

Appellant's Authorities.—(1.)—Stewart, Feb. 15. 1812, (F. C.); Jeffrey v. Russel, July 26. 1822. 1816, (not rep.)—(3.)—Rex v. Hall, 1. Cowper, 60.

Respondent's Authorities.—(1.)—1. Bell, 368.—(3.)—1. Ross, 290.

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(*Ap. Ca. No. 38.*)

JAMES CARRICK, Appellant.—*Gifford—Forsyth.*

No. 48.

JAMES MARTIN and COMPANY, and THOMAS MARTIN and COMPANY, Respondents.—*Clerk—Skene—Rutherford.*

Meditatio Fugæ Warrant.—Circumstances under which it was held, (affirming the judgment of the Court of Session,) that it is not a sufficient ground of suspension of a *meditatio fugæ* warrant, that the oath of the petitioner and the declaration of the defender have been taken by the clerk and assessor of a royal burgh acting in virtue of a commission by the Magistrates,—the warrant bearing to have been issued by a Magistrate, on considering the oath and declaration.

JAMES CARRICK, a merchant and mercantile agent in the island of Martinique, was employed in the latter capacity by Thomas Martin and Company of the island of Guadaloupe, (a branch of Thomas Martin and Company, merchants in Glasgow,) to dispose of goods which they consigned to him. In the year 1816 he came to Glasgow, at which time it was alleged he had a large balance in his hands belonging to Martin and Company. The affairs of that company having become embarrassed, a conveyance of their effects was made to Alexander Wighton and others, as trustees for their creditors; and in the month of June 1817, these trustees, having reason to suspect that Carrick was about to leave the country without settling the balance, presented a petition to the Magistrates of Glasgow, stating that James Martin and Company had, through their partners Thomas Martin and Company, made large consignments to Carrick, who had hitherto rendered no regular account-sales:—that ‘ he is justly ‘ due to the petitioners, as trustees for James Martin and Company’s creditors, a sum exceeding £4000 sterling:—that they ‘ are about to commence an action of count and reckoning and for ‘ payment against him, but that they had received information, ‘ and verily believed, that the said James Carrick was in *meditatio fugæ*, and about to leave the country, with a view of ‘ eluding the petitioners’ just demands.’ They therefore prayed the Magistrates ‘ to grant warrant for apprehending the said ‘ James Carrick and bringing him for examination, and there-

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 ‘ Glasgow, ay and until he find caution de judicio sisti in any
 ‘ action which may be brought against him within six months
 ‘ from this date.’ An order was thereupon issued by one of the
 Magistrates, that the trustees should depone to the verity of what
 was set forth in the petition ; and a commission was granted to
 any of the clerks of court to take the deposition. Accordingly
 Mr. Wighton, one of the trustees, appeared in presence of Mr.
 Robert Thomson, one of the three clerks of court, and one of the
 assessors of the Magistrates, (but not in presence of any of the
 Magistrates themselves,) and deponed, ‘ that a few weeks ago the
 ‘ said James Martin, in a conversation with the deponent, told the
 ‘ deponent that in a conversation with Carrick the latter had
 ‘ said he would pay the estate a certain sum of money before he
 ‘ went away ; but that he immediately checked himself, and
 ‘ seemed to be under considerable embarrassment at what he had
 ‘ so said.’ He also deponed, ‘ that Carrick had been misapply-
 ‘ ing the proceeds of the goods consigned to him by Martin and
 ‘ Company ; and that from the above conversation, and from
 ‘ Carrick having no fixed residence except in the West Indies,
 ‘ and from other information, it is the deponent’s belief that he
 ‘ intends immediately to leave this country, and to return to the
 ‘ West Indies, to avoid being called to an account for the pro-
 ‘ ceeds of the goods so consigned to him by Martin and Com-
 ‘ pany, and for the misapplication of them.’ This deposition was
 not authenticated by the subscription of any of the Magistrates,
 but the procedure was laid before Bailie Leckie, who subscribed
 the following warrant : ‘ Having considered the deposition of the
 ‘ petitioner Alexander Wighton, grants warrant for apprehend-
 ‘ ing James Carrick, designed in the petition, and for bringing
 ‘ him for examination on what is therein stated, and grants com-
 ‘ mission to any of the assessors of court to take his declaration.’
 In consequence of this warrant Carrick was brought before Mr.
 Thomson, in whose presence (but not in that of any Magistrate)
 he was examined, and declared that his business establishments
 were in the West Indies, and no where else :—that he was de-
 tained here only by an arbitration relative to some old partner-
 ship claims, which he expected would be settled in the course of
 a few weeks :—that, according to a state which had been trans-
 mitted to him since he had left the West Indies, he was indebted
 to Martin and Company about £1200 ; but he was not prepared
 to admit that he was indebted to them in so considerable an
 amount. This declaration was not subscribed by a Magistrate ;
 and on the proceedings having been again laid before Bailie

