1787. *February* 10.
ALEXANDER PARK and GEORGE BROWN, *against* JOHN BENNET.

No 8.
A warrant for incarcerating on account of *meditatio fugæ*, may be obtained againſt one who has retired to the ſanctuary.

ALEXANDER PARK and George Brown, two of the creditors of John Bennet, who had retired to the Abbey, made oath before the bailie, That they believed he had gone thither to have an opportunity of leaving the kingdom, and thus diſappointing the demands of his creditors.

John Bennet was examined by the bailie; and on his refuſing to give ſecurity for his remaining in Scotland, he was committed to the jail of the Abbey. Afterwards, in conſequence of an application to the Lord Ordinary on the bills, in which it was ſtated, that the creditors intended to bring Bennet to trial as a fraudulent bankrupt, and that the Abbey jail was inſufficient for the purpoſe of ſecuring his perſon, a warrant was obtained for removing him to the priſon of Canongate.

Obſerved on the Bench: The privilege of the ſanctuary would be greatly perverted, if it could be uſed as a means of a bankrupt's eſcaping from Scotland, and thus evading altogether the demands of his creditors. The bailie of the Abbey, therefore, with regard to thoſe who take refuge within his juriſdiction, muſt be warranted, in the ſame manner as the other ordinary judges, to uſe the neceſſary precautions for preventing wrongs of this ſort.

After adviſing a reclaiming petition for John Bennet, with anſwers for the creditors, which were followed with replies and duplies, the Lords affirmed the interlocutor that had been pronounced by the Lord Ordinary. (*See* MEDITATIO FUGÆ.)

Lord Ordinary, *Henderland.* For Bennet, *A. Fergusſon.* Alt. *Jo. Clerk.* Clerk, *Colquhoun.* *Craigie.*
Fac. Col. No 311. *p.* 480.

1799. *July* 11.
JAMES DUNLOP of Garnkirk, *againſt* the ROYAL BANK of SCOTLAND and JAMES CHRISTIE, Eſq.

No 9.
Incarceration in the Abbey jail found not to be ſuch impriſonment as to entitle the party to commence a proceſs of *ceſſio bonorum.*

JAMES DUNLOP, whoſe eſtate had been ſequeſtrated in 1793, having retired to the ſanctuary of Holyroodhouſe in 1798, was incarcerated in February 1799, in the Abbey jail, upon an act of warding of the bailie of the Abbey, obtained for recovery of a debt contracted during his reſidence there. He brought a proceſs of *ceſſio bonorum.*

The Royal Bank and Mr Chriſtie, objected, That incarceration in the Abbey jail, was not ſuch impriſonment as was required by law, particularly by the act of ſederunt 1688, in which it is enacted, 'That in time coming, when any bankrupt ſhall raiſe a proceſs of *ceſſio bonorum* againſt his creditors, that with the proceſs he produce a certificate under the hand of one of the magiſtrates of the

No. 9.

Dyvour's habit.

'burgh where he is incarcerate, bearing, That he hath been for the ſpace of a 'month in priſon, without which certificate the proceſs is not to be ſuſtained; 'and when he ſhall obtain a decreet, ordains the magiſtrates of the burgh, before 'his liberation out of priſon, to cauſe him take on and wear upon his head a 'bonnet, partly of a brown and partly of a yellow colour, with uppermoſt hoſe 'or ſtockings on his legs, half brown and half yellow coloured, conform to a 'pattern delivered to the magiſtrates of Edinburgh, to be keeped in their tol-'booth; and that they cauſe take the dyvour to the *market-croſs* betwixt ten 'and twelve o'clock of the forenoon with the foreſaid habit, where he is to ſit 'upon the dyvour-ſtone the ſpace of an hour, and then to be diſmiſſed; and 'ordains the ſaid dyvour to wear the ſaid habit in all time thereafter; and in caſe 'he be found either wanting or diſguiſing the ſame, he ſhall loſe the benefit of 'the *ceſſio bonorum*; and in caſe the magiſtrates certificate aforeſaid ſhall be re-'dargued, or that they ſhall not obſerve the ſaid order in the liberation of dyvours, 'they ſhall be liable in the debt for which the dyvour is incarcerate. And the 'Lords declare they will obſerve this act in time coming, and will not diſpenſe 'with the foreſaid habit, except in caſes of innocent misfortune liquidly libelled 'and proven; and appoints this act to be printed, and the agent for the *royal* '*burrows* to tranſmit a printed copy thereof to the *magiſtrates of each burgh*.'

Pleaded for the purſuer, The protection of the ſanctuary, denied to criminals, is allowed to unfortunate debtors, as a gentler ſpecies of confinement. The privilege is at leaſt co-eval with our earlieſt judicial records, and has been eſteemed by the wiſeſt men, to be honourable to the law, and uſeful in its conſequences. It is a humane proviſion for misfortune againſt one of the ſevereſt puniſhments, which can be inflicted on guilt. Creditors, for the gratification of reſentment, might otherwiſe puſh legal meaſures to an exceſſive ſeverity; an evil, which, without violating ſalutary general rules, could not be corrected by any ſpecial interpoſition of authority. A debtor availing himſelf of this refuge, does no injury to the intereſts of his creditors, ſince his property can be effectually attached, although his perſon be not previouſly ſeized. The gratification of reſentment, which alone is fruſtrated, conſtitutes no intereſt which a court of juſtice will recognise. There is nothing, therefore, unfavourable in the caſe of a debtor, whoſe application for the benefit of *ceſſio* proceeds from the ſanctuary; on the contrary, the neceſſity for allowing a *ceſſio* to an innocent debtor, who, impriſoned even in the ſanctuary, has, in a great degree, loſt the benefit of that laſt miſerable refuge, is more urgent than in any other caſe.

Previous to the introduction of the proceſs of ſequeſtration, actual incarceration of an inſolvent debtor had been thought neceſſary, before he could obtain the *ceſſio*, as conducive to a full diſcovery. A certificate of impriſonment was accordingly required, by the act of ſederunt 1688. But, ſince the proceſs of ſequeſtration, with the relative procedure for the ranking of creditors, and diviſion of bankrupt eſtates, has been brought to the perfection it has now attained; the *reaſon* at leaſt, for requiring any impriſonment, previous to a *ceſſio*, has ceaſed, though the

form may remain. The purſuer has the authority of the Court itſelf for affirming, that neither reaſon nor juſtice require any impriſonment at all, in order to a *ceſſio*, where there has been a previous ſequeſtration. A temporary act of ſederunt, paſſed on 29th July 1735, entitled 'an act for the ſecurity of creditors,' &c. concludes with this remarkable clauſe, as one conſequence of the new regulations then adopted, 'and laſtly, the Lords declare they will ſuſtain proceſſes *bonorum*, although the purſuers thereof ſhall not actually be in priſon.' This act is not now in force; but it affords a preſumption, that the ſame clauſe has not been continued in the bankrupt ſtatutes, only from accident or overſight. After ſequeſtration, there can be little need for the impriſonment of a bankrupt, unleſs *in modum pœnæ*. His affairs muſt undergo a complete judicial ſcrutiny. His effects muſt be judicially collected and divided. No 9.

