

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^{rs} Queen, 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

No 9.

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.

No 9. debt, authenticated in some degree by proper evidence; whereas here the incarceration proceeded upon a claim, unsupported by proof, illiquid in its nature, and so extensive in its consequences, as to intimidate every friend of the defender from interposing in his behalf. *Secondly*, Proof is required, either from circumstances, or at least by the arrester's oath, that the debtor means to fly the country for debt; and on this principle, according to Lord Stair, b. 4. tit. 47. § 23. the power of judges in granting these warrants is limited to the case where the debtor meditates an escape from justice. Here no such design is imputed to the defender. His acknowledgment amounts to this, that having no prospect of employment in this country he intends to take the first opportunity of departing for America, in the prosecution of his ordinary profession.

Answered for Gammell; To prevent suits from becoming elusory, it is now part of the common law of Scotland, that a person having a claim against another who is about to leave the kingdom, where he has no tangible funds, may apply in the manner which has been adopted. To require evidence of the debt to justify such application, would in most instances entirely frustrate the ends proposed by it. It is therefore sufficient for the party, to make oath, that a claim exists, and that he thinks it well founded; a criterion which the defender in this case has not thought it necessary to demand. The second branch of the defender's argument is quite inconsistent with the nature of arrestments of this kind. The decision of a judge must be equally ineffectual, from whatever cause the party against whom it is pronounced departs from the territory in which he is sued. Hence Mr Erskine, b. 1. tit. 2. § 21. properly explains the expression on which a critical argument is attempted by the defender, as including every case where the debtor means to leave the kingdom. In this case the defender's admissions superseded the necessity of proof on this point.

THE LORDS had no doubt of the propriety of the Sheriff's judgment, but to accommodate the defender as much as possible, they allowed him to find caution for his appearance six months after requisition by the pursuer.

Lord Ordinary, *Brasfield*. Act. *Ilay Campbell*. Alt. Mat. *Ross*. Clerk, *Campbell*.
Fol. Dic. v. 3. p. 400. Fac. Col. No 27. p. 48.

1786. January 16. GAVIN KEMPT *against* His CREDITORS.

No 10.
A *meditatione fugæ* warrant may be put in execution at any time.

GAVIN KEMPT, as being *in meditatione fugæ*, was committed to prison, by a Magistrate, on an application of his Creditors. He afterwards presented a bill of suspension and liberation, in which it was argued, that the arrest, having taken place on a Sunday, was illegal.

The cause was reported by the Lord Ordinary on the bills; when