

produce the party to execution. By the pursuer's own construction of this obligation, it extends no farther than to produce the party till decree is pronounced. But if this be the fact, the pursuer had Muir in his power even after the decree was extracted.

No 15.

THE COURT gave judgment as follows :

' In respect the pursuer did not, at any time during the dependence, or before extract, require the cautioners to produce the person of Muir in Court, find the cautioners are liberated from their obligation *de judicio sisti*, and assoilzie them from this action.'

See — against M'Culloch, 20th February 1666, No 8. p. 369.

Act. Wight.

Alt. Rolland.

Clerk, Campbell.

Fol. Dic. v. 3. p. 114. Fac. Col. No 143. p. 374.

1775. December 6.

WILLIAM SCOT, Merchant in Newcastle, against JOHN CARMICHAEL, Merchant in Morpeth.

IN October 1775, Scot transmitted to his doer at Edinburgh the following affidavit: ' William Scot, of the town and county of Newcastle upon Tyne, merchant, maketh oath and sayeth, That John Carmichael, late of Morpeth, in the county of Northumberland, shopkeeper, (who has lately retired to Edinburgh, as this deponent believes, to avoid the payment of his debts) is justly and truly indebted unto this deponent in the sum of L. 65 : 0 : 6, for goods sold and delivered, and for which said sum this deponent has not received any satisfaction or security whatsoever ; and, in regard that the wife of the said John Carmichael is now selling off his stock, and refuses to pay his debts, this deponent verily believes the said John Carmichael intends to defraud this deponent and his other creditors, and not to return into England.' And the agent was authorised to endeavour to get Carmichael secured.

The agent accordingly gave in a petition to the Sheriff, praying him to incarcerate Carmichael till he should find caution *judicio sisti*, in any action to be brought against him for payment of the above debt; and the Sheriff having ordered Carmichael to be brought before him for examination, he emitted the following declaration: ' Declares and acknowledges, that he is resting to the petitioner William Scot the debt mentioned in the petition: Declares, that he left Morpeth on the 25th September last, and came to Edinburgh, and has remained there ever since, until yesterday that he went to Leith to see if he could find a conveyance to carry him to Newcastle: That he intends to return to his own home at Morpeth, and that his wife is carrying on his business in his absence, and paying off his debts; and that, since he came here, he has sent different parcels of goods to his wife at Morpeth; and that he did not leave

No 16.

A summary warrant cannot be issued at the instance of one foreigner against another, when transiently in this country, to the effect of obliging him to find caution *judicio sisti*, in relation to a foreign debt.

No 16.

‘ Morpeth with any view to avoid the effects of writs of arrest against him, as he knew of none against him. And being interrogated, if his wife was paying off debts at Morpeth, why she did not pay the petitioner Mr Scot his debt, or any part of it, though demanded by himself, and also demanded by his clerk, as appears by the letters produced, last Monday? declares, That his wife has wrote to the declarant that she had been paying off debts, as they occurred, since he came from home; and that, when Mr Scot made the demand upon her, she was not in cash to pay him, but promised to pay his debt how soon cash came to her hand, and wrote him to that purpose.’

The agent then *insisted*, that as it appears, from the above declaration, that Carmichael intends to leave this kingdom; and as it appears, from the affidavit produced, that Mr Scot does not believe he meant to return to England, but that his intention is to defraud his creditors, therefore craved warrant, in terms of the petition; and that he, as attorney foresaid, was willing to make oath in the above terms. And accordingly he deponed, that he really and truly believed, in his conscience, that Carmichael was *in meditatione fugæ*, and about to leave this kingdom, and not to return to England, in order to defraud his constituent, and his other creditors, of their just debts; upon which the Sheriff granted warrant as craved; and Carmichael being incarcerated, presented a bill of suspension and liberation upon juratory caution, which the Lord Ordinary reported to the Court.