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Leckie, he subscribed this warrant: 'Having considered the declaration of James Carrick, and former procedure, grants warrant for imprisoning the said James Carrick, till he find caution to the effect craved in the petition.' Carrick was not brought into the presence of the Magistrate when this warrant was issued. Of these proceedings he did not complain by bill of suspension, but found caution, in consequence of which he was liberated. Two days thereafter the trustees of Martin and Company raised an action of count and reckoning against him, concluding for £20,000 sterling, more or less, and expenses of process. A great deal of procedure took place in this action, in the course of which the trust having been brought to a conclusion, Martin and Company were sisted as parties in place of their trustees. At last Carrick having failed to produce certain accounts, he was held as confessed by the Magistrates, and decree was pronounced against him in terms of the libel. Thereafter his cautioners presented him in Court in terms of their bond, and were liberated from their obligation accordingly. A bill of advocacy was then presented by Carrick, on which a remit was made to the Magistrates to proceed in the cause; and Martin and Company having applied incidentally by a minute for a warrant of imprisonment against Carrick, until he should of new find caution to abide the issue of the action, a warrant to that effect was granted by the Magistrates, on which he was forthwith imprisoned, without any new deposition by Martin and Company, or examination of Carrick. He thereupon presented a bill of suspension and liberation, without caution or consignation; on advising which, with answers, the Lord Ordinary reported the case to the Court upon memorials. In support of his application Carrick maintained,—

1. That as the petition proceeded on a charge of intending to fly from Scotland to avoid making payment of his just debts, this was of the nature of a criminal accusation; and that it was necessary, before a warrant of imprisonment could be granted, that the oath of the party making the accusation should have been taken before a Magistrate, and that the examination of Carrick ought also to have been in the presence of the Magistrate, and the deposition and declaration authenticated by his signature; but that this had not been done, and therefore the warrant was illegal.

2. That even regarding the proceeding as one of a civil nature, yet, as a warrant of this description was a *remedium extraordinarium*, it was not competent for the Judge or Magistrate to delegate to any clerk or servant of his Court the duty of examining the complainer upon oath, or of taking the examination of the accused party, and any allegation of a practice to that effect was irrelevant and illegal, and ought to be checked: And,—

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3. That, after having been presented in Court, the original procedure came to an end, and that it was not competent to issue a new warrant of imprisonment without a new oath being emitted by the party complaining, and a new examination into the circumstances being made; and this the more especially, as the new warrant on which he was imprisoned had been granted at the instance of a different party from the one who presented the original petition.

To this it was answered by Martin and Company,—

1. That warrants of this description were not of a criminal nature, but merely a summary process pursued *ad civilem effectum*, and therefore it was not necessary, as in criminal proceedings, that every thing should take place in presence of the Magistrate; and that there was no statute or imperative rule of law requiring that the proceedings under such an application should take place as a matter of solemnity before a Magistrate.

2. That, being a civil process, it was perfectly competent for the Magistrate to delegate his power to any person duly qualified to take the oath and declaration, as was usually done in all civil cases:—that the clerk to whom the delegation in this case was granted did not issue the warrant; but that, on the contrary, it was done by the Magistrate before whom the whole procedure was laid, and who had thus an opportunity of considering it before issuing the warrant; and that Carrick himself had acquiesced in this, and had allowed proceedings to go on for a long period without taking any objection, so that he was barred *personali exceptione* from now doing so:—that, in the case of Magistrates of Burghs generally, the judicial business was usually conducted by means of assessors or clerks, similar to recorders in England, and who were much better qualified than the Magistrates, who were annually changed, and were in general ignorant of law proceedings, and who, it was notorious, were guided by their advice:—that, in particular, such had been the mode of conducting business for time immemorial in the Burgh Court of Glasgow, each of the three clerks having commissions to act as the assessors of the Magistrates, and to advise the proceedings which came before them:—that it had been the invariable practice in that Court, and in almost all the Burgh Courts in Scotland, to delegate to one or other of the assessors or clerks power to take proofs and declarations, which had never hitherto been objected to; and,—

3. That the application for the new warrant was made by the party having the real interest in the matter, who had applied originally, and that it was not necessary, where cautioners

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had been liberated, pendente lite, by presenting the party, to require a new oath or examination.

