

sums which are not arrestable, *a-fortiori*, he ought to convey all that may be affected by that diligence.

No 102.

*Answered* for the pursuer; No argument can well be drawn from the Roman, or ancient Scots law, to the present case, the subject in question having been unknown in the time of these laws. Besides, it is certain, that notwithstanding the general terms in which the rule is laid down as to this matter, yet there were many exceptions. Thus a sum might be given to a debtor with a *proviso*, that it should not be assignable by him, nor attachable by his creditors; and it would be no bar to his obtaining the *cessio*, that this could not be conveyed by him. The pursuer's half pay falls to be considered much in the same light with such a sum. It is given by government for decent living to him, and that he may be ready for public service when required. If it should not be applied in this way, he would be in danger of losing it. It is for this reason that it is not arrestable. For the same reason, he ought not to be obliged to assign it; and indeed it was so found *in terminis* by the House of Lords, in the case Alexander Blackwood *contra* John Cathcart. See APPENDIX. Nay, it is universally understood, that the pay, of sea-officers especially, whether full or half-pay, is not assignable, in so much that no agent will pay upon an assignation.

This argument applies to the whole of the half-pay; and, as there is here no question as to arrears, the case of Captain Brodie is no precedent.

"THE LORDS found the pursuer was not obliged to assign any part of his half-pay."

Aet. *Buchan Hepburn.*Alt. *Geo. Ferguson.*

A. R.

*Fol. Dic. v. 4. p. 138. Fac. Col. No 75. p. 130.*

1775. February 4.

JOHN SHARP *against* DAVID TURNER, RACHEL FORBES, late Spouse of the said John Sharp, and Others, His Creditors.

THE pursuer is eldest son of the late John Sharp stabler in the Pleasance, who made a disposition of several heritable subjects, to a considerable value, in favour of his said son, and others therein mentioned. After reciting the several subjects disposed, is the following clause: "Declaring always, That these presents are granted by me, with the burden of the payment of my just and lawful debts, contracted prior hereto, and unpaid at my decease; and particularly, with the payment of the provisions to Janet Sharp my daughter, and Elisabeth Elliot my intended spouse: And, further, that it shall not be in the power of any of my said sons, to sell, dispone, burden, or affect the foresaid subjects with any debts of their contracting, until the youngest of their children shall attain the years of majority complete: Which provision I hereby appoint to

No 103.

*Cessio bonorum* denied to a pursuer, as not being bankrupt so far as to entitle him thereto, although rendered bankrupt in terms of the act 1696.

No 103. be insert in the infefiments to follow hereon," &c. But there is no irritant or resolute clause.

John Sharp, in his father's lifetime, was married to Rachel Forbes, by whom he had several children ; but, falling into a dissipated course of life, and having also behaved badly towards his wife, she brought a process of divorce against him, before the Commissaries of Edinburgh, and obtained a decree of divorce, by which she became entitled to an aliment of L. 30 Sterling *per annum*, in terms of the contract of marriage between them, besides the expense of process, and the expense of extracting the decree of divorce, amounting together to L. 75 Sterling.

Some time after this, John Sharp, the father, died ; and, in default of payment of the above debt, awarded by the Commissaries, John Sharp (now pursuer) being incarcerated upon their decree, at his wife's instance, he brought a process of *cessio bonorum* ; and having, in support thereof, given in a concordance of losses in trade, and of debts due to and by him, it was stated, That, even in this view, there is a considerable balance in the pursuer's favour ; but that there was the less occasion to insist upon these particulars, as, by the rental of the heritable subjects to which he succeeded on the death of his father, which is also produced, it appears, that they amount to within a trifle of L. 200 Sterling *per annum*, which is a great deal more than will pay every farthing he is owing ; and he was willing immediately to convey to any trustee whom the Court or his creditors shall think proper, for the benefit of all concerned. The pursuer likewise *argued*, That there is no necessity for a debtor's being insolvent in order to obtain a *cessio bonorum* ; that neither the Roman law, the act 1696, the acts of sederunt, or any lawyer, say it ; and that the contrary is to be inferred, from its being laid down, that the debtor is entitled to the surplus of his effects after paying his debts ; and that it is incomprehensible why a fair surrender of effects, not sufficient to pay his debts, should entitle the prisoner to be released, and that a surrender of effects, more than sufficient, should not entitle him.

The grounds upon which the defenders opposed the pursuer's obtaining the benefit of the *cessio*, were the following : In the *first* place, the benefit of a process of *cessio bonorum* was intended by the law, and has ever been confined, by the practice of this Court, to restore to liberty and their former state of industry, such persons as, by innocent losses in trade, or by unforeseen accidents and misfortunes, have been reduced to an incapacity of paying their necessary and lawful debts ; but it never was intended by law, or applied by practice, for relieving from deserved confinement, and restoring to their former vice and extravagance, persons who, by a life of debauchery and immorality, idleness and expense, have beggared themselves, and defrauded their just and onerous creditors. To this it was *answered*, That extravagance alone cannot afford any objection against a debtor's obtaining a *cessio* ; and, in the present case, the

creditors cannot say they are defrauded, as there are effects much more than sufficient for their payment.