The suspender *insisted*, that his incarceration is doubly illegal. In the *1st* place, because he himself is not subject to the jurisdiction of this country, not having been born here, nor having resided forty days so as to have a domicile; having only come to this country for his health, and in order to purchase goods, and about to return. And, *2dly*, because Mr Scot himself is not to be held a subject of this part of the united kingdoms, nor entitled to that privilege in the law of Scotland, by which a creditor can have his debtor secured till he find caution *judicio sisti*: That, to allow Englishmen to get other Englishmen imprisoned, as *in meditatione fugæ* from this country, when neither of the parties are resident in it, but have their proper *forum* in England, would be a manifest absurdity, and lead into inextricable confusion. For example, the suspender, who is an Englishman, would be obliged to find caution *judicio sisti* in this country, and, upon his return to his own country, which is also that of his creditor, he would, by the power of another jurisdiction, be again attached, and again obliged to find bail, so that he would be laid under the necessity of putting himself to a great deal of trouble and expence, which could be attended with no good effect whatever. And the suspender referred to the authority of Bankton; and to a decision collected in the Dictionary, as precisely in point: ‘ THE LORDS refused to sustain themselves judges between two foreigners being in this country occasionally, *non animo remanendi*, especially in matters of debt contracted forth of the country.’ Haddington, 23d November 1610, Vernour *contra* Elvies; *voce* FORUM COMPETENS.

The cause was decided, after a hearing in presence. Several of the Judges delivered an opinion, that the warrant was legal and well founded in this case. It was said, there was no good distinction between a foreigner's person, and his moveable estate in this country, which was clearly subject, *ab initio*, to the jurisdiction, though it cannot be explicated without an arrestment; but that their being found here did create a temporary jurisdiction equally as to both; more especially in a case of necessity such as the present, accompanied with an intention to defraud. On the other hand, it was *observed*, that there was not before the Court sufficient evidence of fraud on the suspender's part; so that the question came simply to this, whether the mere personal existence of a stranger in this country shall subject him to its jurisdiction? which, it was said, was neither agreeable to principles of law nor expediency.

The bill was passed without even juratory caution. See MEDITATIO FUGÆ.

Reporter, Gardenston.

Act. M^cLaurin.

Alt. J. Boswell.

Clerk of the Bills.

Fol. Dic. v. 3. p. 114. Fac. Col. No 202. p. 143.

No 16.

1790. June 24.

CHARLES and JAMES BROWN and COMPANY, against WILLIAM WILSON.

MESSRS BROWN and Company having arrested a debtor of theirs, as being in *meditatione fugæ*, Wilson became bound as cautioner for him in the usual form, that he should appear personally before any competent court in Scotland, and answer to any action which might be tabled against him at the instance of Charles and James Brown and Company, touching the debts specified in the warrant of arrestment, at any time within six months after the date of the bail-bond, when lawfully summoned for this effect, and that he should attend all the diets of the Court touching said action.

The date of this cautionary obligation was 20th November 1788. On 27th November, the debtor was personally cited before the Magistrates of Dumfries; and on 29th November decree in absence was pronounced, which the pursuers, on account of the defender's bankruptcy, were authorised to extract without waiting the ordinary *induciæ*. To these proceedings the cautioner was not made a party; nor was the decree ever extracted by the pursuers.

The debtor remained in Scotland till 12th January 1789. On 24th February 1789, after he had left the country, a new action was brought against him and his cautioner in the Sheriff-court of Dumfries. The Sheriff having found the cautioner liable, a bill of advocation was preferred; when, in support of the judgment, Messrs Brown and Company

Pleaded: The purpose of a *meditatio fugæ* warrant, is to oblige the party to remain within the jurisdiction of the courts in Scotland, not only till the claims

No 17.
The security of a cautioner *judicio sisti*, is not entirely at an end, by the obtaining of decree, without requiring the cautioner to produce the person of the debtor. Such requisition may be made at any time before the lapse of the period allowed for extracting decree.