

APPENDIX.

PART I.

MEDITATIO FUGÆ.

1801. March 4. SUSANNA FRANCES TASKER against RICHARD MERCER.

RICHARD MERCER, a gentleman of Ireland, had considerable property in that country, but his debts exceeded its value. Owing, however, to his wife and daughters being possessed of separate funds, he was enabled to live in apparent affluence.

In 1797, he went to reside in the Isle of Man, in order to avoid arrest. In autumn 1798, he made an affidavit before the Deputy Governor, stating, *inter alia*, "that he was under dread of returning to Ireland lest he should be deprived of his personal liberty;" and his avowed object for making this affidavit was, that he might obtain from the Lord Chancellor of Ireland a protection from civil arrest, so that he might be in safety to return to Ireland for the purpose of making an arrangement with his creditors.

Mr. Mercer's application for a personal protection was not granted, but he nevertheless returned to Ireland, where, after remaining a short time, he came to Edinburgh about Midsummer 1799.

Mr. Mercer owed above £400 to Susanna Frances Tasker of Dublin, by a bond dated in 1795, on which, in 1799, she had been able to recover only one year's interest.

Mrs. Tasker, learning that Mr. Mercer had gone to Scotland, made oath before the Chief Justice of the Common Pleas in Ireland, to the verity of her debt; and, "that the said Richard Mercer left the kingdom of Ireland, in order to avoid the execution of the aforesaid judgment, and thereby defraud this deponent of her said debt: That the deponent is informed, the said Richard Mercer is now residing in the city and county of Edinburgh, in Scotland; and she is also informed, and has good reason to believe, and does verily believe in her conscience, that the said Richard Mercer will likewise leave Scotland, also with a view to defraud this deponent of her said debt, in case any intimation or notice shall be given him of this deponent's intention to proceed, or pursue any steps against him for recovery of said debt,

No. 1.

The circumstances of this case found to justify the issuing a warrant at the instance of a foreign creditor against a foreign debtor, as being *in meditatione fuga*.

No. 1. " the amount of which is specified in this deponent's affidavit to the verity
 " thereof, dated the 30th June last, also here referred to: That the affairs of
 " the said Richard Mercer in Ireland, are in an embarrassed state; and this
 " deponent, who is a destitute widow, must inevitably lose her money, which
 " is her only dependence, unless the person of the said Richard Mercer is se-
 " cured, having reason to believe his having carried money with him."

Mrs. Tasker's agent in Ireland transmitted this affidavit, along with the documents of her debt, to Robert Dick, writer in Edinburgh, accompanied with a power of attorney by Mrs. Tasker, authorising him to take such steps as should be necessary for recovery of the debt. Mr. Dick, accordingly, presented a petition to the Magistrates of Edinburgh, in which, after narrating the grounds of debt, he stated, " That he was credibly informed, and believed in his con-
 " science, that the said Richard Mercer is *in meditatione fugæ*, and about to
 " leave Scotland, in order to avoid payment of the foresaid debt to the other
 " petitioner Mrs. Tasker." The petition therefore prayed, that Mr. Mercer should be imprisoned till he should find caution *judicio sisti*, in any action for the debt which should be brought against him within six months.

Mr. Dick made oath before the Magistrates, to his belief of the facts stated in the petition.

The Magistrates ordered Mr. Mercer to be brought before them for examination.

Mr. Mercer, in two different declarations, admitted, that his affairs were embarrassed; but denied, that he had left Ireland in order to avoid arrest by his creditors, asserting, that one of his daughters was afflicted with a lingering complaint, on which account he had been advised to put her under the care of Dr. Monro and Dr. Gregory; that this was the sole cause of his coming to Scotland; and that as his daughter's cure was yet far from being accomplished, he had fixed no time for leaving this country. Mr. Mercer further admitted, that he resided in lodgings which he hired by the week, and that in the course of about four months he had changed his lodgings three or four times; but he denied that he had done so to prevent his being discovered by his creditors; in proof of which he stated a fact, which was not denied, that he appeared openly at all times, both on the streets and in places of public resort.

