One Judge thought that the act of sederunt might apply to this case, because the escape had prevented the pursuer from arresting his debtor on the Sheriff's decree. No 85.

THE COURT assoilzied the defenders.

Lord Ordinary, *Monboddo.* Act. *John Miller* junior. Alt. *Robert Hamilton.* Clerk, *Colquhoun.*

D. D. *Fol. Dic. v.* 4. *p.* 137. *Fac. Col. No* 4. *p.* 10.

1803. *January* 27.

DEAN and ATTORNEY *against* MAGISTRATES and JAILORS of AYR.

No 86.
A debtor incarcerated on a *meditatione fugæ* warrant, which had been granted without any oath of credulity, and for a debt to which the creditor had not made oath, having escaped through the negligence of the jailors, the Magistrates were found liable for the debt.

WILLIAM THORP, formerly of Buckminster, carried on trade for some time in Bristol, in the course of which he became largely indebted to Niblock and Burgess, merchants there, as well as to William Dean. Before the promissory-notes which he had granted to them became due, he absconded; and in November 1799, an Englishman, who went by the same name, was found living in the burgh of Ayr, along with a woman in the character of his wife.

Niblock and Burgess accordingly, along with James Lang, writer in Edinburgh, their attorney, presented a petition to the Sheriff of Ayr, narrating these circumstances, and concluding, that as there could not be the smallest doubt that Thorp's intention was to defraud the petitioners of their property, and as he appeared to have no fixed residence, that the Sheriff should grant warrant to apprehend him and his pretended wife; and, as the debt was instructed by the promissory-notes, to imprison him till he should find sufficient security to continue within the Sheriff's jurisdiction for six months, and until he should pay the debt with expenses.

They were both brought before the Sheriff for examination.

On examining Thorp, he denied having been in Bristol for seven years; denied his knowledge of Niblock and Burgess, or ever having granted promissory-notes to them, and denied the subscription to the notes to be his. He declared his having been married for eleven years, although he did not know his wife's sirname; and for five years had been going from place to place in Scotland and England. The woman, again, denied being his wife, having been married to another man five years before; acknowledged she had lived with Thorp three or four years, travelling with him from place to place, as well as that she had once passed through Bristol with him.

The Sheriff also made Thorp subscribe his name and designation; which seemed to be the handwriting of the subscription to the promissory notes.

Being thus satisfied that he was the real debtor, and that he had eloped from England to avoid the claims of his creditors, and that he would leave Scotland for the same purpose, the Sheriff granted warrant (9th March 1799) to appre-

No 86. hend and incarcerate him within the tolbooth of Ayr, in terms of the application.

An aliment, in terms of the act 1696, c. 32., was granted to him on his own petition.

William Dean, his other principal creditor, obtained a sentence of outlawry against him in the English courts; and upon finding that he had been imprisoned at Ayr, he transmitted evidence of his debt, on which Thorp was arrested (17th February) in prison, by a warrant from the Magistrates to that effect.

By means of a saw, Thorp cut through the grating of the prison window, and, on the night between the 20th and 21st February, effected his escape in that manner, and afterwards eluded all attempts to retake him. Actions of damages were brought against the Magistrates and jailors of Ayr, concluding that they should be liable, conjunctly and severally, for the debts, interest and expenses.

A proof was taken, a state prepared, and the cause was heard in presence; when the Magistrates defended themselves, by endeavouring to shew that the escape of Thorp had not been occasioned by any insufficiency of the jail, or negligence of the jailors, but by the extraordinary exertions of the prisoner, and the efficacy and secrecy of the instrument he employed. Besides this, they pleaded, that the warrants on which Thorp was first incarcerated, and afterwards arrested in prison, were illegal, being deficient in the most essential requisites, an oath of verity of the debt, and an oath of credulity as to the debtor being *in meditatione fugæ*.

On this last defence memorials were ordered (29th May 1802). The Magistrates

Pleaded; If an alleged debtor, on being brought before a Magistrate, were to acknowledge the existence of the debt, and his intention to fly the country, this would not supersede the necessity of an oath, as little as an acknowledgment of the debt by a bankrupt supersedes the oath of verity in a ranking. In applying for a warrant against a person as being *in meditatione fugæ*, the very lowest degree of evidence which is taken is the oath of the creditor; and the subject of debate has usually been, Whether this *per se* be sufficient? as in Tasker against Mercer, November 1800*, the creditor by her attorney had sworn to the debt, and to her belief that the debtor, who was a foreigner, was *in meditatione fugæ*; but it was found that this was not enough; and the creditor was obliged to prove sufficient circumstances to justify his suspicion.

Warrants against a person *in meditatione fugæ* are not civil, but criminal acts, proceeding on the suspicion, not merely of the debtor being to leave the country, which a stranger without a fixed residence may be held in law always to be, but that he intends this for the criminal purpose of evading his creditors. It may be executed accordingly on Sunday, and within the sanctuary. Where the existence of this fraudulent intention cannot be shewn, the warrant cannot

* See APPENDIX.