The object of the act of ſederunt 1688, in requiring, as a preliminary to a proceſs of *ceſſio*, that the bankrupt ſhould have been incarcerated for a month, was, that the creditors might have time to inquire into the affairs and conduct of the debtor; and that the confinement might operate to produce, more eaſily, a full diſcloſure from him. The ceremony, no doubt, ſtill remains as a matter of form; but it is a form certainly not ſo eſſential, in the caſe of an inſolvent trader, at the cloſe of the 18th century; as it might have been a hundred years before, when the bankrupt laws, which now regulate ſuch affairs, did not exiſt.

By the law of Scotland, from the earlieſt period, perſonal liberty was reſpected. In the Roman law, the *ceſſio bonorum* was introduced only after civilization had made ſome progreſs; but, in Scotland, it was never an encroachment on the common law; it was a part of the common law, and a conſequence of the principles on which it was founded. Thus, in the *Quoniam Attachiamenta, cap. 7. ſec. 3.* the ancient rule is ſtated in theſe terms: 'Gif the debtour confeſſes the 'debt, and is not valiable in gudes and geir to pay the ſamine, he ſal acquyte 'himſelf be his awin eath, that he hes not, in frie gudes and geir, above the va'lour of five ſhillengs and ane plack: and alſwa he ſall ſware that he ſall pay the 'debt thereafter, as he may wone and purches it, reſervand to himſelfe his neceſ'ſare ſuſtentation quhereby he may live.' And in the ſtatutes of King William, cap. 17. under the title of *Ceſſion of Gudes*, it is enacted, 'That he quha ſould 'be made bairman, ſall ſwere in court, that he has na gudes nor gere attour five 'ſhillengs and ane plak; and that he ſall nocht retene to himſelf, of all his won'ning and profite, fra that day in ainie time coming, bot twa pennies for his 'meat and claith; and he ſall give ilk third pennie for payment of his debt.' So averſe was the genius of the law of Scotland from indulging creditors in wanton ſeverities, and from ſuffering unfortunate debtors, who were willing to give up all they had, towards payment of their debts, to languiſh in perpetual confinement! It is beyond a doubt, then, that after the introduction, and completion of the enactments, for the transference of the property of traders who become inſolvent, to their creditors, and for the complete diſcovery and diviſion of their

No 9. eſtates, the neceſſity of impriſonment for debt, in caſes of ſequeſtration, almoſt entirely ceaſed, unleſs on account of fraud, and *in modum pœnæ*.

But whether the form of impriſonment be eſſential or not, it has here been ſufficiently complied with. The regality of Holyroodhouſe comprehends, *inter alia*, a burgh of regality; which extends from the old chapel to the boundary of the royal burgh of Edinburgh at the Nether-bow port, including the whole length of the ſtreet, at the eaſtern end of which the priſon of Holyroodhouſe is at preſent kept. The boundaries of the ſanctuary are diſtinctly pointed out in Maitland's Hiſtory of Edinburgh, p. 153.; and, from that author, it appears, that before the preſent Canongate church was built, the chapel of Holyroodhouſe, after the Reformation, *was the common parish church of that burgh of regality*. According, then, to the very words of the act of ſederunt, the priſon of the Abbey, in which the purſuer was incarcerated, is a priſon belonging to a burgh of regality.

It would, however, have been ſufficient, on this point, to obſerve, that priſons 'of burghs,' are mentioned in the act of ſederunt 1688, only *exempli gratia*, and as the moſt common caſe; without being excluſive of any priſon whatever, in which a debtor may be lawfully confined. The priſons of burghs are not more highly privileged than any other regular priſons. The warrant for incarceration, in captions and other diligences, requires magiſtrates to impriſon the parties in any 'tolbooth, or others their warding places,' without diſtinction, whether theſe be in burghs, royal caſtles, forts, or any other buildings, within which priſoners may be confined, exiſting in the ſheriffdoms, ſtewartries, or other juriſdictions of the kingdom. A debtor ſo incarcerated, in virtue of the diligence of the law itſelf, muſt have equal right to found upon his impriſonment, as a circumſtance entitling him to commence a proceſs of *ceſſio*, wherever his place of confinement may be. It is true, indeed, that captions cannot be executed within the ſanctuary; but, with regard to the right to commence a proceſs of *ceſſio*, it is ſurely altogether immaterial upon what warrant the purſuer may have been incarcerated, provided only the warrant has been legal.

The juriſdiction of the bailie of the Abbey of Holyroodhouſe, is underſtood to be derived, both from the heritable regality of that Abbey; and alſo from the right of juriſdiction inherent in the Crown; to which, on the ſuppreſſion of the Abbey, at the Reformation, the Abbey itſelf, and every right and privilege annexed to it, reverted. Even before that period there was a royal reſidence within the precincts of the Abbey. Conſequently, as a juriſdiction belonging to his Majeſty, it was in no reſpect affected by the act aboliſhing the heritable juriſdictions of ſubjects. Beſides, being the juriſdiction of a burgh of regality, it was particularly excepted in the ſtatute. In a caſe reported by Lord Fountainhall, 26th February 1695, vol. 1. p. 673. (*See* INHIBITION.) James Watſon of Saughton *against* Sir Robert Baird of Saughtonhall, an inhibition was reduced, becauſe it affected lands within the *regality of the abbot of Holyroodhouſe;* and yet was not publiſhed *at the market croſs of Canongate*. In mutual declarators of rights and privileges,

20th Geo. II. ch. 43.

between the taylors of Cannongate and the taylors of Edinburgh, mentioned by Lord Fountainhall, vol. 2. p. 388 and 443. (*See* BURGH.); the taylors of Canongate produced their ſeal of cauſe from *the abbots of Holyroodhouſe and barons of Broughton*, which was ſuſtained. In the caſe, *No* 2. *h. t.* from Fountainhall, Cockburn ſupplicant, a ſuſpenſion of a decree of the bailie of the Abbey was repelled. Since the act of 20th Geo. II. was paſſed, the bailie of the Abbey has pronounced many decrees without objection, in matters which, after the date of that ſtatute, would not have been cognizable by the baron bailies of ſubjects. Since the abolition of heritable juriſdictions, various caſes have occurred where the juriſdiction of the bailie of the Abbey has been recogniſed, *See No.* 5. and *No* 7. *h. t.* From practice alone, then, there could be no queſtion now reſpecting the juriſdiction of this magiſtrate, ſo often ſuſtained and exerciſed. No 9.