Mr. Mercer, for the purpose of confirming his statement, called Dr. Gregory, who deponed, " That he knows Mr. Mercer and his family: That about
 " a year ago, Mr. Mercer applied to him for medical assistance to one of his
 " daughters: That the defendant had at that time an account of the case,
 " which was a difficult one, from Dr. Pellieson of Dublin: That Miss Mercer
 " had been ill for ten or twelve years: That she has found some relief from
 " the treatment of her disorder in Edinburgh; and that Mr. Mercer has very
 " often, and very strongly expressed to the deponent his intention to continue
 " in Edinburgh for the purpose of carrying on the cure. Depones, That the
 " cure is far from being completed. And being interrogated, Whether he

‘ knows any thing, from which he infers or suspects, that Mr. Mercer has an
‘ intention of leaving Edinburgh? depones, *Negative*; and that, on the con-
‘ trary, some time ago, Mr. Mercer would not leave Edinburgh to go to
‘ Moffat, although he was advised to do so by the deponent and Mr. Benjamin
‘ Bell, who were of opinion, that it would contribute to the health of his
‘ daughter: That the deponent understood Mr. Mercer’s reason for not leav-
‘ ing Edinburgh to be, that he wished the deponent to be near him. De-
‘ pones, that six months ago, or more, the deponent offered to give Mr. Mer-
‘ cer all his receipts, and full written directions, for the management of his
‘ daughter’s case, that he might return to Ireland, which the deponent under-
‘ stands to be his native country; and the deponent thinks that he offered to
‘ correspond with Mr. Mercer upon his daughter’s case; at least he thinks it
‘ probable he made this offer, as it followed of course had Mr. Mercer agreed
‘ to go to Ireland; but Mr. Mercer declined to go, and for the reason above-
‘ mentioned, that he wished to have the deponent’s immediate assistance; and
‘ the deponent never knew any other reason why Mr. Mercer should have
‘ declined leaving Edinburgh at the time; but the deponent adds of himself,
‘ that Mr. Mercer had informed him that his affairs were embarrassed, which
‘ was a reason with Mr. Mercer for not going back to Ireland. Depones,
‘ That shortly after Mr. Mercer came to Edinburgh, the deponent had some
‘ conversation with him with respect to the consequences of his being prose-
‘ cuted for his debts; Mr. Mercer asked the deponent, Whether he thought
‘ he would be safe here? The deponent said, he thought not; and he men-
‘ tioned to him, that he might be taken up, without any warning, upon a *fuga*
‘ warrant, and he thought he would be safer in London, within the verge of
‘ the court: That he does not recollect that any thing was mentioned about
‘ the sanctuary of the Abbey, though he does not think it unlikely that it
‘ would be mentioned. But depones, That the deponent, who is no lawyer,
‘ advised Mr. Mercer not to trust to his opinion, but to consult men of busi-
‘ ness; and the deponent referred Mr. Mercer to Mr. Hotchkis, as the person
‘ whom the deponent employs in his own affairs. Depones, That when Mr.
‘ Mercer remained in Edinburgh after this, the deponent could only account
‘ for it by his extreme desire to carry on the cure of his daughter. Depones,
‘ That Mr. Mercer told the deponent he had been with Mr. Hotchkis, and
‘ Mr. Hotchkis told the deponent the same thing; but the deponent does not
‘ recollect any thing particular as to the advice which Mr. Mercer got, and
‘ thinking Mr. Mercer in good hands, inquired no more about the matter,
‘ and would have thought it indelicate to do so.’

On the other hand, Mrs. Tasker examined two messengers at arms, who had been sent to execute the warrant for bringing Mr. Mercer before the Magistrates, one of whom deponed, that after he had informed Mr. Mercer of the warrant, ‘ one of Mr. Mercer’s daughters came forward, and request-

No. 1. 'ed of the deponent to go away; and both she and Mr. Mercer himself said, 'if he would go away he should have a handsome present.'

The other messenger deponed, 'That a young lady, whom he understood to be Mr. Mercer's daughter, came up to him in one of the rooms of the lodging, and said, that she wished him to go away, and say he had not seen Mr. Mercer, and that he should have a handsome present. Depones, That at this time Mr. Mercer himself was standing close by the said young lady; but the deponent cannot recollect that Mr. Mercer himself said any thing upon that subject. Depones, that the deponent having refused Miss Mercer's offer, she did not repeat it: That the lady seemed to be much grieved, but Mr. Mercer, who was in his night-gown, did not seem to be much concerned.'

