

The Court were unanimously of opinion, That as the imprisonment was founded on an alleged intention to defraud creditors, by flying to another country, it might proceed at any time.

No 10.

The Lord Ordinary, after advising with the Lords, refused the bill.

Fol. Dic. v. 3. p. 401. Fac. Col. No 246. p. 378.

1787. February 10. PARK and BROWN against BENNET.

PARK and BROWN made oath before the bailie of the abbey, that their debtor Bennet had retired to the sanctuary, merely to have a better opportunity of flying the kingdom. Bennet refusing to find security for his remaining in Scotland, was committed to the abbey jail, and upon application of the creditors on the ground of that jail being insufficient, warrant was granted by the Lords for removing him to the prison of Canongate.

No 11.

Fol. Dic. v. 3. p. 401. Fac. Col.

* * * This case is No. 7. p. 7. *voce* ABBEY of HOLYROODHOUSE.

1789. December 20.

PATRICK LAING against JAMES WATSON and JOHN MOLLISON.

PATRICK LAING insisted in an action of wrongous imprisonment and of damages against James Watson, a creditor of his, and against John Mollison, the Provost of the borough of Brechin, and one of the Justices of the Peace in the county of Forfar.

It appeared that Patrick Laing was in bankrupt circumstances, and had disposed of most of his effects in the borough of Brechin, with a view of removing to another part of the country, though there was no reason to suspect that he meant to quit Scotland; and that James Watson applied to Mr Mollison for a warrant to imprison Laing, stating that he was *in meditatione fugæ*, and intended soon to leave the kingdom, at least that part of it; and with regard to this James Watson made oath.

It farther appeared, that the desire of the petition was granted, without taking the oath of Watson as to the amount of the debt, without any previous examination of Laing, and without any litimation as to the time within which any action was to be commenced against him. Laing was confined to prison for several months; no proper measures however were taken by him, for some time, in order to obtain his release; and it even appeared, that he was inclined to prolong his stay in prison, so as to increase as much as possible his claim of damages. The defenders

No 12.

A meditatione fugæ warrant was granted without taking the oath of the creditor on the amount of the debt, or examining the debtor. Damages were found due by the Magistrate and the creditor.

No 12.

Pleaded; The ordinary form of summons in Scotland is in certain respects extremely defective. Instead of authorising a detention of the person against whom the suit is intended, as is done in England, agreeably to the ancient law of Rome, the notice thereby given seems to be calculated for enabling the defender to elude the claims that are to be made against him. To remedy this, and render the decreets of our courts effectual, it has been wisely settled, that a warrant may be obtained for imprisoning any person, being a native of this country, or having a fixed residence in it, unless he find caution to remain in Scotland till the claims to which he is liable shall be determined by a final sentence. This has now become part of our common law; and every Judge who has authority to imprison, may issue the warrant necessary for the purpose.

The method of proceeding, however, in such a case, having been introduced by no positive regulation, has never yet been precisely defined. A variety of precautions indeed have been suggested by the writers on our law, for preventing the abuse of so salutary a remedy, such as specifying on oath the nature and extent of the debt; a previous examination of the defender himself before proceeding to actual imprisonment; and a limitation of the security to be found, to such actions as should be commenced within a certain period from the date of the application. But it would be extremely hard, where no *animus injuriandi* appears, to subject a creditor, for omitting any of those precautions, to a claim of damages; and where no objection is made at the time to the regularity of the arrest, the just presumption is, that no wrong has been done.

With regard to the Judge by whose authority a warrant of this sort has been issued, it does not appear that in this, more than in any other case, where his conduct has not been accurately pointed out by a particular enactment, he can be subjected in damages, if he has proceeded without fraud, reparation being only due by persons so situated, as has been justly observed, "in the case of manifest and palpable injustice against law; but not in dubious cases, where rational men may be of different opinions; unless there be corruption by bribe or bias; otherwise no one but a beggar or a fool would be a Judge;" Stair, b. 4. tit. 1. § 5.

Answered; An arrest of one's person as *in meditatione fugæ*, being an extraordinary remedy, and liable to great abuse, ought ever to be gone about with the utmost caution. Being of the nature of a criminal process, it ought never to be applied for without a thorough conviction, that the party is about to leave the kingdom. Nor ought it to be authorised without evidence, at least by the oath of the person requiring the warrant, that a debt of a certain amount exists, and that without the intervention of the Judge, it will be frustrated by the disappearance of the debtor. And as by the statute of 1701, cap. 6. one charged with any bailable crime must be set at liberty on his finding security to abide any prosecution that may be brought against him within six months; it would be singular, if one accused merely of an intention to avoid the diligence of the law for a civil debt,

were to be in a worse situation. In addition to all this, which arises from the nature of the proceeding itself, it has been properly suggested, that before the imprisonment, the party charged with an intention to fly ought to be examined by the Judge, so as to give him every opportunity of preventing a measure which may be attended with fatal consequences to his credit and fortune, Stair, b. 4. tit. 47. § 23.; Bankt. b. 1. tit. 23. § 36.; Erskine, b. 1. tit. 2. § 21.