The Lord Ordinary, on advising with the Court, refused the bill, but found no expenses due. Against this interlocutor Carrick presented a petition; on advising which, with answers, and a minute lodged by Martin and Company, explaining that Mr. Thomson was the legal assessor as well as town-clerk of the burgh, and was authorized to advise the summary actions, and to take proofs generally, the Court, 'with a view to establish an uniform practice in future in the administration of the law regarding the granting of warrants against persons as in meditatione fugæ, they, before answer, ordered copies of the whole printed papers in this cause, of the minute now put in, and a copy of this deliverance, to be laid before the Judges of the other Division of the Court, and the permanent Lords Ordinary for both Divisions of the Court; and the Lords, in terms of the act of Parliament thereanent, required the opinions of these Judges, either as a collective body, or as individual Judges, whether the warrant in this case is or is not a legal warrant, in respect that neither the oath nor the declaration have been taken in the personal presence of the Magistrate, but on commission by Mr. Robert Thomson, one of the joint town-clerks and assessors for the city of Glasgow, holding the powers as set forth in the said minute and printed papers.'

Lords President, Hermand, Balgray, and Cringletie, in consequence of this remit, returned the following opinion:—'We are of opinion, that it is not a legal objection to a warrant against a debtor as in meditatione fugæ, that neither the oath of the creditor, nor the declaration of the debtor, were taken in the personal presence of the Magistrate, but on commission by the town-clerk holding a general commission, as set forth in the minute. We are of opinion, that a warrant against a debtor, as in meditatione fugæ, does not possess any character of a criminal proceeding, but is merely a precautionary measure for securing a civil debt in particular circumstances; and as the practice has been inveterate and universal for all Courts and Magistrates in Scotland to take proofs and oaths and examinations by commission, we cannot discover any principle for distinguishing between the oaths and examinations in an application for a meditatione fugæ warrant and any other civil process; neither do we see any expediency in making such a distinction, as the Magistrate remains equally responsible for the warrant he grants, whether the oaths and examinations have been taken in his own presence or not.'

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Lords Balmuto, Succoth, Gillies, Pitmilky, Alloway, and Reston, delivered this opinion:—‘ In obedience to the interlocutor of the Second Division, signed on the 23d of May last, we have considered the printed papers in this case, and humbly report that we are inclined to think, that in applications for warrants against a debtor, on the ground of his being in meditatione fugæ, the oath of the creditor and declaration of the debtor ought to be taken in presence of the Magistrate, and cannot competently be taken on commission,—and on that account the warrant granted against the suspender was illegal.’

On advising these opinions, with the petition and answers, the Court, on the 14th November 1818, by a majority, adhered to the interlocutor refusing the bill of suspension.*

Against these judgments Carrick appealed, and in the mean while Martin and Company obtained an interim decree against him in the action of count and reckoning, upon which, after a suspension had been finally refused, they executed a caption against him in gaol; and in addition to their former pleas, they now maintained, that the object of the bill of suspension and liberation, under which the judgments appealed against had been pronounced, was no longer in existence, seeing that it was impossible to liberate Carrick, as he was now imprisoned upon diligence to which he could not and did not object.

The House of Lords ‘ ordered and adjudged that the interlocutors complained of be affirmed.’

* See Fac. Coll. Nov. 14. 1818, No. 185, from which report it appears that the *Lords Justice-Clerk* and *Robertson* were of opinion that the proceedings were objectionable, because neither the oath nor declaration had been taken in presence of a Magistrate, and that the practice (if it did exist) ought immediately to be checked. On the other hand, *Lord Glenlee* held that it was not a matter of solemnity that either the oath or the declaration should be emitted in presence of a Magistrate; that, particularly in relation to Burgh Courts, it seemed more conducive to justice that these examinations should be taken by the assessor who was in the practice of advising the Magistrates, and guiding them in their judgments; and that there might perhaps be a distinction as to a Sheriff.—*Lord Bannatyne* proceeded on the latter ground, and on the practice of the burgh of Glasgow, and thought that the Magistrate must be responsible in any action of damages for irregularity committed by the clerk; but he was of opinion that it was not sufficient to suspend the diligence, that the oath and declaration had been taken by the clerk acting under a commission, and not by the Magistrate.—*Lord Craigie* concurred in the same conclusion at which these two Judges arrived, but thought there was a distinction, where the application for the warrant proceeded on an allegation that the debtor was going to carry away his funds, and so defraud his creditors, and where it was merely alleged that he was about to leave the country. In the former case, the application was of a criminal nature, and the proceedings ought to take place in the presence of a Magistrate. In the latter it was merely civil, and was to be regulated by the usual form of process in civil matters; and he considered that the warrant in question was of the latter description.

