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solvi, as being *in meditatione fugæ*. THE LORDS, in respect that the officer was a burghess of Edinburgh, and no stranger, and that going to his regiment was no *fuga*, found him entitled to damages from the creditor.

Fol. Dic. v. 3. p. 400. D. Fa'c. Kilk.

* * * This case is No. 63. p. 1929. *voce* BURGH ROYAL.

1773. December 16.

No 8.

Dr ANDREW HERON of Bargaly, *against* Captain WILLIAM DICKSON of Ednam.

One whose residence is not in this country, may be arrested, when occasionally here, without regard to his having a land-estate in it, until he shall find caution, *judicio sisti*, at the suit of a native, upon belief that he is going out of the country, without his alleging, or giving oath of credulity, that his debt, or is in *meditatione fugæ*, as in the case of residents.

CAPTAIN DICKSON having a claim of debt against Dr Heron, applied by a petition to the Sheriff of Edinburgh, setting forth, ' That Dr Heron, a native of Scotland, but who, for some time, had resided abroad, was debtor to James Dickson of Ednam, now deceased, in the sum of L. 150 Sterling, by two promissory notes, to which the petitioner had right as executor testamentar, decerned and confirmed to his uncle: That the said two notes were not at present in his custody, but in his repositories at Kelso: That he had wrote for them, and expected them in a few days; but that, in the mean time, he was ready to depone to the verity of the debt: That Dr Heron was at present, and for some time past, had been in this country, residing in and about Edinburgh, waiting, as the petitioner was informed, for an opportunity of again going abroad, so as to deprive him of the payment of the debt justly due to him;' and the petitioner prayed the Sheriff ' to consider the premises; and, as the petitioner is ready to make oath on the facts above stated, to grant warrant to apprehend and incarcerate the said Dr Andrew Heron in the tolbooth of Edinburgh, therein to remain until he find caution, *judicio sisti et judicatum solvi*, in any action to be brought at the petitioner's instance against him, for payment of the above sums; or to give such relief in the premises as shall seem meet.'

Upon this petition's being presented to the Sheriff, the confirmed testament, in which the aforesaid two promissory notes are contained, was produced; and Captain Dickson emitted the following deposition: ' That the said two sums were justly resting to the deceased James Dickson, at the time of his death; and are still unpaid; and that he has good reason to believe, and is credibly informed, that the said Dr Andrew Heron is about to leave this kingdom.'

The Sheriff thereupon granted warrant to apprehend and incarcerate in the tolbooth of Edinburgh, the person of the said Dr Andrew Heron, until he should find caution, *de juâicio sisti*, in common form. Dr Heron having been committed upon this warrant, presented a bill of suspension and liberation; and also a petition and complaint to the Court of Session, complaining of these proceedings as illegal and oppressive: And the Court having passed the bill of

suspension, containing warrant for liberation, without caution or consignment, it was found unnecessary to give any deliverance upon the complaint.

Dr Heron *next* instituted an action of oppression and damages against Captain Dickson, on account of the aforesaid imprisonment, which was conjoined with the suspension. And it was *argued* for the pursuer, *imo*, That at the date of this warrant for summary apprehension, he had a landed estate in Scotland, which rendered him subject to the laws, and amenable to the courts of this country, by an ordinary action: That formerly his fixed residence having been in London, he had been in use to come to this country, to look after his estate, and certain law-suits concerning it; but, for some time past, he had taken up his residence in the neighbourhood of Edinburgh, where he was apprehended upon this warrant. If then Dr Heron's residence in this country, and having an estate in this country, shall not be thought sufficient to protect him from summary incarceration, at the instance of every creditor that may take it into his head that he means to leave it, it does not occur in what circumstances a person can be safe who owes a shilling of debt, and whose business may at any time call him to go to London or elsewhere. Nay, it is not necessary that he should have an intention to go elsewhere. It is enough that the creditor figures to himself that he has such an intention, and is willing to make oath, that he believes that his debtor has a journey of this kind in view, no matter whether to avoid payment of his debts or not.

2do, The warrant in question was applied for against the pursuer, not upon the footing of his being a foreigner, for it does not say so; on the contrary, makes him a native of Scotland; but is founded entirely upon the supposition of his intention to go abroad, whereby the Captain would be disappointed of recovering his payment from him. This supposes him to have a *forum* in Scotland; but, that the effect of the decree to be obtained against him, might be frustrated, by his retiring out of the country. The case, therefore, does not fall under the rule with regard to foreigners, but under the rule laid down by Lord Bankton, b. 1. tit. 23. § 37. with regard to summary warrants against the subjects of this country, upon suspicion of *meditatio fugæ*. Agreeably to which, in order to found Captain Dickson in his application for a warrant of summary apprehension, he ought to have been in condition to say, that Dr Heron was *in meditatione fugæ*; and he ought further to have shown some probable grounds of suspicion of the designed flight, such as privately disposing of his furniture and effects. But Captain Dickson has not yet condescended on any circumstance to justify the oath which he emitted before the Sheriff, bearing, that he had reason to believe, and was credibly informed, that the said Dr Andrew Heron was about to leave this kingdom, meaning thereby, that he was *in meditatione fugæ*, to withdraw suddenly from the kingdom to disappoint his creditors; for in that way alone was the oath relevant to infer the conclusion.

