

bankrupt himself was no longer in Court, the process of *cessio* having been finally concluded. Here, however, both the bankrupt and his creditors are properly in Court, his process of *cessio* being still in dependence, and his effects are in some measure in *manibus curiæ*, his books and bills being actually lodged in process, and his whole effects being under the protection of the Court.

No 104.

But, in the *second* place, even supposing that the particulars now mentioned should not be considered as placing the effects of the bankrupt under the direction of the Court; yet the peculiar circumstances of the present case do most justly merit the equitable interposition of the Court, by appointing the petitioners, or any other person that may be thought more proper, factor upon the effects of Whyte, pursuer of the process of *cessio bonorum* above mentioned, and upon the said factor's finding sufficient security for his management, appointing the bills and other vouchers of debt due to Whyte, produced in the process of *cessio*, to be delivered up to him the said factor; and further, authorising him to take all other measures necessary and proper for the management of the bankrupt's funds for the benefit of all concerned.

"THE LORDS refused this application as incompetent;" seeing the bankrupt has already granted a disposition to his creditors *omnium bonorum*, therefore a meeting of the creditors may be called by themselves, and the majority of such meeting may choose a factor.

For Petitioner, *R. Cullen.**Fac. Col. No 156. p. 26.*

1775. November 17. DICK against MORISON and Others.

No 105.

DICK pursued a *cessio*, which some of his creditors opposed, pleading, that he was not entitled thereto; but, at any rate insisting, as upon perusing the proof which he has brought, it appeared his losses, all except some trifles, had been occasioned by smuggling, he must be obliged to wear the dyvour's habit if he shall get out of prison without satisfying his creditors, agreeably to the authority of Mr Erskine, B. 4. tit. 3. § 27, and the decisions in similar cases there cited.

"THE LORDS decerned in the *cessio*, but refused to dispense with the wearing of the habit."

Act. *Geo. Ferguson.* Alt. *J. Boswell.* Clerk, *Tait.**Fol. Dic. v. 4. p. 138. Fac. Col. No 198. p. 135.*

1779. February 3. M'KENZIE against HIS CREDITORS.

No 106.  
Tho' the imprisoning creditor consent to the bank...

M'KENZIE was, on the 12th November 1778, incarcerated at the instance of BROWN, and, on the 13th December, executed a summons of *cessio bonorum*.

## No 106.

rupt's liberation, he may still remain in prison, and sue for the benefit of the *cessio bonorum*.

against his Creditors, which was called in the course of the roll 28th January. A few days before the cause came into Court, but after the pursuer had been more than two months in prison, the incarcerating creditor intimated to the Magistrates a consent to his liberation; and the Magistrates mentioned this circumstance in the certificate which they granted of his imprisonment.—When the cause came before the Court, no appearance was made for any of the creditors; but it was at first doubted how far the *cessio* could proceed, in respect of the creditors' consent to his liberation.

*Pleaded* for the pursuer; That, after the debtor has been for the legal time in prison, and his action in Court, or even his summons of *cessio* executed, it is not in the power of the incarcerator, by a consent to his liberation, to bar him from proceeding in the action. If he had such a power, the benefit of the *cessio*, instead of depending on a compliance with the requisites of law, might at all times, be disappointed by the incarcerator, or the bankrupt's other creditors; for there is nothing to prevent any of them from incarcerating the bankrupt anew after his liberation. Thus, he might be kept in a state of constant imprisonment.

The Court “allowed the *cessio* to proceed.”

Act. *Erskine*.

G.

*Fol. Dic. v. 4. p. 139. Fac. Col. No 63. p. 115.*

1781. August 9.

CHARLES STEWART, PRISONER, *against* HENRY M'GLASHAN, one of his Creditors.

## No 107.

The privilege of *cessio* not competent to debtors incarcerated for damages.

THE LORDS refused liberation upon a *cessio bonorum* to a debtor who was imprisoned for not payment of a sum awarded by the following decree of the Court in a former process of wrongous imprisonment, oppression, and damages: “Find it proved, that the defender, Charles Stewart, acted illegally, unwarrantably, and oppressively, by maltreating Henry M'Glashan, pursuer, under pretence of having enlisted him as a soldier, and procuring him to be confined as a prisoner in the tolbooth of the Canongate, from Saturday till Wednesday, under the aforesaid pretence, without order of law; and, therefore, find the said defender liable to the pursuer in damages and expences.”

Act. *H. Erskine*.

Alt. *J. Morthland*.

Clerk, *Menzies*.

D.

*Fol. Dic. v. 4. p. 139. Fac. Col. No 81. p. 137.*