It is next to be conſidered, whether the *mere concurrence* of the privilege of ſanctuary, can have any effect to exclude, from the common-law right of *ceſſio bonorum*, competent to all debtors, a debtor who happens to be lawfully incarcerated for debt, within the ſanctuary, by a decree of the magiſtrate of that juriſdiction. The privilege of ſanctuary itſelf is a legal one, and has always been recogniſed as ſuch; nor, till now, was it ever imagined, that reſidence within the Abbey grounds had the ſmalleſt tendency, except as to the mere legal privilege of ſanctuary, to place thoſe who dwell there, in a different ſituation from the other ſubjects of this country. It will be a ſurpriſing diſcovery indeed, if it ſhould turn out, that reſidence within this territory, which has been ſuppoſed to afford a humane immunity to debtors, does in fact deprive them of one of their moſt valuable privileges, that of purſuing a *ceſſio bonorum*. Within the territory of the Abbey there are, and always have been, many reſidents who do not retire there on account of debt, but for conveniency or choice. Are theſe to be excluded, if they ſhould be incarcerated in the priſon of the juriſdiction where they live, from the benefit of *ceſſio bonorum*, which the law has hitherto been underſtood to extend to every honeſt debtor without diſtinction?

The purſuer has been aſked, whether he would be ſatisfied with a decree in his action againſt the incarcerating creditor alone? But that would be utterly inconſiſtent with the nature and object of the proceſs of *ceſſio*, which embraces an accounting by the bankrupt with all his creditors. The creditors, as a body, are the oppoſing party; and the purſuer can neither litigate his cauſe with a part of them, without affecting the whole, nor cede his goods to one or more, inſtead of the whole.

From all theſe conſiderations combined, it follows, that the objection taken to the proceſs of *ceſſio*, upon the ground, that a debtor impriſoned only in the Abbey jail, is not entitled to purſue it, is without foundation.—There have been various precedents favourable to the purſuer's plea. In the caſe of William Linley, decided very lately, upon printed papers, the only certificate of impriſonment, was one by the bailie of the Abbey; which bore likewiſe that Linley had been liberated, on account of bad health, the third day. In the anſwers for the creditors, it was urged, 'that the purſuer, ſo far from being

No 9. ‘ obnoxious to perſonal diligence, had ſecured himſelf by reſidence in the Abbey ; ‘ and told the Court that he was lately impriſoned, *in the jail within the Abbey*, for a ‘ trifling debt. This incarceration muſt have been purely voluntary and collufive; ‘ for, if it had been otherwiſe, he could not have been confined for a civil debt ‘ alone ; and, beſides, he only continued in priſon for a few hours, to enable him ‘ to ſay he had been there.’—The objection to the mode of impriſonment was never waved or paſſed from ; yet, upon 2d June 1798, the following interlocutor was pronounced : ‘ The Lords having adviſed the ſtate of the proceſs, and writs pro- ‘ duced, and whole proceedings in the cauſe, and heard parties procurators there- ‘ on, Find the purſuer *entitled to the benefit of this action.*’—Nothing but an expreſs minute, waving the objection, could place it out of the conſideration of the Court ; even if the plea had involved merely the intereſt of the objecting creditors, and had not at all affected the public law, and the regularity of judicial procedure. The caſe of Linley, therefore, where the objection to the mode of impriſonment was particularly ſtated, and diſregarded, fixes the point now at iſſue, in favour of the purſuer.—It appears likewiſe, that James Donaldſon, late factor to Lord Perth, was, on 19th June 1798, found entitled to the benefit of *ceſſio*, although incarcerated only in the Abbey jail. And, on 9th March 1799, the ſame thing occurred in the caſe of Kenneth M‘Kenzie, factor to Sir Alexander M‘Kenzie.

In applications upon the *act of grace*, the objection, that the place of confinement was the jail of Holyroodhouſe, would have been equally applicable, as in proceſſes of *ceſſio*, if it were not to be conſidered as a common priſon. Yet there are numerous inſtances of perſons, confined in the jail of the Abbey, who have obtained the benefit of this act.

Pleaded for the defenders : Though the law of Scotland is certainly more lenient to bankrupts, than that of the ſiſter kingdom, or perhaps that of any other country in the world ; yet it admits, to the fulleſt extent, of perſonal execution for debt, and entitles the creditor, *ſqualore carceris*, to compel his debtor to pay, if in his power. Nor does it, in any degree, recogniſe the idea, that the bankrupt has a right, merely by ſurrendering his effects to his creditors, to tie up their hands from incarcerating him. On the contrary, the various acts that have been paſſed, particularly of later years, for rendering the payment of creditors more eaſy and expeditious, put it in the power of creditors to diveſt the bankrupt, by a ſequeſtration, of the adminiſtration, and even the right of property of his own effects, for the behoof of all his creditors: yet they afford him, though thus totally deprived of the power of paying a ſingle farthing of his debt, no protection againſt impriſonment; except in the ſpecial caſe, where his aſſiſtance is neceſſary for extricating his affairs. There the Court are authoriſed, on the application of the factor or truſtee, to grant the bankrupt a perſonal protection for a limited time : a regulation, which has in view the intereſt of the creditors alone, and in no degree the ſituation of the debtor. Nay, after the fulleſt ſurrender has been made, and the debtor's whole eſtate applied to the payment of the creditors ; unleſs the debtor ſhall obtain a diſcharge, which is made to depend

on the mere will of four-fifths of the creditors in number and value, the law, No 9.
though it muſt be preſumed the debtor has no longer any funds to pay his debts, leaves him liable to impriſonment as much as before.—The principle upon which the *miſerabile remedium* of the *ceſſio* was introduced, was not the debtor's inability to pay his debts; his willingneſs to ſurrender his eſtates; or the fairneſs of that ſurrender. If it had, it would have been competent for him to bring his action, without being incarcerated at all. The ſole foundation of the remedy is, to relieve the debtor, after a certain length of ſuffering, from actual impriſonment, that, if he can prove his inſolvency to have ariſen from innocent misfortune, and that he has made a fair ſurrender, he may be freed from the perſonal diligence of all his creditors in time coming. From the very nature of the thing, therefore, he muſt be actually in priſon at the time he brings the action, and that, in ſuch a ſituation, that all his creditors may have a right to arreſt him, and keep him confined, in the event of his failing in the proceſs of *ceſſio*. Indeed, the very idea of a proceſs, at the inſtance of a debtor, to have it found that creditors, whom he has deprived of the power of incarcerating him, ſhall be prohibited and diſcharged from putting him in priſon, would be a ſoleciſm of the very groſſeſt nature.