LORD CHANCELLOR.—This, my Lords, is a case that was argued in this House during the course of this session. James Carrick states himself lately to have been a merchant in the island of Martinique, and detained at present as a prisoner in the gaol of Glasgow; and James Martin and Company are also described as carrying on a considerable trade to the West Indies, and which was managed at Glasgow. July 26. 1822.

The appellant was originally in prison upon a process to prevent his leaving the country. Proceedings had gone on, and the debt, I believe, upon which he was incarcerated, amounted to more than £3000; and this appeal was brought before your Lordships, insisting that the proceeding had been irregular from the beginning—that the process in which the warrant granted against him as being in *meditatione fugæ* was wrong. My Lords, it would have been due to the person making this application to have given more immediate judgment in the case, if the circumstances had satisfied those whose duty it was to consider them, that he was entitled to have a reversal of this proceeding; for if so, the consequence would be, that he might have been liberated from incarceration. But I have not been able to discover that there was such error in the proceedings, as to advise your Lordships to reverse the judgments.

My Lords, we have in this country a process for the purpose of preventing the flight of a person, which we apply not only to persons actually resident in this country, but to persons who may be occasionally here, and which is attended with great hardship sometimes. In the latter case we do require that an equitable debt should be proved and sworn to, in order to warrant that process; for a legal debt will not do, because it is a species of equitable aid. Such a debt is required to be sworn to, and in such a way as to satisfy the Court that such a debt is due. I have no difficulty in saying, that the manner in which this debt is sworn, would not have been sufficient to authorize the person who addresses you to issue the writ of *ne exeat regno* in the Court below. But I think it is a dangerous thing, on the ground of any practice which obtains in our Court, to overturn that which the Judges in the Courts of Scotland have thought to be right,—sufficient regard being had to their own notions of practice; and here the matter has been permitted to proceed from one end to the other, without an objection of the nature which I have stated. But there is an objection that the affidavit in this case, which they call a deposition and the examination of the party, was not sworn before a Magistrate of Glasgow, but before a person who might be represented as his assessor, and whom they assimilate to our Recorder. Certainly, however, there is no great resemblance between them. With respect to this question, the Judges of the Court of Session have been extremely divided. The Judges of the Second Division thought it right to take the opinion of the Judges of the First Division, and there was a great difference of opinion among them; but the final decision was, that the deposition and examination were sufficient to be held as a deposition and examination made before a Magistrate, by the circumstance of a Magistrate signing. And, to be sure, if the Court of Session finally

July 26. 1822. thought that this was sufficient to support the process, your Lordships would think long before you would overturn that opinion, for it is stated without contradiction from all time to have been the mode of proceeding; and many of your Lordships know that, in our own practice, what is called swearing before a Judge is an oath administered by a person in an outer chamber, while the Judge is in an inner room. Your Lordships see what vexation it might lead to, if, in our opinion, we decided that which, in the opinion of the Court of Session, has been thought to be sufficiently formal,—regard being had to the fact of there being no dispute whatever as to the terms of the deposition.

But in truth, my Lords, it appears to me that the objection should have been made much earlier than it has been made; because, if it be valid, it will not only have the effect of rendering the business unauthentic, but will go even to the extent of stopping the proceedings which subsequently took place. I feel no difficulty in saying, that I shall not advise your Lordships to overturn that which, in point of practice, they think is conformable to the law. I cannot think it would be good advice to give to your Lordships. I would therefore move that, under a view of the whole circumstances of the case, your Lordships should affirm the interlocutors complained of.

LORD REDESDALE.—Will your Lordships allow me to say, that the Noble Lord does not appear to recollect that the delay in this case has been of no importance, because the party was incarcerated upon a judgment obtained in the action? This decision could merely go to determine the doubt.

LORD CHANCELLOR.—Certainly. Under the actual circumstances of the appeal, if there had been any reversal of the interlocutor, it would have been of no benefit to him now.

LORD REDESDALE.—It would have had no effect in accomplishing his liberation.

Appellants' Authorities.—2. Mack. 41; Hume, c. 11. § 5; Borthwick, May 14. 1813, (F. C.); Anderson, Nov. 26. 1814, (F. C.); Tait's J. P. *voce* Med. Fug. War. 208.

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