1788. *July* 1. ELIZABETH and MARY BRUCE *against* JAMES BRUCE of KINNAIRD.

FOREIGN.

Succession in moveable effects found to be regulated by the *lex domicilii*; the succession of effects at sea, by the law of the country whither they were destined by the proprietor.

[*Fac. Coll. X.* 41; *Dict.* 4617.]

JUSTICE-CLERK. This case has been determined over and over again, according to the interlocutor of Lord Monboddo.

HAILES. A difficulty is started on account of the funds having been invested in bills, and those bills being at sea when Mr Bruce died; but the truth is, that an English company, residing in Leadenhall Street, London, were the creditors in the bills, and the money for which the bills were granted, lay in *their* out compting-house at Calcutta, for it is but a compting-house, although a pretty large one. No man, who is in a foreign country, can prevent his dying there, but every man in a foreign country can prevent his dying intestate there. If he make no will, and, of consequence, if his succession go contrary to his probable intentions, he himself is to blame; the law cannot supply what he has omitted.

ESKGROVE. Can a man be said to have a domicile in Scotland because he was in meditation of coming to Scotland?

On the 1st July 1788, "The Lords found that the English law must be the rule for determining the succession of Major Bruce; and consequently, that James Bruce of Kinnaird is entitled to succeed with the defenders, his brothers and sisters consanguinean;" adhering to the interlocutor of Lord Monboddo, and refusing a petition without answers.

For the petitioners, Henry Erskine.

1788. *July* 8. ALEXANDER WILSON *against* JOHN GRIEVE, LORD PROVOST of EDINBURGH, &c.

PRISONER.

Magistrates found liable for the sums due to an incarcerating creditor, even where the debtor had, before his release, obtained the *cessio bonorum*.

[*Fac. Coll. X.* 47; *Dict.* 11,757.]

MONBODDO. This case does not fall within the act of sederunt; the question

is as to common law. The pursuer must show, that by the liberation he has suffered a damage; but this he cannot. If the pursuer could say that he meant to appeal, there might be difficulty.

DREGHORN. When a total liberation is granted from indulgence the magistrates would be liable; not so when there is an error in judgment, a mistake in form. If a vicious extract had been produced to the jailor, as, for example, an extract in which the clerk had omitted to sign some of the pages, would the jailor have been liable for having liberated erroneously?

JUSTICE-CLERK. If this case fell under the act of sederunt I should not take it upon me to dispense with the act. The act of sederunt is founded on this, that the *squalor carceris* might force a man to make a discovery of his effects, and so pay his debt. Here there was nothing more than error in judgment. If any damage has arisen, that error will not excuse: but there could be no damage here; for the pursuer had brought a *cessio*, and had obtained decreet. When a man is imprisoned contrary to his will, there the *squalor carceris* may force payment of a debt. But here the very tendency of the action of *cessio* was that a man might remain for a season in prison in order to obtain his liberty. His remaining in prison was necessary to make his action good.

HENDERLAND. The act of sederunt points out the genus and the species of transgression. If I can read and understand words, the act comprehends this case; I cannot say that there was an error in judgment. You constitute the jailor the judge, and you allow him to judge without evidence.

SWINTON. Every law implying any thing penal must be taken just as it is written. Magistrates of boroughs are mentioned in the act, but nothing is said of jailors.

HAILES. There is no doubt that the present pursuit is, what the defenders call it, a catch; and I was very unwilling to concur in giving effect to what I make no scruple to call a thing morally wrong. But judges are not the directors of the consciences of parties. The jailor and the magistrates are one. The jailor is merely a servant: for him they are answerable. Great part of the privileges of boroughs is held by the tenor of warding, and the magistrates, in name of the community, must ward. In the exercise of this duty they may employ servants; but it would be a doctrine equally dangerous and new to hold that they are not answerable for their servants. It is to be supposed that the office of jailor is not forced on any man: it is what is commonly denominated a post, for which there are candidates, and such candidates have friends who will be ready enough to find security for their good behaviour. It is right that the inferior officers of the law should give immediate obedience to the commands of the supreme court; but they ought to know what such commands are before they obey them. Had a clerk of session gone to the Canongate jail immediately after the interlocutor in the *cessio* was pronounced, and shown the president's signature to the jailor, I deny that the jailor could have liberated the prisoner. The court at home speaks by its macers or by its extracts: in foreign countries, it speaks by its seals. It is true that the judgment was final, because, having been pronounced on the last day of the session, it could not have been reclaimed against; but still an appeal might have been lodged; or, on cause shown, the Ordinaries on the Bills might, during the vacation, have stopt execution from the necessity of the case. I should not wish to see any latitude left to

magistrates and their servants: it is fit, by an act of severe justice, to teach them that their office is merely ministerial.

ESKGROVE. Whatever is done by jailors is done by magistrates. The only question is, Whether must this cause be tried by common law or by the act of sederunt. If, by common law, damages must be qualified; not so if by the act of sederunt. I think that it falls under the act of sederunt. There was no mistake here as to the import of a warrant; for there was no warrant, but only an intimation by the agent to the jailor.

PRESIDENT. This case falls within the act of sederunt: the prisoner was discharged without any warrant from the Court of Session. No court has authority to deprive any man of a common law right. During fourteen days after the decreet something might have occurred of so much consequence to the debtor as to have induced any friend of his to purchase his immediate liberty by payment of the debt.

On the 8th July 1788, "The Lords found the magistrates liable;" adhering to the interlocutor of ———.

Act. Henry Erskine. *Alt.* Ilay Campbell.

Diss. Justice-Clerk, Swinton, Rockville, Dreghorn, Monboddo.

1788. *July* 29. JOHN WOOD and COMPANY *against* ARCHIBALD HAMILTON.

HYPOTHEC.

Hypothec does not take place on ships for repairs made in home ports.

[*Fac. Coll. X.* 65; *Dictionary*, 6269.]

SWINTON. I am for the last interlocutor, as being agreeable to the opinion of our lawyers and the decisions of our court of admiralty.

ESKGROVE. A *series rerum similiter judicatarum* in the supreme court ascertains what is law. But I see no series on the point in question. Besides, if an error has been committed by the supreme court in matters of commerce, and not in matters municipal, it may, notwithstanding of practice, be still rectified. That was the opinion of the House of Lords in the noted case of *Hastie and Jamieson.* I do not find that there is any such hypothec, excepting in Holland, of the nature now claimed. Lord Stair does not assert any such hypothec. There is indeed practice in the Court of Admiralty, which I think ill founded. Shall I set it up in opposition to principles? That court has gone too far in granting hypothecs by an irregular and random practice. Wherever there is no room for parties themselves to contract, there necessity requires that the master should have a power of contracting; but necessity goes no farther.

GARDENSTON. Of the same opinion. Strange that the practice in our Admiralty Court should have gone contrary to the practice in England. Probably