The defenders then maintain; 1*mo*, That though the purſuer were truly and *bona fide* incarcerated, in what is called the priſon of the Abbey, and though that priſon were not, as it is, within a legal ſanctuary, whereby he ſtands protected from the diligence of all his former creditors, he would not be in priſon in the eye of the law; what is called the priſon of the Abbey being, *quoad* the proceſs of *ceſſio*, no legal priſon for debtors; 2*dly*, That, were it ſuch a priſon, the circumſtance of its being *within a ſanctuary*, would, *per ſe*, prevent a debtor impriſoned in it, from inſiſting in an action of *ceſſio bonorum* againſt creditors, from whoſe diligence he is ſecure.—In conſidering the firſt point, let *the terms* of the act of ſederunt 1688, be attended to, (*ſee* p. 8.) From them it is clear, that the Court had in view the priſons of *burghs* only, where there were regular magiſtrates having a proper juriſdiction, not only entitling them to receive and detain priſoners for debt, but to carry into execution the ſentence againſt the bankrupt obtaining the *ceſſio*; and accordingly, a copy of the act is ordained to be ſent to the magiſtrates of each burgh. There is no neceſſity to enquire whether the act extends to burghs of regality, where ſuch burghs have regular priſons for debtors, in which may be incarcerated perſons arreſted for debt by horning and caption. The words and ſpirit of the act may include burghs of regality; but the Abbey priſon is not the priſon of a burgh of regality; nor is the bailie of the Abbey a magiſtrate of a burgh of regality: nay he is no magiſtrate of any kind or deſcription whatever. The priſon of the regality, within which the Abbey lies, is the tolbooth of Canongate. The bailies of Canongate are the magiſtrates of the regality; and the perſon called the bailie of the Abbey, is a mere ſervant appointed by the Noble Peer who holds the office of Keeper of the King's palace of Holyroodhouſe; an office, to which there neither is, nor could be, any juriſdiction

No 9. attached; nor any power except that of executing the ordinary police within the bounds of this royal palace.—This will be evident from the following deduction.

The Abbey of Holyroodhouſe appears to have been founded by King David the Firſt, in the year 1128, as a houſe for Canons Regular. The original charter is to be found in Maitland's Hiſtory of Edinburgh, book II. chap. 2. It grants to the abbot, the church of the caſtle of Edinburgh with the appurtenances and rights thereof; trial by duel, water and fire ordeal, *ſo far as appertains to the eccleſiaſtical dignity*. It conveys a variety of lands; ſuch as the town of Saughton and its ſeveral diviſions; the church and pariſh of St Cuthberts with all things thereto belonging; the church-town, &c. and certain lands lying under the caſtle; the two chapels of Corſtorphin and Libberton; the church of Airth in Stirlingſhire; the town of Broughton, and the lands of Inverlieth in the neighbourhood of the harbour; the towns of Pittendriech, Hammar, and Forden; certain penſions out of the tithes of merchandize at Perth, and out of the King's revenues at Edinburgh and Stirling; houſes in Berwick and in Renfrew, with a certain right of fiſhing there; and a variety of other things of the ſame ſort, which it is unneceſſary to recite. It appears by the Cartulary of Edinburgh, vol. 4. p. 323. that in this charter are theſe words, (which do not appear in the copy publiſhed by Maitland,) 'And his Majeſty granted to them *to build a burgh* 'betwixt the ſaid church and the King's burgh of Edinburgh,' &c. * And by

* The clauſe runs thus: 'And his Majeſty granted to them to *build a burgh* betwixt the ſaid 'church, and the King's burgh of Edinburgh, and that the burgeſſes ſhould have liberty of buy-'ing and ſelling in his Majeſty's markets freely, and without any hazard or cuſtom, as his Ma-'jeſty's own burgeſſes: and his Majeſty diſcharged that no perſon in their burgh, ſhould take 'bread, ale or cloth, or any other ſaleable thing by force, or without their conſent: And his Ma-'jeſty alſo granted to the ſaid Canons, that they ſhould be free from all toll and cuſtom in all roy-'al burghs, and throughthe whole land, of all things which they ſhould happen to buy or ſell, and 'that none ſhould poind upon the ſaid lands of Holycroſs, unleſs the abbot refuſed to do juſtice. 'And his Majeſty willed, that all the above written ſhould be held as fully and quietly as the 'King held his own proper lands, and that the abbot ſhould have courts as freely, fully, and ho-'nourably as the biſhop of St Andrew's, the abbot of Dunfermline, and abbot of Kelſo had 'theirs.'—The burgh which was accordingly built, was called Canongate, after the canons or monks.

This charter, which is without date, is confirmed by a charter of William, ſurnamed the Lyon, alſo without date, which confirms the foundation charter with ſome ſmall variations, particularly giving the ground on which the Abbey was ſituated.

The foundation charter was again confirmed by another charter of Robert the Bruce, alſo without date.

In this charter the foundation charter is verbatim engroſſed: and it then proceeds, 'Ratify-'ing, approving, and confirming the ſame in all things, and ſtrictly charging and commanding 'the juſticiars, ſheriffs, provoſts, and their bailies, to whoſe knowledge the ſaid charter ſhould 'come, that they ſhould noways preſume to trouble or moleſt the ſaid abbot and canons, anent 'the foreſaid charter, and confirmation thereof, under his Majeſty's higheſt diſpleaſure.'

Another charter was granted by David II. dated at Ayr the 6th of June, and 14th year of the King's reign, which is the year 1343.

In this charter is engroſſed the ſaid charter of confirmation by Robert the Bruce, 'which 'is thereby ratified, approved, and confirmed, in the whole points and articles thereof, and his 'Majeſty willed that they hold and poſſeſs the whole foreſaid lands therein narrated, in a *free re-'gality*, with full adminiſtration of the ſaid regality in all things, as freely and quietly as any o-'ther regality was held within the kingdom by any perſon whatever.' Then follows a grant to the abbot and convent of the chaplainry of his Majeſty's chapel.

the charter the abbots were authoriſed to hold courts. What was the nature of theſe courts; and particularly, whether there was a civil juriſdiction, including the power of decerning and impriſoning for civil debts, or of having a priſon in which debtors, attached by legal diligence, could be impriſoned; it is unneceſſary to enquire; becauſe, the civil juriſdiction, if any, was afterwards given away by the abbots. Maitland mentions, 'That beſides the privileges mentioned in the

No 9.

p. 147.

Another charter of confirmation of the ſame date and tenor, was granted by the ſame King David II. ſigned at the Monaſtery of Dunfermline, the 30th December 1343.

Theſe charters were again confirmed by a charter of James II. dated at Edinburgh, the 20th April 1450, and by another charter of the ſame King, of the ſame date.

A charter or grant was given by Robert, commendator of the Monaſtery of Holycroſs, and convent thereof, dated 23d Auguſt 1565,—Appointing Sir John Bellenden of Achnowl, and his heirs male, therein mentioned, 'heritable juſticiars and bailies of their hail barony and regality 'of Broughton, as well of their burgh and town of the Canongate, and their lands of Leith, as 'of all their lands and farms lying within the ſhire of Edinburgh principal, conſtabulary of 'Haddington, Peebles, Lanark, Stirling, Linlithgow, and ſtewartry of Kirkcudbright, and all 'their other lands wherever they lye within Scotland;' giving to him and his heirs full power and command 'to ordain, hold, begin, and fence juſticiar and bailie courts of the ſaid barony and 'regality, and of all their other lands and farms, as well in criminal as in civil caſes.'—Infeftment followed upon this gift.

