was also observed, that it seemed to be a very nugatory measure, if not effectual against the foreign creditors, who were not in a situation of being called as parties. But the majority of the Court held, that all these things were to be considered when the merits of the case were entered into : That it was the pursuer's business to make out a satisfactory statement of his affairs, so as to show that he was entitled to the *cessio* ; and that though it might be more difficult to do this in the case of a foreigner, it was no objection to the competency of the action.

Act. Solicitor-General Blair, Forsyth. Agent, Wm. Callender. Alt. Lord Advocats Hope,  
W. M. Morison, Baird. Agent, Ja. Skinner. Clerk, Walker.

J.

Fac. Coll. No. 164. p. 369.