

1802. JOHN M'LEAN, Merchant, Leith, . . . Appellant;
 WILLIAM BETHUNE of Blebo, and Others, his } Respondents.
 Creditors, }
 M'LEAN
 v.
 BETHUNE.
 House of Lords, 4th August 1803.

CESSIO—FRAUD—Circumstances in which the Court of Session refused to grant an insolvent person the benefit of the cessio; but reversed in the House of Lords.

This was an application for a *cessio bonorum* by a party insolvent, and who had assigned his whole means and estate to a trustee, for behoof of his creditors.

He had thereafter retired to the sanctuary; and had there been imprisoned in the abbey jail for a debt contracted within the precincts of the sanctuary; and thereafter he was incarcerated in the Canongate jail; whereupon he sued out the present process. The creditors in part appeared and opposed the cessio—the greater part not appearing. They averred, that during a certain period that the appellant was entrusted with the management of his affairs and funds, by sufferance and arrangement with his creditors, the funds had suffered an unaccountable diminution; that this discrepancy of funds could not arise from innocent misfortune but from fraud; and, therefore, that, as a fraudulent bankrupt, he was not entitled to the benefit of cessio. The Court remitted to an accountant “to report upon the trustee’s proceedings, and
 June 30, 1801. “as to what progress he has made in the execution of his
 “trust since the last report was exhibited by him, whether
 “he has been able to recover any part of the bankrupt
 “effects, and to what extent, or in whose hands they are
 “situated? What preferences are claimed on by particular
 “creditors, and how and at what period these preferences
 “were obtained? And, in particular, to explain, as far as he
 “can do from the books, or other materials before him,
 “whether John M’Lean, during the interval between Janu-
 “ary 1794 and March 1796, while he was entrusted with
 “the management of his own affairs, acted in a fair and re-
 “gular manner towards his creditors, and what were the
 “causes of the great deficiency which appeared at the lat-
 “ter period?”

There was no allegation that the appellant did not keep regular books. It was only objected, that, in the books he kept, he ought, in addition, to have kept a waste book. The accountant, in reporting to the Court, did not specify any circumstances of unfair dealing. Yet the Court of Session
 Feb. 13, 1802. pronounced this interlocutor:—“The Lords having resumed
 “consideration of this petition, and advised the same,

“ with the condescendence and last report of Mr. Russel,
 “ and heard the counsel for the parties thereon, they refuse
 “ the petition and condescendence, and adhere to their for-
 “ mer interlocutors, and decern.”

1803.

M'LEAN
 v.
 BETHUNE.

Against these interlocutors the present appeal was brought.

Pleaded for the Appellant.—That the charges of fraud against the appellant by the respondents, whether stated generally or specially, have been either insinuated or stated, to make up for the want of any real objections to his right to the benefit of the cessio, and, without any evidence, or shadow of evidence, of this fraud being adduced. It is clear, that such unsupported charges, insinuations, and mistatements, cannot prevent him from getting his cessio. He has done every thing a person in his situation is expected to do. He has kept regular books, and these are in the hands of his trustee for his creditors. He has surrendered every thing, and concealed nothing. It is true, to entitle him to the benefit of the cessio, he must be able to adduce the proper and reasonable evidence of the cause of these transactions which have occasioned his insolvency. This is abundantly shown from his journal and ledger. Several foreign consignments to a large amount, together with an unparalleled series of mercantile failures and embarrassments are shown. And although the appellant kept no cash book, or no regular letter book, yet, that the first was supplied by the ledger, wherein there was a head appropriated for all cash transactions, and although copies of all his letters were not kept, yet the originals were in the hands of the creditors. Besides, the respondents, who allege fraud, must prove it. The onus lies on them to prove their defence, not for the appellant to prove a negative—to prove that he himself was guilty of fraud.

Pleaded for the Respondents.—The appellant is bound to prove that the bankruptcy arose from innocent misfortunes, which it was incumbent upon him to do in this action. He has not done so; and therefore the Court, although not expressly prohibited by statute from granting the benefit of a cessio, and may exercise a discretionary power, yet the practice, in such cases as the present, has always been to refuse the cessio. The books of the appellant do not afford any satisfactory information, either as to his past transactions, his misfortunes, or the present state of his affairs. From the manner in which his books have been kept, the accountant found it difficult to understand the state of his affairs,

1803.

 M'LEAN
 v.
 BETHUNE.

and this confusion was doubtless assumed to cover his fraud. But it is not necessary for the respondents objecting to prove *that* fraud. They are only bound to refer to facts in his affairs which suggest suspicion, and which require explanation. It is the appellant who must prove that his bankruptcy has arisen from innocent misfortune; and this not having been done, he is not entitled to the benefit of the *cessio*.

After hearing counsel,

LORD CHANCELLOR (ELDON) said,

“ My Lords,

“ This is a question arising out of an application for the benefit of *cessio*, which is a very unusual subject here, and brings up a judgment pronounced below by a very narrow majority. Five of the judges having thought him entitled to the *cessio*, and six judges not.

“ I may refer your Lordships to Erskine's Institutes, B. iv. 3, 26, so as to show that the appellant's circumstances came under the description of persons entitled to sue for the benefit of this process.

“ The appellant here was originally in Holyrood House, or Abbey. He was thereafter in the Edinburgh jail, and endured the *squalor carceris* for some years. He then applies for *cessio*. Part of the creditors do not oppose. But part do.