A precept was granted by Adam, biſhop of Orkney and Zetland, perpetual commendator of the Monaſtery of Holyroſs, for infefting Ludwick Bellenden, as heir to Sir John, in the ſaid offices of juſticiar and bailie, dated 13th May 1577.

In July 1587, Sir Lewis Bellenden of Auchnoul, Lord Juſtice Clerk, and who was alſo heritable bailie of the regality of Holyroodhouſe, prevailed upon the commendator and convent of Holyroodhouſe to reſign the lands and barony of Broughton, with the burgh of regality of Canongate in the King's hands, for new infeftments in favour of Sir Lewis, and a charter from the King paſſed upon their reſignation, narrating the ſervices done by the family of Bellenden, and 'that 'it was known to his Majeſty that the heritable office of bailiery of the lands, baronies, and others 'underwritten, and a great part of the ſaid lands, did then belong heritably to the ſaid Sir Lewis:' Therefore his Majeſty gave, granted, and confirmed, to Sir Lewis Bellenden and his heirs, 'all 'and hail the lands and barony of Broughton, containing the particular burgh of regality, 'towns, lands, and others underwritten, viz. The burgh of regality of the Canongate, lying be-'twixt the burgh of Edinburgh and Monaſtery of Holyroodhouſe, and that part of the town of 'Leith which lyes on the north ſide of the water and bridge of Leith;' and a variety of other lands, but which does not include the abbacy or Monaſtery of Holyroodhouſe, or the diſtrict immediately adjoining to it. And in the *quæquidem* of the charter, the lands 'and privilege of re-'gality,' are deſcribed 'as a *part* of the patrimony of the benefice' of Holyroodhouſe. *Cartulary of Edinburgh, vol.* 4.

The family of Bellenden of Auchnoul, were the predeceſſors of the family of Roxburgh; and it appears, that Robert Earl of Roxburgh ſucceeded to the lands and juriſdiction mentioned in the above charter.

This Earl of Roxburgh conveyed the above lands and juriſdiction to King Charles I. and his Majeſty then wadſetted them to the Earl. The reaſon of this does not now appear; although it is probable that the grant, proceeding from the commendator and convent, had not been deemed a ſufficient title, after the different acts of annexation of church lands to the crown; and as it is narrated in the charter 1587, that the Earl had acquired certain heritable rights to the lands, prior to the reſignation by the commendator and convent, it is not improbable, that the wadſet ſums came in place of theſe rights. In order, however, to validate, as it ſhould ſeem, the King's own title, and the tranſaction that had been entered into, an exception was inſerted in the act of annexation 1633. c. 13. of 'the lands and barony of Broughton, comprehending the towns, lands, burgh of 'barony, mills, and others mentioned in the infeftments granted by his Majeſty under his high-'neſs' great ſeal, to his highneſs' right truſty couſin and counſellor Robert Earl of Roxburgh.'

While the rights ſtood upon this footing, an agreement was entered into betwixt Robert Earl of Roxburgh, with conſent of Charles I. the foefees in truſt of Herriot's hoſpital, and the Magiſtrates of Edinburgh, as repreſenting the community of the city, in the form of a minute of con-

No 9. ‘ above recited charter, Robert abbot of Holyroodhouſe, granted *to the inhabi-*
‘ *tants of the Canongate* divers other privileges, which were not only confirmed
‘ by the Kings David II. Robert III. and James II. and III.; but the ſaid Kings
‘ granted *to the bailies, conſuls, and community of the burgh of Canongate*, the ſe-
‘ veral annuities payable at the Exchequer by the ſaid burgh; the common
‘ muir lying between the lands of Broughton on the weſt, thoſe of Pilrig on the
‘ eaſt, and the way leading from Edinburgh to Leith on the ſouth, with all the
‘ rights and cuſtoms thereunto belonging; together *with* all *the liberties, commo-*
‘ *dities, privileges, and immunities, appertaining to a burgh of regality:* and that
‘ it ſhall be lawful for the burgeſſes of the ſaid burgh, to ſell wax, ſalt, iron, wool,
‘ ſkins, hides, bread, ale, cloth, and other ſtaple commodities; with a right to
‘ have bakers, cloth workers, and a number of other artificers, ſufficient to ſup-
‘ ply the market, and to carry on commerce; with a power to elect annually, at
‘ Michaelmas, two or three bailies, a treaſurer, with a proper number of officers,
‘ for the adminiſtration of juſtice within the ſaid burgh, who ſhall continue in
‘ office during the ſpace of one year, and ſhall yearly account, for the adminiſtra-
‘ tion of their reſpective offices, to a committee of burgeſſes, to be choſen for that

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tract, dated 8th Auguſt 1636; and in which it was ſtipulated, that the Earl of Roxburgh, with conſent of his Majeſty, ſhould ſell and diſpone to the magiſtrates and council, and their ſucceſſors, as repreſenting the body and community of the city of Edinburgh, ‘ All and haill the particular ‘ lands, ſuperiorities, regalities, and others following, viz. The burgh of regality of the Canon- ‘ gate,’ and that part of the town of Leith, on the ſouth ſide of the water, which belonged to the abbacy of Holyroodhouſe, with the village, houſes, and yards, called Dearaneuch, or Pleaſants, without any other ſubjects or juriſdiction whatever. And by the ſame minute, it was alſo agreed, that the Earl, with conſent of his Majeſty, ſhould diſpone to the foefees in truſt for Heriot's hoſpital ‘ the lands, mills, ſuperiorities, feu-duties, and others following, viz. The town ‘ and lands of Broughton,’ and a variety of other lands, among which are *not* included the abbacy or monaſtery of Holyroodhouſe, the grounds adjoining, or the juriſdiction belonging thereto. *Cartulary of Edinburgh, vol.* 4.

A contract followed upon this minute of agreement, and in conſequence the barony of Broughton ſtill remains with Heriot's hoſpital; but the juriſdiction was ſold to the crown; and the ſuperiority of Canongate and Pleaſants, and juriſdiction of Canongate, ſtill remain with the town of Edinburgh.

Robert Stewart, the commendator of Holyroodhouſe, natural ſon of King James V. made an exchange with Adam Bothwell, biſhop of Orkney, of the abbacy of Holyroodhouſe for the biſhoprick of Orkney, about the year 1569.

In the year 1581, the whole remaining part of the regality was, by a charter under the great ſeal, dated the 24th of February that year, upon the demiſſion of Adam biſhop of Orkney, granted and diſponed to John Bothwell his ſon; and by the terms of the charter there was conveyed to him ‘ totum et integrum beneficium, et abaciam abbaciæ de Holyroodhouſe, *cum juriſ-* ‘ *dictione regalitatis ejuſdem*, pro omnibus ſuæ vitæ diebus.’

