

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.