

Pleaded for Reid: The decret of *cessio* protects the suspender not only from personal diligence, but likewise from diligence against his effects afterwards acquired; except in so far as the charger is able to instruct, that the suspender has effects over and above a competency for the subsistence of him and his family. This is agreeable to the doctrine of the Roman law, from which we borrow the action of *cessio*, and the *beneficium competentiæ* given by that law to the obtainer of the *cessio*, ff. l. 42. 3. 6. is likewise adopted into ours, *Quon Attach. c. 7.*; Bankton, v. 3. p. 18. § 1.; p. 19. § 5.; Erskine, p. 696. § 27. The charger, therefore, can attach no effects belonging to the suspender, without first condescending on such effects, that it may be known whether a competency would remain.

On the part of the charger: No objection was made in this case to suspending, as to diligence against the person of the bankrupt; but, it was insisted, that the decret of *cessio* does not protect effects of the bankrupt, afterwards acquired, from the diligence of his creditors. Our law does not indulge the bankrupt with a reservation of effects sufficient for an aliment. The opinions of Lord Bankton and Mr Erskine, adduced by the suspender, seem to be founded solely on a passage in the *Quon Attach. c. 7.* which supposes that every debtor, both before and after a *cessio*, is entitled to this privilege. That passage, therefore, can merit no regard as an authority. The law is fixed by the usage. No instance ever occurred, in which this reservation was allowed, either at obtaining the *cessio*, or out of effects afterwards acquired. The charger, therefore, is not bound to condescend, as the suspender is not entitled to have any thing reserved. Such a condescendence might likewise be the means of disappointing the diligence altogether.

The Court were of opinion, That the charger must be allowed to proceed in his diligence to attach the effects, without condescending; and that the debtor had no right to have any part of his effects set aside to him for his maintenance; but in case the charger, in the execution of the diligence, should proceed to any act of rigour, such as attaching the tools by which the suspender, as an artificer, gains his daily bread, the Court would then judge on the circumstances of the case, whether the diligence ought to be supported.

The Court suspended the letters *quoad* personal diligence against the suspender; but, in other respects, found the letters orderly produced.

Fol. Dic. v. 3. p. 73. Fac. Col. No 31. p. 52.

1788. August 5.

ROBERT PRINGLE against ALEXANDER NEILSON.

ROBERT PRINGLE, formerly a retail dealer in the town of Dalkeith, after having obtained a *Cessio bonorum*, was employed as a merchant's clerk; in which capacity he had a salary of L. 25 per annum. Having furnished a small house for

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 debtor who had been called. The bankrupt urged, that the decret of *Cessio* protected not only from personal diligence, but from diligence against effects acquired after the decret, except in so far as exceeding a competency. The Court suspended only as to personal diligence. But they expressed an opinion, that the tools by which the bankrupt earned his subsistence, could not be affected.

No 6.

A person who had obtained a *Cessio*, was afterwards employed as

No 6.
a clerk, with
a salary of
25l. He fur-
nished a small
houfe. A
creditor at-
tempted to
pound and
arrest. He
pleaded *bene-
ficiam compe-
tentiam*. The
Court sus-
pended only
quoad perso-
nal diligence,
wearing ap-
parel and
working
tools.

the reception of his family, confifting of a wife and feveral children, a pointing of the furniture was attempted by Alexander Neilfon, a creditor of his, to the extent of L. 4 : 16 : 9, who had been fummoned in the procefs of *Cessio*. An arrestment of the salary was alfo ufed.

Robert Pringle offered a bill of fufpention, in which he

Pleaded: A decret of *Cessio* does not, like a certificate of bankruptcy in England, procure a total releafe to the debtor, any property he afterwards becomes mafter of, being ftill, in general, attachable by his creditors. But while, in this manner, a proper care has been taken by our law, to hinder a perversion of this humane remedy, it has been equally an object of attention, that it fhould not, by an over-rigorous execution of diligence, in virtue of prior debts, be entirely frustrated. With this view, the *beneficium competentis* has been introduced, whereby not only the debtor's wearing apparel, and the implements of his trade, but alfo fuch a portion of the effects acquired by him after obtaining the *Cessio*, as is indifpenfably neceffary for his fupport, are fecured to him. In the prefent cafe, where the fums earned by the debtor are barely fufficient, with the utmoft frugality, to maintain him and his numerous family in that decent manner, which the nature of his employment requires, the proceedings that have been held muft appear equally irregular and unauthorifed; *Quon. Attach. c. 7. § 3.*; *Erkine, b. 4. tit. 3. § 27.*

Answered: In confequence of a *Cessio bonorum*, a debtor merely obtains an exemption from perfonal arrefts. Whatever he afterwards acquires, whether by his own induftry, or by other methods, is liable to the diligence of his creditors.

If, indeed, a creditor were to exercife his right in an oppreffive manner, as by pointing the body-clothes of his debtor, or the tools which are neceffary for providing his fubfiftence; this, as an abufe of legal execution, would be liable to correction. But, beyond this, our cuftoms have never gone; the *beneficium competentis*, as known in the Roman law, being only admitted with us in the cafe of gratuitous obligations, or in thofe where the parties ftand in the relation of parent and child to each other. And, in circumftances fuch as the prefent, where the fums due to the ufer of the diligence are fo inconfiderable, that after payment, there is ftill a fufficiency left for enabling the debtor to live, with that frugal economy, which becomes one in his unfortunate fituation, it feems impoffible to doubt the legality of the meafures that have been followed; 11th July 1778, Patrick Reid *contra* Matthew Donaldfon, (*supra*).

THE LORD ORDINARY fufpended the letters '*quoad* the fufpender's perfon, wearing apparel, and working-tools; but found the letters orderly proceeded '*quoad ultra*.'

After advifing a reclaiming petition for Robert Pringle, with answers for Alexander Neilfon, it was

Observed on the Bench: There is no example, where the *beneficium competentis*, in the extent known in the Roman law, has been recognifed in the Scots courts.

And in the case under consideration, it does not seem necessary to give any determination on the point. But, if the creditors of a bankrupt, who had obtained a *Cessio*, were to proceed in such a way, as not even to leave him the necessaries of life; as the purpose of the law would thus be frustrated, it would doubtless be competent for the Court of Session to apply a remedy.

' THE LORDS refused the petition,' thus affirming the judgment pronounced by the Lord Ordinary.

Lord Ordinary, *Dunsinnan.*

A&C. *Dickson.*

Alt. Geo. *Fergusson,*

Clerk, *Sinclair.*

Craigie.

Fol. Dic. v. 3. p. 73. Fac. Col. No 42. p. 70.

See PRISONER.