And the ſame perſon was afterwards, by patent, dated 20th December 1607, raiſed to the peerage, by the title of Lord Holyroodhouſe, and got the lands that formerly belonged to the Abbey and convent of that name, and which were by this time reduced to the lands over which the bailie of Holyroodhouſe now exerciſes his juriſdiction, to be called the Lordſhip of Holyroodhouſe.

The grant to John Bothwell, of the abbacy, with the juriſdiction of regality, being only for his life, it reverted to the crown upon his deceaſe.

On the 10th of Auguſt 1646, a charter was granted to James Duke of Hamilton, appointing him heritable Keeper of Holyroodhouſe, and the gardens, orchards, &c. ‘ Cum omnibus privi- ‘ legiis feodis caſualitatibus et divoriis quibuſcunque ad eadem pertinen.’ The office has remained in the family of Hamilton ever ſince.

'purpoſe: And the ſaid burgeſſes are likewiſe empowered to hold courts, both No 9
'civil and criminal, for the adminiſtration of juſtice; and the fines ariſing there-
'from to be employed in the ſervice of the town; provided always, that the
'acts and ſtatutes for preſerving the peace within the ſaid burgh, be conform to
'the laws and ſtatutes of the kingdom. And the ſaid burgeſſes were to have,
'and hold all their rights, privileges, and immunities foreſaid, in free burgage, as
'fully, freely, and honourably, as any other burgh of regality within the king-
'dom, rendering yearly at the Exchequer, for the ſame, the ſum of 4d. Scottiſh
'money.'

Thus, from a period co-eval almoſt with the erection of the monaſtery itſelf, the civil juriſdiction conferred by the charter was completely veſted in the magiſtrates of the burgh of Canongate, (the burgh which was built by the abbots, under the power given them by the foundation charter,) as bailies of regality, where it has ever ſince remained: Here, accordingly, there has always been a regular jail for impriſoning, not only ſuch perſons as are attached by acts of warding from the bailies, but ſuch as are apprehended upon letters of caption for civil debts.

At the Reformation, the abbacy of Holyroodhouſe returned to the Crown. That part of it, which had been erected into a burgh of regality, appears to have been gifted to the family of Ballenden; from whom it deſcended to that of Roxburgh; and, on the 18th Auguſt 1636, the magiſtrates and council of Edinburgh, bought of the Earl of Roxburgh, the ſuperiority of the Canongate; together with the town of North Leith, part of the barony of Broughton adjoining to the water or river of Leith; and part of the village called the Pleaſance, for the ſum of 42,100 merks; which was confirmed by a charter of King Charles I. This charter confirms to the magiſtrates of Edinburgh,
'All the ſeveral lands, burgh of regality, ſuperiority, and right of regality, with Maitland's Hiſtory, page 149.
'other things hereafter mentioned, viz. The whole burgh of regality of the
'Canongate, &c. with the right and privilege of ſerving brieves, making returns,
'and adminiſtring juſtice in all cauſes and actions, both civil and criminal, be-
'longing to a free regality, within the juriſdiction foreſaid; with a right and li-
'berty to elect, conſtitute, and qualify, one or more bailies, with their deputies,
'aſſeſſors, clerks, ſerjeants, and other neceſſary officers for holding a court; with a
'power of holding courts of regality and juſticiary, as often as ſhall be found ne-
'ceſſary for the trial of actions, both civil and criminal, according to the laws of
'this our kingdom of Scotland; with a right of judging and determining as fully
'and freely as any other lord of regality within our ſaid kingdom.'

The reſult of this juriſdiction is thus ſummed up by Maitland: 'This rega- Page 151.
'lity, in ſubordination to the Edinburghers, is governed by a baron and a bailie;
'the former, who is one of the late bailies of Edinburgh, and the latter, his
'deputy, are appointed by the common council of Edinburgh. The bailie pre-
'ſides in the court of the regality held in this place; wherein are tried all cauſes,

No 9. ‘ both civil and criminal, other than in capital caſes. The officers in this town ‘ are the baron and his baillie, a treaſurer, town-clerk, and fiſcal, eight conſtables, ‘ and five officers, belonging to the magiſtracy. The companies, or incorpo- ‘ rations of trades, are ſeven in number; namely, the wrights and maſons, ham- ‘ mermen, bakers, taylors, cordiners or ſhoemakers, weavers, fleſhers or butchers, ‘ and candlemakers; to whom belong a convenery. To this regality, as men- ‘ tioned in the above charter, appertains the town of North Leith, that part of ‘ South Leith called the Coalhill, and that part of Saint Leonards denominated ‘ Dearenough or the Pleaſance, adjoining to the ſouth-weſtern part of the Canon- ‘ gate; and the baron and bailie of this burgh are juſtices of the peace in the ‘ county of Mid-Lothian.’

It is evident, then, that whatever civil juriſdiction was veſted in the abbot of Holyroodhouſe, was completely transferred, and now ſubſiſts, in the magiſtrates of the Canongate. The juriſdiction, being in its nature indiviſible, was clearly annexed to the burgh, the abbot was authoriſed to build, and could not be divided; but muſt have paſſed entire, with that burgh, to the family of Roxburgh; in whoſe power the regality-juriſdiction was accordingly confirmed by the Crown.

What then is the juriſdiction, veſted, or ſuppoſed to be veſted, in the perſon called the bailie of the Abbey?—Although the Crown, after the Reformation, granted to the family of Roxburgh, thoſe parts of the domains of the Abbacy, which now form the regality of the Canongate; it retained the Abbey church, and the palace, as a royal reſidence; together with what is called the King's Park; the management of which was, as is uſual in other royal domains, committed to ſome nobleman about the court; and appears, by a charter in 1646, to have been veſted, as an hereditary office, in the noble family of Hamilton.

The charter runs in the following words: ‘ Carolus, &c. Sciatis nos feciſſe et ‘ conſtituiſſe, tenoreque præſentium facere, et conſtituere prædilectum noſtrum ‘ conſanguineum et conciliarium Jacobum Ducem Hamiltoun, &c. ejuſque hære- ‘ des maſculos de corpore ſuo legitime procreat. ſeu procreand. quibus deficien. ‘ hæredes ſuos talliæ, hæreditarios cuſtodes Palatii noſtri de Holyroodhouſe, cum ‘ omnibus hortis, hortulis, pomariis et ſphæriſteriis, *lie* bowling greens, eidem ſpec- ‘ tan; et dediſſe, tenoreque præſentis cartæ noſtræ dare, dict. Duci, hæreditarium ‘ officium et cuſtodiam earund. cum omnibus privilegiis feodis caſualitatibus et ‘ diveriis quibuſcunque ad eaſd. pertinen.; cum plena poteſtate præfato Duci e- ‘ juſque præſcript. faciendi et conſtituendi ſub-cuſtodes dicti noſtri Palatii, horto- ‘ rum, aliorumque prædict. unum vel plures pro eorum arbitrio; ac nominandi et ‘ deſignandi hortularios, alioſque ſervos, pro colendis et cuſtodiendis dict. hortis et ‘ pomariis, dict. Palatii, tum borealibus tum auſtralibus; ac parvo horto infra i- ‘ dem Palatium, ſphæriſterio, *lie* bowling green, aliiſque ad ejuſmodi ſpectan; om- ‘ niaque alia præſtandi adeo libere in omnibus reſpectibus, ſicuti quovis tempore ‘ præterito fieri ſolebant.’