The Magistrates advised these documents with written pleadings for the parties, and considering the case to be attended with nicety, pronounced the following judgment: "In respect that Mr. Mercer has found caution in the books of court, to appear in judgment at any time when required, for ten days from this date, and thereafter, if a bill of advocation be presented within that time, until the said bill is advised, refuse the desire of the petition, and decern."

Mrs. Tasker complained of this judgment by a bill of advocation, and

Pleaded: Till of late, it appears to have been understood, that the creditor of a foreigner was entitled, in all cases to insist, that he should find caution *judicio sisti*; 7th March 1755, Herries against Lidderdales, No. 11. p. 2044; 21st June 1763, Ray against Bellamy, No. 13. p. 2051; 6th February 1782, Wright against Gammell, No. 9. p. 8553; and although this rule may now be departed from, yet the creditor is entitled to this remedy whenever he can shew probable grounds for suspecting that the debtor has it in contemplation to leave the country before the creditor shall have time to get his debt constituted. Now, in the present case, the grounds of suspicion are numerous. Mr. Mercer's circumstances are so embarrassed, that it appears he cannot return to Ireland, for fear of arrest by his creditors; and if he finds that they are following him here, the natural inference is, that he will move off to some other country where he may hope to find them less troublesome; a supposition which is strongly corroborated by the attempt made by him and his daughter to bribe the officers who were sent to apprehend him for examination.

Answered: The warrant against a debtor as *in meditatione fugæ*, is an extraordinary remedy sought by a creditor for an extraordinary wrong, namely, where his debtor means to leave the kingdom, in order to defraud him; and, accordingly, unless this fact can be reasonably instructed, the warrant will not be granted, although the debtor should be in the most embarrassed circumstances; 3d June 1797, Scudamore against Lechmere, No. 14. p. 8559. Now, the whole evidence in the present case goes to show, that, while the de-

fender has the strongest inducement to remain in Scotland, he cannot conveniently return to his native country, and there is not the slightest reason to suppose that he means to go elsewhere. The words used by him and his daughter to the officers arose from consternation, in consequence of their unexpected appearance; and, although his daughters' offer had been accepted, he had no intention of leaving the country, but only of retiring to the sanctuary.

Some of the Judges expressed a strong sense of the importance of preserving uniformity in the decisions of the Court; and therefore that the warrant could not be granted in this case, after having been refused in the case of Scudamore.

But a majority of the Court thought the whole circumstances sufficiently justified the pursuer's apprehensions of Mr. Mercer's fleeing the country; that the case of Scudamore was ill decided, and that, even supposing that decision to have been right, there were circumstances in this case which did not occur in the other, and which justified an opposite determination.

The Lord Ordinary, (20th November 1800) after advising with the Court, remitted the cause ' to the Magistrates of Edinburgh, with instructions to recall the interlocutor complained of, and grant warrant, in terms of the application made by the complainers, for incarcerating the respondent Richard Mercer, until he find caution *de judicio sisti*, in any suit to be brought by her for payment of the debt stated in said application, within the space of six months from the date of such caution being found; but supersedes execution until a reclaiming petition shall be advised, in case such shall be presented in due time by Mr. Mercer, upon Mr. Mercer's finding sufficient caution to the effect mentioned in the enactment of caution before the Magistrates of Edinburgh, until the expiry of the reclaiming days, and thereafter until such reclaiming petition (if presented) shall be advised."

A reclaiming petition was accordingly presented by Mr. Mercer, but, upon advising it with answers, the Court, by a considerable majority, "adhered."

Lord Ordinary, *Bannatyne*.

For Mrs. Tasker, *C. Hope, W. M. Morison, T. W. Baird*.

Alt. *H. Erskine, Jo. Clerk*.

R. D:

Fac. Coll. No. 225. p. 508.

* * See case between the same parties, No. 2. APPENDIX, PART I. *voce* CAUTIO JUDICIO SISTI, &c. and another APPENDIX, PART I. *voce* PRISONER.