“ The Act of Sederunt 1st Dec. 1685, read. When communicating with one of the law Lords on the terms of this act, we lamented to see so much looseness in the law, as it was not easy to determine whether insolvency, or misfortune, or both considerations, were necessary to be made out. The passage is not clear, whether the pursuer is to make out that his insolvency is not owing to fraud. If so, he undertakes proof of the negative—a course which, your Lordships know, is quite unusual.

“ If, on the other hand, he openly makes a full disclosure, and if the creditors can distinguish no criminality, *that* will be distinct proof of this negative. The creditors must prove their allegation of fraudulentency.

“ By the Act of Sederunt he is bound to assign over his estate to creditors. It seems to have been taken for granted, that in a case of fraudulent practices, he could not be entitled to his *cessio*.

E. B. iv. tit.
iii. § 26.

“ The effect of decree of *cessio* (reads from Erskine, § 26,) is to set the prisoner at liberty from his creditors' diligence, but having no effect as to future debts. According to this passage, a party may have the benefit of *cessio* if he submits to wear a dyvours habit. In a case of this sort, where a party can protect no property that he has, or may acquire, and where no protection or certificate can save *that* from the creditors, but is only a protection to his person from imprisonment for debt, some favour is due in considering the present application. Perhaps some may look at this case with too much feeling, the other with too much severity. But a party, in a judicial suit, cannot too often re-

collect that he is not to look at the condition of the parties—neither to the right nor to the left—but whether the individual is in the situation entitled to redress.

“In my opinion, this case is quite unusual for an appeal; and, therefore, it may be worthy of inquiry how far appeals are proper in this and bankruptcy cases.*

“At same time, I should have liked to have seen, in this case, why the decree of *cessio* was refused. In such cases of practice it is very delicate to meddle with the judgment of the *Court below*, and for that reason I should have wished it more explicit, because the notes of the judges’ speeches are so loose (reads notes), that I cannot extract satisfaction from them. I have listened anxiously to counsel to learn why the *cessio* was not to be granted, but could not learn it distinctly.

“It would be very loose to say, that though no fraud appears, there must have been fraud done to the creditors from the state of the affairs. It would be a hazardous principle to say that there is fraud, and yet, when called on to specify, you cannot discover or disclose it. In this case, I presume the contrary, ‘*De non apparentibus*,’ &c. must apply.

“If the Court had gone on the ground that the misfortune by which his insolvency was produced, was not made out, or fraud of various kinds, specifying these, this would have been intelligible. We do not see the grounds, and therefore we must take from books of authority some directions to go by. (Reads state of case from printed cases.)

“True, the question is, whether it be made out by evidence that this did happen by such gross inattention, fraudulent preferences, or concealments. If fraud had clearly appeared, then there would have been an end of the question. They do not say that this man had not kept his books so regularly as he ought to have done. And the fair result of the accountant’s report is, that there is no fraud.

“On the whole, I cannot see ground on which to refuse my concurrence with the minority of the Court below. I concur with the learned Lord who was here yesterday, and with Lord Thurlow, that the preponderance of evidence is in favour of granting the *cessio*, and that the interlocutors be therefore reversed.”

Ordered and adjudged that the interlocutors complained of in the appeal be reversed. And find, that the pursuer in this case is entitled to the process of *cessio bonorum*. And it is further ordered that the cause be remitted

1803.

M'LEAN
v.
BETHUNE.

* This is the third case in which his Lordship had expressed doubts as to the propriety of appeals in such cases. Viz. in a Protection case—in a Discharge case,—and now in a *Cessio*. The recent Bankrupt Acts do not alter this; and the act 6 and 7 Wm. IV. § 19, in regard to the *Cessio*, expressly allows an appeal.

1803.

INCORPORATION OF
TRADES OF
PERTH
v.
PROUDFOOT,
&c.

back to the Court of Session in Scotland to proceed accordingly.

For the Appellant, *John Clerk, Thomas Thomson.*

For the Respondents, *Wm. Adam, Adam Gillies.*

Unreported in the Court of Session.

JAMES CHRISTIE, Deacon, and ROBERT KEAY,
Boxmaster of the Incorporation of Hammermen of Perth, and Others, Members of the Incorporation of the said Burgh, } *Appellants;*

JAMES PROUDFOOT, Merchant, Dean of Guild of Perth, and Others, Members of the Guild Council of the said Burgh of Perth, } *Respondents.*

House of Lords, 6th December 1803.

BURGH—TRADES CORPORATIONS—PRIVILEGES.—The sons, and sons-in-law of the several incorporated trades of Perth, had the privilege of entering their respective corporations at lower or illusory dues. By the charters erecting the guildry corporation, the *members* of these several trades had a privilege also of entering the guildry, upon paying smaller dues than was exacted from strangers. The sons, and sons-in-law of the trades incorporation, imagining that they had a similar right, sought to be entered as members, on payment of the like small dues. Held that they could not claim to enter the guildry, except on paying the dues as strangers.

In the burgh of Perth, as in all Scotch burghs, the burghesses are of two descriptions,—merchant-burghesses, so called from their dealing in merchandize only; and trades-burghesses, who are engaged in mechanical employments. All the burghesses of Perth (excepting weavers and waulkers) are guild brethren, and, as such, have certain rights and privileges.

There are seven incorporations of trades, burghesses in Perth; hammermen, bakers, glovers, wrights, taylors, shoemakers, fleshers. All these incorporations have peculiar rights and privileges, and separate funds under their own management. As long as a burghess is a member of any of the trades' incorporations, he can only exercise the calling, and enjoy the peculiar privileges of that incorporation.