The charter aſſigns and diſpones to his Grace, certain annual ſums of money and quantities of victual, ‘ pro cuſtodia ipſius Palatii, una cum omnibus divoriis et ‘ caſualitatibus dicti Palatii, hortorum, viridariorum, et pomariorum, quæ de eiſdem ‘ annuatim lucrari poterint, cumque omnibus aliis divoriis quibuſcunque, quæ pro ‘ colendis et cuſtodiendis eiſd, perprius perſolvi ſolebant; cum poteſtate ſimiliter ‘ dict. Duci, ejuſque præſcript, per ſemet ipſos alioſque eorum nominibus, haben. ‘ eorum warrantum, levandi prædict. annua feoda, particulariter et generaliter ſupra- ‘ ſcript. omni tempore futuro; et de omnibus annis præteritis debit. et nondum ſo- ‘ lut. &c.’ No 9.

The bailie's commiſſion flows from the Duke of Hamilton, as Keeper of the Palace. His Grace ‘ *makes, nominates, conſtitutes, and appoints* the ſaid Henry ‘ Home, to be our bailie of his Majeſty's Palace of Holyroodhouſe, and of ‘ the whole bounds and precincts thereof, or belonging thereto, giving and ‘ granting to him all the fees, caſualties, profits, duties, and emoluments what- ‘ ſoever, pertaining, or anywiſe known to pertain and belong to the ſaid ‘ office, and that during pleaſure allenarly, and until theſe preſents are re- ‘ called by us: With power to the ſaid Henry Home, or any ſubſtitute to be ‘ named by him, to exerce the ſaid office, and to hold courts within any place ‘ or part of the Palace of Holyroodhouſe, or pertinents thereof, upon whatever ‘ day or days lawful, and to conſtitute the ſame as often as needful: And alſo, ‘ with power to him to name fiſcals, ſerjeants, officers, and dempſters, and all o- ‘ ther neceſſary members of court, excepting the clerk, (the nomination of whom ‘ is reſerved,) the ſaid Henry Home being always anſwerable for his ſuſtitutes; to ‘ proceed and adminiſter juſtice in all actions and cauſes competent to be pur- ‘ ſued before him; decreets and ſentences to give forth and pronounce; and to ‘ fine and puniſh delinquents and tranſgreſſors according to law; and to apply the ‘ fines to his own proper uſe; and generally, all and ſundry other things, con- ‘ cerning the premiſſes, to do, uſe, and exerce, during the continuing in office, as ‘ fully and freely in all reſpects, as any other bailie of ſaid palace have done, or ‘ lawfully may do; promiſing to hold firm and ſtable, all and whatever things the ‘ ſaid Henry Home, or his ſubſtitute, ſhall lawfully do in the premiſſes.’

It is evident, that however apparently extenſive the powers granted by this commiſſion may be, they can never legally exceed the powers conferred on the Duke himſelf; by a charter, which appoints his Grace the Keeper of the Palace, park, and gardens; with no other authority than that of appointing ſub-keepers of the Palace and gardens, and of naming ſub-gardeners, and other ſervants for cultivating and keeping the ſame. Nothing, then, can be clearer, than that Mr Home, though dignified with the title of bailie, and veſted with ſomething reſembling a juriſdiction, can be conſidered as nothing elſe, than a mere under-keeper or gardener of the Palace. Though, then, it were allowed, that, in a royal garden, practice might introduce, or might ſanction, the exerciſe of a ſort of police, for preſerving order; and even for extricating the privileges of a ſanctuary; yet it ſeems impoſſible to conſider the under-keeper, as a civil judge or magiſtrate; and, to hold to be a *priſon*, in the ſenſe of the act of ſederunt, any

No 9. *lock-up-place*, which he may uſe, for puniſhing petty delinquencies, committed within the Abbey; or even, (as a matter of police,) for enforcing payment of debts contracted there.

The legality, even of this paultry juriſdiction, might, perhaps, if neceſſary, be ſucceſsfully diſputed; but it matters not whether it be legal or illegal. It cannot be conſidered, as more than a mere exerciſe of authority, in the way of police; a method of correcting the delinquencies of debtors, taking the benefit of the ſanctuary, and refuſing to pay for their aliment; a practice *originating in the neceſſity of the caſe;* as no ordinary diligence of the law could there affect debtors, even for ſuch debts. To hold this to be impriſonment, in the ſenſe of the act of ſederunt; to conſider the place of this confinement as a priſon; or the certificate of this bailie, the mere deputy of the keeper of the palace, as the certificate of a magiſtrate of a burgh, entitling the debtor to inſiſt in an action of *ceſſio*, would be an abſurdity; although the place were not within the bounds of a ſanctuary. But let it be next conſidered, whether a perſon locked up, upon ſuch a warrant, *within the precincts of a ſanctuary*, for a debt there contracted; and being, while in this ſtate of ſuppoſed impriſonment, protected from the diligence of his creditors at large; is entitled to inſiſt againſt thoſe creditors in an action of *ceſſio*. If he prevail, he will be ſecured from diligence in all time coming. If he fail, he may remain in the ſanctuary and defy diligence, as ſecurely as if he had been ſucceſsful in the action. The bare ſtatement of ſuch a propoſition, would almoſt ſeem enough to confute it; if the leaſt regard be due to the obſervations, already made, on the nature and object of the action.—The purſuer's ſummons contains, and every ſuch ſummons muſt contain, theſe words: 'The purſuer is likewiſe continually oppreſſed, and in danger of being arreſted 'in priſon, at the inſtance of the following perſons, his real or pretended credi-'tors.' Is it poſſible to read this ſubſumption, without being ſatisfied, that a man, confined in what is called the priſon of the Abbey, cannot maintain an action upon that ſummons? The propoſition it contains, is completely contradicted by the ſtatement itſelf. With the ſame breath, that the party aſſerts he is in danger of being arreſted in priſon, he ſets forth, that that priſon is in *the ſanctuary*; where it would be impoſſible for any creditor to arreſt him.—The Supreme Court of a great commercial country, cannot give way to ſuch a proceeding as this, with their own act of ſederunt before their eyes; which declares, that no perſon ſhall be heard in ſuch an action, unleſs he ſhall produce the certificate of his incarceration, by one of the magiſtrates of the burgh in which he is incarcerated.

