

No 115. is there any hardship in this. Retiring to the sanctuary is a voluntary act on the part of a bankrupt; and if he be imprisoned there, and wish to obtain a *cessio*, he may get himself transferred to the Canongate prison, where he will meet his creditors on equal terms.

THE LORDS (1st June 1799) dismissed the action.

A reclaiming petition was followed with answers; and, after a hearing in presence, as part of the trials of Lord Probationer, Hermand, the Court thought both defences well founded; but the decision was rested chiefly on the second.

THE LORDS unanimously adhered to the former interlocutor.

Act. Lord Advocate Dundas, M. Ross, Ja. Ferguson. Alt. Solicitor-General Blair, H. Erskine,
Ar. Campbell. Clerk, Pringle.

D. D.

Fac. Col. No 139. p. 312.

* * See another report of this case, No 9. p. 7, *voce* ABBEY of HOLYROODHOUSE.

S E C T. III.

Act of Grace.

No 116.

A person imprisoned till he perform an act in his power cannot demand the benefit of the act of grace.

1709. December 2. TURNER against Ross.

WILLIAM TURNER, notary in Birse, having intromitted with the means of one Middleton, by virtue of a testament, afterwards found null, and being pursued by Ross of Tillisnaught to refund the money, and decret being obtained against him, he is thereupon imprisoned in the tolbooth of Brechin; and having required the Magistrates either to modify an aliment to him, (in regard he made faith he was not able himself), or else to liberate him, in terms of the act of Parliament, 32,1696, they declined; whereon he gave in a complaint against them and Tillisnaught. To which it was *answered*, That he was not in terms of that act of Parliament, which was only conceived in favours of poor debtors who were incarcerated for debts and sums of money which they were naturally incapable to pay; but he was imprisoned for not exhibiting and producing the bonds and other writs of Middleton's executry, which he acknowledged, by his oath produced, were in his own hands. And this being *conditio potestativa*, which he could purify when he pleased, the act could never protect him, obstinately and maliciously to refuse what was in his power. THE LORDS, finding the grounds of imprisonment not being a debt, but a fact prestable by himself, they refused to modify any aliment, or to set him at liberty till he first

exhibited the papers he had in his hands; for they considered, that the Abbey is made a sanctuary for debtors; yet, if any be decerned for exhibition of papers, they have no privilege; but the Bailie of the Abbey may expel them, till they obey the will of the charge, and produce the papers.

No 116.

Fol. Dic. v. 2. p. 174. Fountainball, v. 2. p. 533.

1709. December 10.

Mr WILLIAM LAW, Schoolmaster, *against* Mr DUNCAN WHITE.

Mr Duncan White having incarcerated Mr William Law in the tolbooth of Edinburgh, by virtue of a caption for a civil debt, and Mr William being set at liberty by the Magistrates, upon giving his oath, in terms of the late act of Parliament, that he was not able to maintain himself, and Mr Duncan's declining to aliment him, Mr Duncan did new again summarily, upon the same caption, apprehend and commit him to the Canongate prison; which being complained of to the Lords, they found the second imprisonment was unwarrantable, and that Mr Law could not, after he was once set at liberty for Mr White's not alimending, be incarcerated again by virtue of the same caption, but *causa cognita* by warrant of the Lords. For the Lords thought, that the setting a prisoner at liberty, as not able to maintain himself, was equivalent to a suspension and relaxation.

Fol. Dic. v. 2. p. 175. Forbes, p. 363.

1710. December 28. DURHAM *against* GLASWELL.

THE act of grace having been made upon the application of the royal burghs, who were burdened with the entertainment of poor prisoners, the words being That in case the creditor declined to aliment the prisoner, it should be leisum to the magistrates to liberate him, which is neither command nor injunction, but merely permissive and discretionary; therefore, the LORDS thought the magistrates might renounce the privilege of this act of Parliament introduced in their favour, and that it was a discretionary power, which they might use or not as they pleased. (See No 120. p. 11805). When a debtor has been imprisoned by a factor, the creditor himself being out of the country, it is sufficient to intimate to the factor that application has been made for the benefit of the act of grace.—Magistrates may require the prisoner, before liberation, to grant a disposition *omnium bonorum*, or not, as they please.

Fol. Dic. v. 2. p. 173. Fountainball.

* * * This case is No 181. p. 7460. *voce* JURISDICTION.

No 117.

One imprisoned on a caption for a civil debt, having deponed in terms of the act of Parliament, that he was not able to maintain himself, and being set at liberty, because the creditor declined to aliment him, the Lords found, that he could not be summarily recommitted to prison on the same caption, but only by warrant of their Lordships.

No 118.