

acting trustee under that deed. But unfortunately his own affairs were in an embarrassed condition, and on 20th May 1881 he was made notour bankrupt, and ordained by the Sheriff of Midlothian to execute a disposition *omnium bonorum*, the trustee in whose favour that deed was executed being Mr J. C. Penney. In these circumstances Mr Penney found that Mr Sawers' only available asset was a liferent interest of his uncle's estate, and the only chance of his creditors being paid was that this interest should be made available. There being difficulties in the way of doing that, Mr Penney presented a petition to this Court on 2d June 1881 setting out the facts of the case, and averring that "the management of the estate has been such as to materially diminish the annual income derivable therefrom, and should such management continue there is every chance of the estate going entirely to waste." It therefore became a matter of deep interest to the personal creditors of Mr Sawers that the trust-estate should be put under a better system of management, and so Mr Penney, in this view, applied to have Mr Sawers removed from his office of trustee and a judicial factor appointed in his stead. That petition was duly served on Mr Sawers, who did not lodge answers, and the prayer was granted in absence. Thereafter Mr Sawers presented the petition which is now under consideration, and answers to it were lodged for Mr Penney. As there was a conflict between the parties on matters of fact, your Lordships made a remit to Mr Dickson, who reported on the condition of the estate. The result of his report is to show that Mr Penney's averments as to mismanagement are true, and that Mr Sawers' action since he has been sole trustee has been such as is calculated to bring the estate to ruin. His state of indebtedness has also been made out, as well as is possible in a summary application of this kind, by the production of vouched claims by the creditors on his individual estate and on the trust property. We do not, of course, at present determine that these claims are all well founded, or that they may not be subject to deduction; but we have before us claims to the extent of about £778 against Mr Sawers as an individual, and about £968 against him as trustee; and in these circumstances I think it is very clear that Mr Sawers is not qualified to continue the management of the trust-estate, and that Mr Penney, who is already trustee on his private estate, should be continued in his appointment as judicial factor on the trust-estate as well. I am therefore for refusing the petition.

LORD MURE concurred.

LORD SHAND—I am of the same opinion. Mr Sawers' interest as liferenter here has become entirely subordinated to the interests of the creditors on the trust-estate and of his own personal creditors.

LORD DEAS was absent.

The Lords refused the prayer of the petition.

Counsel for the Petitioner—Party. Agent—Andrew Clark, S.S.C.

Counsel for Respondent—Dundas. Agents—Dundas & Wilson, C.S.

Wednesday, December 21.

FIRST DIVISION.

[Lord McLaren, Lord Ordinary
on the Bills.

CLARK v. BREMNER.

Process—Fugæ Warrant—Necessity for New Warrant where Cautioner Liberated and Creditor wishes to Imprison Debtor.

Where a debtor was apprehended as in *meditatione fugæ*, and found caution *judicio sisti*, and the cautioner had been liberated by producing the debtor in Court—held that a new warrant was necessary in order to the reimprisonment of the debtor.

In this case the respondent Janet Bremner raised an action against the complainer John Clark for the aliment of an illegitimate child, in the Sheriff Court at Kirkcaldy. The Sheriff-Substitute (GILLESPIE) on 13th July 1881 assoilzied the complainer, but on appeal the Sheriff (CRICHTON) recalled this interlocutor, and remitted to the Sheriff-Substitute, who on 2d November decreed in terms of the conclusions of the action. During the dependence of this action the respondent on 3d August 1881 presented a petition to the Sheriff of Fife to have the complainer apprehended as in *meditatione fugæ*, and a warrant was thereupon granted for his apprehension. He was accordingly on 5th August 1881 apprehended and committed to prison until he should find caution *de judicio sisti*. On the following day, having found caution, he was set at liberty.

On 2d November 1881 the Sheriff-Substitute, on the motion of the pursuer, pronounced the following order:—"The Sheriff-Substitute, on the motion of the pursuer, appoints Mr William Arnott, colliery manager, Regg Colliery, Kirkcaldy, cautioner for the above-designed John Clark, to produce the said John Clark within the Sheriff Court Room here on Wednesday, the 9th inst., at half-past eleven o'clock a.m." In terms of this order Arnott produced the complainer in Court on the day named, when the following orders were pronounced, and Arnott got up his bond:—"Compared the said William Arnott, along with the said John Clark, and protested that he should be free from his bond of caution." "*Eo die*.—The Sheriff-Substitute, on the motion of the said William Arnott, grants warrant to the Clerk of Court to deliver up to him the bond of caution entered into by him for the said John Clark." Immediately after the cautioner had produced the complainer, a sheriff officer was instructed to take the complainer into charge on the old warrant of 5th August; and without any new order or warrant having been applied for or granted by the Sheriff, the complainer was, on 9th November, apprehended under the warrant of 5th August 1881, and incarcerated in the prison of Cupar.