The defenders would diſdain to diſpute with the purſuer, in his unfortunate ſituation, on a point of form: But this is not a queſtion of form, but of ſubſtantial juſtice. They are entitled to be on equal terms with the purſuer; and this they cannot be, while he ſhelters himſelf in the ſanctuary, whether his incarceration there be legal or illegal, real or fictitious; for while, on the one hand, if he ſhall ſucceed in his action, he would be free from their diligence forever; ſo they are entitled, on the other hand, if he fail, to find him in a ſituation liable

No 9.

to their diligence; and this he cannot be, whether impriſoned in the ſanctuary, or going at large within its bounds.—In liſtening, therefore, to this action, the Court would cut up, by the roots, the juſt rights of creditors, without any neceſſity; for the purſuer would have the full benefit of the humane principle, which dictated the proceſs of *ceſſio*, by leaving the ſanctuary, and expoſing himſelf to the diligence of his creditors. If they ſhould not incarcerate him, he would have no occaſion for the benefit of the *ceſſio*, being in full poſſeſſion of his perſonal liberty; if they ſhould incarcerate him, he would then be entitled to ſay, that he was incarcerated in terms of the act of ſederunt; and he would be enabled to produce the certificate required. His ſummons, which is now falſe, inaſmuch as it aſſerts, that he is in danger of being arreſted in priſon, would then be true; and he would meet his creditors on equal terms.

It has been alleged, that the purſuer cannot leave the Abbey for this purpoſe, being there incarcerated; or, what is the ſame thing, being under caution to the amount of L. 10, to return to the Abbey priſon when his health will permit. But let it be conſidered, 1*ſt*, That it was his own choice to retire to the ſanctuary, rather than fairly to meet the diligence of his creditors; 2*dly*, That he can found no argument on the conſequence of his own unwarrantable act, in contracting a debt in the Abbey, which, being already inſolvent, he could not pay; and 3*dly*, That were he to come out of the Abbey, and be laid up in a legal jail by any of his creditors; neither the Abbey bailie, nor his pretended Abbey creditor, could take him out of that legal priſon, and compel him to return to the ſanctuary.—If the purſuer were truly in a priſon in the Abbey, *he might apply to be removed to the Canongate jail.* There he can be arreſted and detained by all his creditors; and there he might commence a proceſs of *ceſſio* in a regular manner, after having been a month in that priſon. This, let it be particularly noticed, is a ſufficient anſwer to the purſuer's argument—that if a debtor, in his ſituation, be not allowed to inſiſt in an action of *ceſſio*, he may be perpetually impriſoned in the Abbey for a debt contracted there.

The purſuer has mentioned a liſt of perſons, impriſoned in the jail of the Abbey, who have been liberated upon the act of grace. It is perfectly obvious, that whether ſuch impriſonments are legal or not, it cannot, in the leaſt, affect the queſtions, whether the Abbey priſon is a priſon in the ſenſe of the act of ſederunt; or whether, though it were, the debtor being confined within the bounds of the ſanctuary, where the diligence of his creditors cannot reach him, is entitled to purſue an action of *ceſſio*.

The ſame obſervation applies to the caſe of Cockburn of Clerkington, which has been mentioned. The queſtion there was not, whether Cockburn being impriſoned in the Abbey jail, for a debt there contracted, was entitled to purſue a proceſs of *ceſſio*; but whether the impriſonment itſelf was legal? Had the firſt been the queſtion, it ſeems pretty evident, from the reaſoning of the Court, as mentioned in the caſe, that the ſtriking objection made here, would not have eſcaped the Court. It is ſtated, that 'ſome doubted of their having a priſon, and thought he ſhould have been tranſported to the Canongate or Edin-

No 9. 'burgh tolbooth; but then his other creditors might have arrested him, which 'they cannot so well do in the Abbey, which is a sanctuary.' This consideration, though it might operate as a reason for sustaining imprisonment in the Abbey, for a debt contracted there, would have occurred to the Court as an invincible reason against allowing the party to pursue a *cessio*, without being removed to the Canongate or Edinburgh tolbooth.

As to the case of Linley, had the point now at issue been *expressly* decided, the judgment must have been considered as erroneous; and ought not to stand as a precedent; but the question was not argued; nor was the bailie's commission, or the source from which it flows, explained as it has now been.

In the cases of Donaldson and M'Kenzie, the objection to the mode of imprisonment was not at all stated.

On 1st June 1799, the following interlocutor was pronounced on a pleading: 'THE LORDS having heard parties procurators, sustain the defences, and dismiss 'the action.'—A reclaiming petition was presented, which was followed by answers. The Court, upon full deliberation, in which the argument for the defenders had much weight, adhered to their judgment*. (*See* JURISDICTION.)

Act. *Mat. Ross.* Alt. *H. Erskine.*
D. Wemyss, W. S. Agent. *Jas. Marshall*, W. S. Agent. Clerk, *Pringle.*
(*See* SANCTUARY.)

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* This case, which was reported by Lord Hermand, as a part of his probationary trials, appears to have been most properly decided. The process of sequestration ought to have no effect on the law of *cessio bonorum*. Sequestration relates exclusively to commercial affairs. The extension of commerce, and liberality of opinion, always accompany one another with equal steps. And it is scarcely to be supposed, that, in the present advanced state of both, a bankrupt, who deserves to be discharged, will be refused the requisite consent. Should it, in any extraordinary case, be otherwise; the man, by being a trader, is not excluded from the benefit of *cessio*, common to all. But why should any man, *while unmolested in his person*, be entitled to convene all his creditors in an action, in order to make a judicial surrender of his effects, and to demand a discharge of his debts? To admit of this, would be to allow the *consequence*, without the *cause*. The process of *cessio bonorum*, is the remedy humanely provided by the legislature; for the hard situation of the man, who is imprisoned for debts; which misfortune has equally occasioned him to incur, and prevented him from discharging. The regulation, therefore, of the act of sederunt 1688; requiring evidence of the fact, that the party has actually been imprisoned; flows naturally and necessarily from the principle of the law.

It is equally obvious, that incarceration in the Abbey jail, ought not to be understood, to amount to the requisite imprisonment; for, whatever was the origin, or may be the extent, of the bailie's jurisdiction; there is sufficient ground for deciding; that it ought not be held to exceed the *necessity* of the case; but ought to be precisely commensurated with it. It is *necessary*, that, as there is a sanctuary there, there should be a superintending officer. It is *necessary*, that he should have some mode of enforcing his authority. Without this, order could not be preserved. A species of confinement, is the *engine*. But it is *not necessary*, that this instrument should possess one *iota* of power, more than sufficient for performing the operation, for which it was primarily intended.

The Court of Session, therefore, will not allow a bankrupt, who by retiring to the sanctuary, has already obtained shelter from the diligence of his creditors, to demand the benefit of *cessio bonorum*; although, in that sanctuary, he has done something, which has occasioned its bailie to put him under some kind of confinement, confessedly of a very slight nature.

*** *What is strictly the law of this case, might have been compressed within much narrower limits; but it is within the scope of the Editor's design, to insert whatever naturally falls in his way, which is curious in the history or antiquities of the country.*