N.B. Here there was a strange original blunder, which, for more security, was sought to be amended by another blunder.

1776. *February* 16. MACKENZIE BROWN *against* THOMAS CARMICHAEL and OTHERS.

PRISONER.

A debtor, after having been liberated on the act of grace, may be again imprisoned on the same diligence.

IN November 1775, the pursuer was incarcerated in the tolbooth of Peebles, on a caption at the instance of Thomas Carmichael, his creditor. On 23d December following, the pursuer was liberated under the Act of Grace. His creditors being displeased with his subsequent conduct, and alleging that he improperly interfered with the management of a factor appointed by them, he was again apprehended and imprisoned on the same diligence, on 26th January 1776. The pursuer applied for relief to the Court, by petition, craving that he might be set at liberty. The application was opposed by the creditors, who

PLEADED,—That the proper and only remedy open to the pursuer, in such a case, is to apply for the benefit of the *cessio bonorum*.

The Act 1696 does not prohibit the proceedings complained of, and the creditors are ready now to aliment the petitioner. The statute was intended solely for relief of the burgh, and did not at all abridge the creditor's right of imprisoning.

Abercrombie against *Brodie*, 19*th June* 1759; *Pollock*, *Nov.* 1769.

The following opinions were delivered:—

COVINGTON. The Act of Parliament 1696 is partly intended for the relief of unhappy prisoners. It binds the creditor-incarcerator to aliment. When the creditor withdraws the aliment, this implies a consent to liberation. I would not say that the creditor is barred from doing diligence again, yet I think that, if he means to incarcerate again, he ought to charge again, or give some other intimation, that the debtor might have warning, so as to prevent incarceration anew.

MONBODDO. I doubt whether the debtor could have been incarcerated even on the same debt. By refusing to aliment, the creditor seems to renounce his right of charging on the same debt.

KAIMES. A *cessio bonorum* is the proper mode for setting a man free who has remained so long in prison as to give evidence that he means to make no concealment. A man in such case cannot be again incarcerated on the same debt, unless there is a change of circumstances. But the act of grace stands on a different footing; it is for the sake of royal burghs, while the debt and the diligence remain. If that is the case, what hinders the creditor again to imprison the debtor? It is said that here there is a presumed consent. Why so?

I may perhaps be not able to aliment the prisoner at one time, though I may at another. I may let him out, believing that he has acted fairly, and I may again imprison him on suspicion that he means to defraud me. Here the debtor has no cause of complaint, nor have the magistrates. There might be reason for allowing a new imprisonment, only in consequence of a new intimation; but I see no authority in practice for this. There was no bad purpose *here*. The incarceration was only to keep the man out of the way.

HAILES. It is admitted by the creditor, that he imprisoned this man anew, not with the view of obtaining payment of his debt, and that it was impossible to obtain payment of his debt that way; but it is said that Brown was troublesome to the trustees of his creditors, and therefore this device was thought of in order to quiet him: but is not the law strong enough to keep M'Kenzie Brown within its rules as well as the rest of the king's subjects? The Judge Ordinary could, upon a proper application made to him, have forced the debtor to submit to the regulations of the law.

COVINGTON. We have in practice something analogous to a new intimation to the debtor: an obligation to remove, without warning, has been found not sufficient to authorise a summary removing.

GARDENSTON. The right of creditors is concerned *here*; a sacred right, which ought not to be weakened, especially in times like ours. If we depart from the doctrine of the two decisions, *Abercrombie* and *Pollock*, we confound that material distinction which there is between the *cessio bonorum* and the *act of grace*. The sense of the statute 1696 is, that the creditor shall aliment, if he will confine: from inadvertency, he may have omitted to aliment, but where is the wrong done when he is willing to aliment? The only thing which seemed to afford an opening was, that the creditor had neglected to furnish a new aliment; but that, it now appears, is not the case. There would be reason for requiring new diligence, had that been ever required in practice.

JUSTICE-CLERK. Of the opinion of Lord Kaimes and Lord Gardenston: the not alimenting formerly, may have been owing to incapacity or to neglect; there may be a *third* cause. I come to have information that my debtor is possessed of funds, and therefore I procure his imprisonment anew. The creditors, here, are willing to let the debtor out of prison, upon his agreeing not to molest their management: this is a reasonable offer, and shows that there is no intention to oppress, though it is a private offer with which the Court has no concern.

PRESIDENT. The Act, 1696, was partly intended for the benefit of the borough, partly for the benefit of the prisoner. The judgment pronounced in 1709 seems to be just. It prohibits a new incarceration *nisi causa cognita;* that is, there must be reason given. *Here* the creditors have fairly said that they do not imprison with the view of recovering their debts. I do not like this. If the man behaved ill, let him be punished, but let him not be imprisoned *in modum pœnæ*. If he is a fraudulent bankrupt, the creditors may have the aid of the law against him.

On the 16th February 1776, "the Lords dismissed the complaint."

Act. A. Scrymgeour, J. Swinton. *Alt.* A. Wight.

Diss. Covington, Monboddo, Alva, Hailes, President.