If, therefore, without any reason for believing that his debtor is about to leave Scotland, a creditor shall have recourse to so harsh a measure, he ought to suffer the consequences of his improper conduct. And if, by omitting any of the precautions which have been thought of for the due exercise of this extraordinary power, a man has been deprived of his liberty, even the character of a Judge ought to afford no protection from the claim of reparation arising to the injured party. The distinction adopted in this matter in the Court of Exchequer seems to be a solid one. In the case of an illegal seizure of goods, neither the officer of the revenue, nor the Judge who has interposed his authority, is in general liable in damages, if the proceedings do not evidently appear to have arisen from improper motives; but where the personal liberty of any one has been restrained without the order of law, a claim of indemnification ever necessarily follows. Indeed in such a case as this, where the Judge was at liberty either to interpose or not, there is not any reason for admitting the same latitude as may be thought necessary in other cases, where, from the nature of the thing, he is obliged to adopt decisive measures.

Replied; As every sentence of a Judge may, in Scotland, be enforced by imprisonment, no reasonable distinction can be made between the case of a party arrested in the ordinary way, in virtue of a decret erroneously pronounced, and that of one apprehended in consequence of a warrant such as was here issued. In both cases, the error committed by the Judge, and the injury resulting from it to the private party, are precisely of the same nature.

It was separately urged for the pursuer, that warrants of this sort could not be granted by a Justice of the Peace; but as the pursuer had been apprehended within the limits of the borough of Brechin, where Mr Mollison, one of the defenders, was Provost, and as it did not clearly appear whether he had acted in the one character or in the other, little attention seems to have been paid to this circumstance.

The Judges were unanimous in finding James Watson the creditor liable in damages, as he had made the application without having any reason to believe that the pursuer meant to leave Scotland.

Somewhat more difficulty occurred with regard to Mr Mollison, who appeared to have acted *bona fide*, and without any intention to injure. In general the Court were of opinion, that although perhaps no one of the particulars mentioned would have been sufficient to subject him, his conduct on the whole had been so incautious as, in a proceeding of this sort, justly to create an obligation to

No 12. make up the loss; which, however, on account of the pursuer's omitting to take the proper measures for obtaining his enlargement, the Court resolved to bring within as narrow limits as possible.

THE LORDS found "the defenders liable to the pursuer in damages and expenses."

A petition was afterwards preferred for the heir of Mr Mollison, he having died, insisting that he should be assoilzied; or at least, that he should be found liable *subsidiarie* only, after the pursuer had endeavoured to recover his damages from Watson, as the person chiefly guilty. THE LORDS appointed the petition to be answered on the last point. But after advising these papers the former judgment was affirmed. See REPARATION.

Reporter, *Lord Eskgrove.* Act. *Dean of Faculty, W. Robertson.* Alt, *Wight, Corbet.*
Clerk, *Sinclair.*

Fol. Dic. v. 3. p. 401. Fac. Col. No 99. p. 179.

* * * This case was appealed:

THE HOUSE of LORDS, 8th April 1791, 'ORDERED that the appeal be dismissed, and the interlocutors complained of affirmed.'

1793. March 9. DAVID WIGHT and Others *against* PETER NIBLIE.

No 13.
Application for a warrant *meditatione fugæ* against a person who has retired to the Abbey, must be made in the first instance to the bailie of that sanctuary.

PETER NIBLIE having retired to the Abbey, a petition was presented by some of his creditors, praying to have him deprived of the benefit of the sanctuary, on account of some alleged acts of fraud, or at least to have him ordained to find caution *judicio sisti*, in the actions already brought, or to be brought against him at their instance, as they were apprehensive that he meant to escape.

THE COURT were of opinion, that the circumstances of the case did not warrant his being deprived of the benefit of the sanctuary; and that any application against him as *in meditatione fugæ*, fell to be made in the first instance to the Bailie of the Abbey, the Judge Ordinary, who, if he saw cause for requiring caution, might, on Niblie's failing to find it, confine him in the prison of the Abbey, as was done in the case of Park against Bennet, No. 7. p. 7.

THE LORDS, as to this point, refused the petition.

For the Petitioners, *Geo. Fergusson.*

Clerk, *Sinclair.*

D. D.

Fol. Dic. v. 3. p. 401. Fac. Col. No 48. p. 101.