Pleaded for the defender; There is no foundation for damages in this case. Such warrants are well known in the law. If the debtor lives in Scotland, and

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does not intend to leave it, there is no occasion for this remedy ; because he can be convened at any time ; but, where the debtor has not a fixed residence in this country, the creditor is entitled to obtain from any magistrate, within whose territory he may be found, a warrant to secure his person, until he find caution, *judicio sisti*. It is no defence against such a demand, that he may have a land-estate in Scotland ; because the law allows a creditor to have recourse either to personal or real diligence against his debtor, whichever of them he may think proper to use ; and, indeed, in small debts particularly, personal diligence is by much the most expeditious method of operating payment. At the same time, it is ludicrous, in this case, for the pursuer to lay so great stress upon the circumstance of his having a landed estate in this country at the date of these proceedings, when the real state of that matter is attended to : But holding the fact to be so, it was so much the easier for the pursuer to have found the caution required, which was only *judicio sisti*, after he had refused to give Captain Dickson, who was acting, in discharge of his duty, as executor, the same security which he owned he had granted to other creditors over that estate.

It is not surprising that Captain Dickson should not have been perfectly certain where the pursuer was born, as he gives contradictory accounts of this matter himself. But it is of no importance in this question what country gave him birth. It was set forth in the petition to the Sheriff, that his residence was abroad, that he was here occasionally, and was about to leave the country, and that was sufficient for the purpose. The pursuer has repeatedly said, that he is an Englishman, residing in London, which makes him, in the eye of the law, as much a foreigner as if he had been born and resided in Japan.

Again, the oath emitted in this case was sufficient to justify the Sheriff's warrant. In questions of this kind, there is a material difference between the case of a person having his fixed residence within this kingdom, and that of a stranger occasionally here, having his fixed residence elsewhere. As to the former, it may be reasonable, that, before a creditor obtain a summary warrant against his debtor, he should be able to say, that he is in *meditatione fugæ*, in order to avoid payment of his debt. Where the debtor is only to leave the kingdom for a time, without any view of withdrawing himself, or his effects, from the diligence of his creditors, there is no good reason why summary execution should be granted against the person of the debtor ; but there is no occasion to allege and prove a *meditatio fugæ* against one who has his residence in another country. A man's return to the place of his fixed residence, is presumeable, and it is lawful and allowable ; but, as creditors are entitled to attach the person of their debtor, in order to force payment of what he owes ; and, as by leaving the kingdom, though lawfully, his person is withdrawn from the reach of his creditor's diligence, under the authority of the laws of this country ; so the creditor is entitled to avail himself of the circumstance of his finding his debtor in this kingdom, and to seize and lay hold of his person in a summary manner ; as it is highly presumeable, that, if a previous charge were to be given, a person,

whose residence was out of this kingdom, would not stay in this country till the days of the charge are elapsed : And a case, similar to the present, occurred in the year 1755, between John Herris, merchant in Rotterdam, and Robert and John Lidderdales, merchants in London, No. 11. p. 2044.

THE COURT, without respect to *origin*, considered Dr Heron in the situation of a person not having a residence here, but in England ; and were of opinion, That a debtor's being owner of a land-estate, does not protect his person from diligence, it being optional to his creditors which diligence to use ; *2dly*, That it was a proper distinction that has been established between the case of persons residing in this country, and persons residing abroad, that, with regard to the latter, there was no necessity to allege, or prove *meditatio fugæ*, to found an application for a warrant of summary apprehension : And, therefore,

“ Assoizied the defender from the process of oppression ;” and, upon a reclaiming bill and answers, “ adhered.”

Act. *Dean of Faculty, Solicitor General, Ilay Campbell.*
Clerk, *Pringle.*

Alt. R. *M^cQueen, Pat. Murray.*

Fol. Dic. v. 3. p. 400. Fac. Col. No 97. p. 248.

1782. February 6.

WRIGHT against GAMMELL.

GAMMELL instituted an action against Wright, who had been one of his factors in America, to oblige him to account for the proceeds of two ships and their cargoes, said to be purchased by him for the pursuer's behoof ; otherwise concluding for the sum of L. 5000 Sterling as the amount of the profits arising from that transaction, together with L. 1000 as the expense of process.

During the dependence of this action in the Court of Session, Gammell applied to the Sheriff-depute of the county of Lanark, within whose jurisdiction Wright then resided, setting forth the action then depending, the defender's having no funds in this country, and his intention soon to leave the same ; and therefore praying that he should be apprehended, and obliged to find caution *judicio sisti* to the extent of the sums found due in the said action.

Wright having been called before the Sheriff, acknowledged the truth of the facts set forth ; and the Sheriff immediately granted warrant for incarcerating him till he found caution in the terms prayed for. Against this judgment Wright applied to the Court of Session, and

Pleaded ; The arrestment of one's person, as in *meditatione fugæ*, is an extraordinary exertion of the civil power ; and as it may be the handle of much oppression, and productive of great embarrassment in a commercial nation, is only to be tolerated upon the best grounds, and for the most urgent reasons.

Hence, to the due obtaining of this summary warrant, two things are essentially necessary ; *first*, The production of a clear and determinate ground of

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An action was raised at the instance of a Scotsman against a person who had been his factor in America, and who intended to return to that country. During the dependence, the pursuer applied for a *meditatione fugæ* warrant, which was granted, but the Court allowed the defender to find caution to appear within six months after requisition by the pursuer.