In these circumstances the complainer presented this note of suspension and liberation, in which he pleaded—" (1) The respondent not having been entitled to apprehend or incarcerate the complainer after the cautioner had produced him at the bar, without of new applying for and obtaining a warrant of incarceration, the apprehension and incarceration of the complainer

under the original warrant was wrongful and illegal."

The Lord Ordinary (M'LAREN) on 2d December 1881 passed the note and granted warrant for the liberation of the suspender. The following opinion was delivered by his Lordship in giving judgment:—"In this case the complainer seeks liberation on the ground that having found caution in an application for a *meditatione fugæ* warrant, and the cautioner having presented him at a diet of Court, he was then incarcerated on the original warrant until he should find caution for his appearance at subsequent diets.

"It has long been settled that the cautioner is entitled to be freed from his obligation by producing the debtor at a diet of Court and protesting that he has fulfilled his obligation. The debtor is then liable to be imprisoned as in *meditatione fugæ* if he fail to find caution a second time. The question is, how this liability is to be enforced—whether by the Judge on a special application for this purpose, or by the creditor at his own hand.

"In the present case the creditor has proceeded on the assumption that the original warrant of imprisonment was a continuing warrant, and, accordingly, on an interlocutor being pronounced discharging the cautioner he caused the debtor to be imprisoned on that warrant without obtaining the authority of the Sheriff. In support of the regularity of this proceeding he founds on the case of *Forgie v. Stewart and M'Donald*, in which it was decided that a debtor who had been liberated under the Act of Grace might be again incarcerated on the registered decree and charge without a new fiat being obtained.

"I am of opinion that the cases are not parallel, and that the judgment in the case of *Forgie* was not intended to be applied to a case like the present, where the imprisonment is not in execution of a decree, but is awarded in the exercise of a discretionary power, and for the purpose of enforcing the appearance of the debtor *judicio sisti*. Where imprisonment is to follow on a registered charge the debtor cannot avoid the diligence by finding security for payment. Imprisonment is the consequence of his disobedience to the charge, and he can only escape that consequence by payment. Liberation under the Act of Grace only suspends the operation of the warrant until the creditor chooses to comply with the obligation which the law imposes on him of alimenter his prisoner.

"But in the present case the warrant is for the incarceration of the debtor until he shall find caution *judicio sisti*.

"Having found caution, he has satisfied the condition, and is no longer in contumacy. If the cautioner should thereafter withdraw, no doubt further security must be found, but this is in consequence of a new state of circumstances, to which the original warrant is inapplicable. And, in my opinion, the creditor's proper course in these circumstances is to apply to the Judge for a new warrant of imprisonment until new caution shall be found. This was the course followed in the case of *Douglas v. Wallace*, 5 D. 338, where it is stated that the Lord Ordinary entertained doubts as to the competency of granting a new warrant without a fresh proof of the fact of the debtor being in *meditatione fugæ*, and

reported the matter to the Court. The question in controversy was as to the necessity of ascertaining whether the debtor still contemplated withdrawing himself from the jurisdiction, and it was held that in such a case further inquiry was unnecessary. But it does not appear to have occurred to anyone engaged in the case that the creditor could proceed upon the original warrant after caution had been found and the debtor presented. On the contrary, the report bears that the Court 'instructed the Lord Ordinary to grant warrant of incarceration of new.'

"It is, I think, in the highest degree expedient that all proceedings affecting personal liberty should be regulated by fixed and invariable forms, and when the form of proceeding has been fixed, as in the present instance, by a considered judgment of the Supreme Court, I should not think it consistent with sound practice to sustain any equivalent form, or to dispense with any of the preliminaries which have been considered essential to the assertion of the creditor's right to coerce his debtor by restraining his person. I am therefore of opinion that the proceedings complained of are not according to law, and that the complainer is entitled to liberation."

The respondent reclaimed.

The following further facts were stated at the bar:—Extract of the Sheriff Court decree was issued on December 1; the complainer was charged on December 2, but in consequence of a blunder in the charge there was a renewed charge on the 8th; warrant of imprisonment was applied for on the 16th and obtained on the 19th, but the complainer having been liberated on the 2d under the Lord Ordinary's interlocutor, had, it was stated, left for America.

Parties were heard before the First Division on 17th December, and their Lordships without making formal *avizandum* advised the case on the 21st.

The reclamer argued—A new warrant was unnecessary. The original warrant was not exhausted by the finding of caution; on the contrary, its continuing force was necessarily presumed—*Douglas v. Graham and Wallace*, Lord Justice-Clerk Hope's opinion, 5 D. 342. The books of practice did not state a practice, but gave an interpretation—an erroneous interpretation, it was contended—of the cases they cited. As to what the practice had been since the date of these books, there was no evidence.

Replied—The finding of caution exhausted the original warrant. That was the practice.

Authorities—*Stevenson v. Chisholm*, March 11, 1812, F.C.; *Carriek v. Martin*, July 26, 1822, 1 Sh. App. 257; *Douglas v. Graham and Wallace*, December 17, 1842, 5 D. 338; *Muir v. Barr*, February 2, 1849, 11 D. 487; *Forgie v. Stewart and M'Donald*, July 20, 1876, 3 R. 1149; M'Glashan's Sheriff Court Practice (Barclay's edit.), p. 396; Tait's Justice of the Peace (4th edit.), 317; Barclay on Fugæ Warrants, p. 84.