No 86.

be legally granted, and still less can it be, from the mere circumstance of the debtor being a foreigner. In Scudamore against Lechmere, No 14. p. 8559, the oath of credulity alone was not held to be sufficient, and the warrant was refused, because the creditor could not condescend upon reasonable grounds of suspicion.

An oath is absolutely essential in point of form, and is uniformly given before a warrant can be legally obtained. But still more must it be so, where the person apprehended, not only denies the debt, but also his being the real debtor mentioned in the petition, as well as his intention to abscond. It is not sufficient from presumptions and suspicions to supply these defects. To deprive a citizen of this free country of his liberty, is no light matter; and it can only be in the precise form which the law allows.

Although the last warrant was granted by one of the Magistrates, and on the first, the prisoner was received by them, still on the illegality of these warrants they are entitled to found a defence; for these pass *periculo petentis*; and any one procuring an illegal warrant for incarceration, cannot be allowed to maintain an action of damages for the escape of one who never should have been their prisoner.

Answered; As the usual *inducia* of a summons would enable the defender to remove himself and his property to another country, limitations of the rule were early introduced in the case of border warrants; and foreigners may be arrested summarily, and obliged to find caution *judicio sisti*, and at first even *judicatum solvi*; Wilson and Ray against Bellamy, 21st June 1763, No 13. p. 2051. Scotsmen who reside generally abroad, are subject to the same rules; Ayrie against Chattos, 6th February 1701, No 36. p. 4826.; Hrerries against Lidderdale, 7th March 1755, No 11. p. 2044. In Carmichael against Scot, 6th December 1775, No 16. p. 2057.; and Scudamore against Lechmere, 3d June 1797, No 14. p. 8559., the Court were far from unanimous.

In every case the question is, Whether the circumstances appearing from the evidence are sufficient to justify the detention of the debtor? Captions may be issued upon special occasions without any preceding charge; Stair, b. 4. tit. 47. § 23.; Bank. v. 2. p. 601. No law has said, that in granting warrants for imprisoning persons till they find caution *judicio sisti*, a precise form is to be observed, or a particular kind of evidence resorted to, exclusively of every other. Each case is left to the discretion of the Judge. If the circumstances arising from the facts satisfy him, he need not resort to the oath of the claimant as a corroboration. With regard to the debt, the oath of verity has been dispensed with, when not insisted for at the time by the party; Wright against Gemmill, 6th February 1782, No 9. p. 8553.; Laing against Mollison, 20th December 1789, No 12. p. 8555.; so that it is not an essential in point of form.

No 86. Though the judgments pronounced, and the warrants granted, had been illegal, they were binding on all parties, till they were recalled by the same Judges, or by some higher authority; and as the Magistrates received the prisoner on this warrant, they cannot now object to any informality upon it.

As no precise form seemed to have been prescribed for applications for *meditatione fugæ* warrants, it was held to be left to the discretion of the Judge what kind of evidence would satisfy him, As he can even after the oath of credulity has been given resort to other evidence, and grant the warrant, or refuse it as he pleases; so, without any oath, if circumstances be so glaringly suspicious as to justify his belief, he need not fortify this conviction by the opinion of any other person; and the Court being also satisfied that the escape had been effected through the negligence of the jailors, they (27th January 1803) "repelled the defences, finding the defenders liable for the sums due by William Thorp at the time of his escape, with interest and expenses of process."

In a reclaiming petition, the Magistrates, besides urging the above grounds of defence, *pleaded* also, that they were not bound for the escape of persons incarcerated on *meditatione fugæ* warrants, but only for rebels, those denounced at the horn, and taken up on captions; act of sederunt, 11th February 1671; Stair, b. 4. tit. 47.; Gordon against Mellis, 24th January 1786, No 79. p. 11756.; Brown against Magistrates of Lanark, 16th November 1792, No 85. p. 11763.

Supposing, however, the Magistrates, by accepting the custody of Thorp's person, became *quasi* cautioners for him, their obligation cannot be stronger than it would have been, had they been voluntary cautioners for the appearance of the debtor *in judicio*. They must be required to present him, and the consequence of their failure is becoming liable for the debt. This requisition can only be in an action commenced; and while no process is brought, the condition of the cautioners' obligation cannot be purified. They are only bound to make him forthcoming *in judicio*. Some days after Thorp's escape, indeed, under protest, they asked to see him; but this was not the terms of the cautionary obligation. In Brown against Magistrates of Lanark, 16th November 1792, No 85. p. 11763., the Magistrates were assoilzied on this very ground, although the action against them was brought during the existence of the cautionary obligation, which was not the case here.

The Court remaining of their former opinion upon the other defences, considered the instrument of requisition sufficient, as it would have been unnecessary to have raised any action against him at that time; and therefore the petition was refused without answers (15th February).

Lord Ordinary, *Craig*. For Pursuers, *Solicitor-General Blair, Craigie, Cathcart*.
Agent, *Alex. Wight, W. S.* For Magistrates, *H. Erskine, J. Fergusson*.
Agent, *John Hunter, W. S.* Clerk, *Home*.

F. *Fac. Col. No 79. p. 175.*