

1769. November 17.

ROBERT POLLOCK *against* ROBERT FULTON, Merchant in Paisley.

POLLOCK having become debtor to Fulton, was at his instance incarcerated in the jail of Paisley. He applied for the benefit of the act of grace. Fulton for some time alimanted him; but having failed, as he alleged, by neglect to consign, Pollock was liberated in terms of the statute. Being apprehensive that Fulton would incarcerate him again, Pollock suspended; but in discussing the suspension, restricted his plea solely to personal liberty, and prayed that, being once enlarged, Fulton might not be authorised to imprison him again.

THE LORD ORDINARY repelled the reasons of suspension; and thereafter "in respect the suspender has not brought a process of *cessio bonorum*, which is the legal method of being freed from personal diligence, adheres to the former interlocutor."

*Pleaded for Pollock;* When a debtor had been incarcerated once, and was liberated upon the act of grace 1696, an act founded in the humanity of the legislature, and intended for the relief of unfortunate debtors, it was not lawful to incarcerate him a second time *sine causa cognita*: and so the Court determined; 10th December 1709, Law *contra* White, No 117. p. 11803. If indeed the circumstances of a debtor, after being liberated, were so altered that the creditor could reasonably expect to operate his payment, he might be entitled to recommit; but the cognition of this fact should not be left to the debtor, but be determined by the Judge. Upon this plan the ends of justice and public utility might be answered; for if the debtor's circumstances were mended, it was just that the creditor should be entitled to the benefit of them; and if they were not, justice and humanity did not permit that the cruelty of the creditor should be indulged; as to allow a creditor to liberate his debtor one day and incarcerate him the next for the same debt, on the same diligence, and so on without end, would be an intolerable oppression.

The case 19th June 1759, Abercromby *contra* Brodie, No 130. p. 11811, where a contrary decision was ultimately given, was attended with peculiar circumstances of complaint against the conduct of the debtor, and was pronounced in a process of wrongous imprisonment brought at his instance against the creditor, and wherein he insisted not for personal liberty but for damages.

*Pleaded for Fulton;* The statute 1696, the foundation of the debtor's claim to liberation, appeared, in particular from the rubric, to have been enacted, not so much with an immediate view to relieve unfortunate debtors, as to relieve the royal burghs of the burden of maintaining them. When the requisites of the statute were not complied with, the debtor must be liberated; but as there was nothing in the act which hindered the creditor from recommitting his debtor anew, even *sine causa cognita*, it was not the duty of any court, from motives of compassion, to interpose and to prevent the diligence of the law from

No 132.

A debtor liberated upon the act of grace, may be again incarcerated at the instance of the same creditor, a process of *cessio bonorum* being the proper remedy.

Sec No 130.

No 132. being carried into effect. The present age furnished more examples of fraudulent debtors than of rigorous creditors; and if any creditor should be wantonly rigorous, and incarcerate his debtor, not with a view to obtain payment but to oppress, the debtor might obtain his relief by a *cessio bonorum*. Relief upon the act of grace ought not to be substituted in place of relief by a *cessio*; the one passed in a summary manner without expiscation before the Magistrate of a burgh, merely upon a neglect or refusal to aliment; the other was a regular process, competent only before the supreme Court, always discussed in presence and with solemnity. The decision 19th June 1759, Abercromby *contra* Brodie, No 130. p. 11811, was directly in point; it was not given solely in a process of wrongous imprisonment, as there was a suspension conjoined with that action, in which the letters were found orderly proceeded.

Several things were alleged against the conduct and character of Pollock, particularly that, notwithstanding of his having sworn he was unable to aliment himself, and of his having granted a disposition *omnium bonorum* to his creditors, he was still possessed of effects, and, since his liberation, had paid away several sums to some of his creditors who had threatened to distress him. These allegations were denied, and a motion was made from the Bench to have them enquired into. Two of the Judges of weighty authority were for altering; but the majority were of opinion that the act of grace afforded a very different indulgence from a process of *cessio bonorum*, which was unquestionably the proper remedy. THE COURT accordingly adhered to the Lord Ordinary's interlocutor, and thereafter refused a reclaiming petition without answers.

Lord Ordinary, *Kennet*.  
Clerk, *Tait*.

For Pollock, *John Dalrymple*.  
For Fulton, *W. Wallace*.

R. H.

*Fac. Col. No 2. p. 6.*

No 133. 1776. January 18. JOHN SMITH *against* JAMES CHRISTIE.

SMITH, serjeant and sutler in the 66th regiment of foot, while that regiment was quartered in the Castle of Edinburgh, contracted a debt, by open account, to James Christie grocer in Edinburgh, at whose instance he was incarcerated in the prison of Edinburgh, as *in meditatione fugæ*, on the regiment being ordered to Ireland. He made application to the Magistrates for an aliment, which being refused, he presented a bill of advocation, on which the following deliverance was given:

“THE LORD ORDINARY, after advising with the Lords, refuses this bill, but remits the cause to the Magistrates of Edinburgh, with this instruction, that they modify an aliment to the complainer, under this express condition, that he makes