At advising—

LORD PRESIDENT—The question raised by this reclaiming note has certainly never been in terms decided before, and of course it is a question of importance, because it is one which affects the liberty of the subject. But I cannot find any reason for differing from the Lord Ordinary; on

the contrary, it appears to me that the whole tenour of the judicial opinion to which we are able to appeal is precisely in accordance with the judgment of the Lord Ordinary, and that his judgment is also justified by what appears to be the constant and invariable practice. The proceedings in *Stevenson v. Chisholm*, and particularly the Lord Ordinary's concluding interlocutor, go far to support the view which Lord McLaren has given effect to, and his opinion, I think, gains further support from the later case of *Douglas v. Graham and Wallace*. On the other hand, there is not the slightest appearance of the doctrine that the debtor may be imprisoned on the original warrant after his cautioner has produced him in Court. There is not the least trace of such a proceeding in any of the cases, and we have, besides, the authority of the books of practice, which lay it down as the established rule that once the cautioner has produced the debtor in Court the proper course, when it is desired to have him reimprisoned, is to obtain a fresh warrant. That seems to be a salutary practice, and I am not for disturbing it.

LORD MURE—I think when a course of practice has been in existence for a number of years, and has become established, and when it has substantially the authority of the older cases, that that practice ought to be adhered to, unless it is in clear violation of some well-defined legal principle. There is no such legal principle here, while, as we see from Sheriff Barclay and Mr M'Glashan's books, the practice of requiring a new warrant has been established for many years. In these circumstances I think the imprisonment in the present case on the old warrant was an illegal act.

LORD SHAND—I think that the case of *Douglas* recognises the practice as an existing practice, because there the Lord Ordinary (Lord Ivory) having asked the Court whether it was necessary to repeat the inquiry as to the debtor being *in meditatione fuga*, or whether the new warrant might be issued without any fresh inquiry, the Court replied that no new inquiry was necessary; but if the reclaimer here is right, the Court would have replied that no new warrant at all was necessary. On the whole matter I am of the same opinion as your Lordships.

LORD DEAS was absent.

The Court adhered.

Counsel for Reclaimer (Bremner) — Novay.
Agent—R. Broatch, L.A.

Counsel for Respondent (Clark) — Trayner.
Agent—David Hunter, S.S.C.

Wednesday, December 21.

FIRST DIVISION.

[Lord Rutherford Clark,
Ordinary.

MUNRO (BORLAND & CO.'S TRUSTEE) v.
PATERSON.

*Reparation—Damages—Where Disposer of Feu-
ding Subjects held Justified in Resuming Posses-
sion thereof brevi manu.*

A feued ground for building purposes to B, with entry at Whitsunday 1880, and on condition that B should erect and finish certain prescribed tenements thereon by Whitsunday 1881. A agreed to advance sums of money to B by instalments to enable him to erect the tenements; and it was stipulated that for the security of any advances made he should hold the subjects and tenements thereon erected, with power to sell them, and with power to finish any tenements left unfinished previous to selling the same. The work went on, and instalments were paid, until A, having received a report by the architect that the work was very bad, intimated to B, first, that he must remedy the defective work, and then, since B had abandoned the work, that if he did not proceed with the work within a week A would resume possession of the subjects and complete the building. Thereupon, B having neither remedied the defects nor resumed work, A entered into possession of the subjects and proceeded to finish the work. In an action for damages against him at the instance of B's trustee in bankruptcy—*held* that A's conduct was justified in the circumstances, and A assolizied accordingly.

On 12th June 1880 a minute of agreement was entered into between Thomas Lucas Paterson of Dowanhill on the one part, and George Coupar, Robert Borland, and Adam Borland, the partners of the firm of Adam Borland & Co., on the other part, by which the first party agreed to feu, and the second party to take from him in feu, a plot of ground in Victoria Street, Govan, on the following among other conditions:—*First*—The term of the second parties' entry shall be the term of Whitsunday 1880. . . . *Third*—The second parties shall before the term of Whitsunday 1881 erect and finish on said plot of ground tenements of dwelling-houses, or of shops and dwelling-houses, of four square storeys in height, with suitable offices, and the houses shall consist of not less than two apartments each, but the second parties shall have liberty to have one house of one apartment in each flat. . . . *Seventh*—In case the first party shall make advances to enable the second parties to erect and finish said tenements, or of their being indebted to him in any sums, he shall be entitled to hold the said ground and whole erections made or to be made thereon as a catholic security for repayment of the debt due to him at the time, including interest and expenses, and to let the subjects and uplift the rents thereof; and he shall also have full power to sell and dispose of the said tenement or tenements and ground by public roup or private bargain, and to dispose the subjects to the purchasers absolutely and