In the *second* place, the defenders *insisted*, That, independently of this, the pursuer is, in another light, not entitled to a *cessio bonorum*, viz. that, not being properly bankrupt, he is not a person for whom the law has appointed the benefit of a *cessio bonorum*. The original intention of this humane and useful law, was to save from perpetual imprisonment, persons whose debts so far exceeded their funds, as to make it impossible for them ever to regain their personal liberty by discharging the debt for which they were imprisoned. But it never was the intention of the law, nor has it ever been the practice of this Court, to extend the privilege to those whose means in any considerable degree exceed their debts, they being in no danger whatever of suffering perpetual imprisonment, or even confinement for any considerable duration, as they have it in their power, by a sale of their effects, to satisfy their creditors, and procure their liberation, or else to wait patiently, till, by legal diligence, they shall have operated payment out of their subjects. The pursuer, by his own condescendence, is in this latter situation; and, were the Court to indulge persons with a *cessio* in the pursuer's situation, all personal diligence would be at an end.

But, on another account, the defenders *insisted*, That the pursuer cannot prevail in this action. He offers to make a trust-disposition for behoof of his creditors. But, without the consent of his creditors, no such disposition can be effectual, nor can the Court interpose their authority to render it so, because, by the law, a bankrupt has no power, by any deed of his, to deprive any one of his creditors who has not consented to it, of the legal right, competent to all creditors, of using diligence in the manner they judge most proper for their security or payment, or to impose upon him a trustee not of his own choosing; and this was expressly found, July 12th 1734, Snee, No 242. p. 1206. And as the pursuer, though not bankrupt so far as to entitle him to a *cessio bonorum*, is yet clearly bankrupt in terms of the act 1696, by being imprisoned, he cannot, by granting any deed, affect the rights of his creditors, or put any restraint upon them as to the form of attaching either his effects or his person. But, further, as the pursuer's estate is not bankrupt, it cannot, by any legal method, be brought to a sale without the consent of all the creditors concerned; and, therefore, the attempt made by him to obtain his personal liberty, by a trust-disposition not consented to by his creditors, must be unsuccessful.

To the pursuer's argument, that there is no necessity for a debtor's being insolvent who demands a *cessio bonorum*; it is *answered*, That the very meaning and intention of the laws themselves, introducing the benefit of the *cessio*, imply insolvency, and therefore need not mention it, they being intended merely to prevent people unable to pay their debt from being confined, when such confinement can answer no purpose, which can only happen in the case

No 103.

of absolute insolvency. As to the surplus being payable to the debtor, that circumstance does not take the supposition of insolvency, as every person may be called insolvent, when it is a doubt whether his funds exceed his debts or not; and, if such should accidentally be the case, he must be entitled to the balance. But, in the present case there is no doubt, as the pursuer boasts, that his property far exceeds his debts, in so much that he endeavours to vindicate any supposed concealment of his effects, by arguing, that his creditors cannot be defrauded, so long as there is sufficiency for payment of the sums due them.

And, with respect to the pursuer's last observation, the answer is obvious. In the first case put by him, the prisoner must remain for ever confined, if not released by a surrender, his funds being short of his debts. In the last, this is impossible, the contrary being the case; so that he has it in his power to obtain his liberty, by payment of all that he owes; and the respondents cannot see why they should be deprived of their legal right of using diligence against his person and estate, in order to hasten his liberation.

The Court seemed to lay no stress upon the *first* point alleged by the defenders to exclude the pursuer from the *cessio*, viz. his extravagance; but they were moved by what was urged by them on the *second* point; and, in particular, it was *observed*, That there was no instance of a person being ever found entitled to the *cessio* but where there was a bankruptcy, though that, indeed, was not to be taken judaically: That a *cessio* is a remedy, only competent where insolvency is alleged to found the action; and hitherto it has been understood, that it is only allowed to those who were really bankrupt, or at least bankrupt with a small excrescence: That a sale cannot proceed in this case upon the act of Parliament, because the pursuer is not bankrupt; and it is the right of every creditor to prosecute the diligence of the law. Here there is only one creditor prosecuting, namely his own wife for her aliment, and the expense of the process of divorce, which was his chief debt; and it was impossible to deny her the compulsory aid of the law, when, in various shapes, he has it in his power to do her justice; and his reasoning would have made greater impression, if he had done every thing in power to raise money for that purpose.

The following judgment was pronounced, and afterwards adhered to, on a reclaiming bill and answers.

“THE LORDS find the pursuer is not entitled to the *cessio*, and assoilzie the defenders from this process.”

Act. Rolland, Macqueen.

Alt. H. Erskine.

Clerk, Pringle.

Fol. Dic. v. 4. p. 138. Fac. Col. No 155. p. 23.