Friday, May 19.

SECOND DIVISION.

[Sheriff of the Lothians.

KIDD *v.* HYDE.

Diligence—Meditatio fugæ—*Competency—Debtors (Scotland) Act* 1880 (33 *and* 34 *Vict. cap.* 34), *secs.* 4 *and* 8.

Warrant against a debtor as *in meditatione fugæ* is not a competent diligence after decree has been obtained against him.

Question—Whether apprehension on such a warrant is now in any case competent, in respect of the provisions of the Debtors Act of 1880 (33 and 34 Vict. cap. 34)?

A creditor having applied for a *meditatio fugæ* warrant against his debtor, against whom he already held a decree for the debt, *held* that such warrant being a form of diligence directe dsolely against the person and not against the estate of the debtor, and one under which the latter was bound to find caution only *de judicio sisti* and not *judicatum solvi*—the application was in the circumstances incompetent, since it could in no way be made available to the creditor, and in particular would be unavailable to enable him to compel the debtor to grant *cessio bonorum* under sec. 8 of the above Act.

Charles Kidd, pursuer and appellant, cab proprietor in Edinburgh, applied on 17th March 1882, for a *meditatio fugæ* warrant for the apprehension and detention of Charles Herbert Hyde, defender and respondent, described as residing at No. 11 Raeburn Place, Edinburgh, till he should find caution for payment of a sum of £37, 5s. 4d., consisting of cab hires, lent money, and expenses of a decree in absence of the Court of Session which he held against him.

The debt was alleged to have been incurred in December 1880, the decree having been obtained in January following.

The Sheriff-Substitute (Hamilton), of the date of the application, granted warrant to apprehend the defender for examination, when the latter declared that he had come that morning from Manchester for the purpose of amusing himself, and intended to return at his own convenience. He had come to see an uncle who lived in Raeburn Place, and he would probably remain for a week. He had no fixed residence, but Manchester was his headquarters, and while there he lived in an hotel. Since the alleged debt was incurred he had been in Edinburgh on several occasions for periods of two or three days at a time.

A proof was held on the following day, and the only witnesses examined were a cabman who had observed the defender's arrival at the station and given information thereof to the pursuer, and the uncle of the defender, who corroborated his declaration.

The Sheriff-Substitute found the *meditatio fugæ* not to have been established, and dismissed the petition.

The petitioner appealed to the Sheriff (Davidson), who dismissed the appeal.

While the appeal was pending, the defender brought a suspension of the Court of Session decree, in which he denied the whole debt.

The pursuer now appealed to the Court of Session, and argued—That as on his own statement the defender had no fixed residence, and intended to leave Edinburgh in a few days, he (the pursuer) was entitled to have his warrant, and to this end it was not necessary for him to show that the defender's purpose was to evade payment of this particular debt. *Meditatio fugæ* is the intention of the debtor to leave the country within such time as to deprive his creditor of the means of completing his diligence against him. Therefore all he had to show was the intention on the part of the defender, by the change of his whereabouts, to do that which would avoid his creditor's diligence. Under sec. 8 of the Debtors Act the effect of a *meditatio fugæ* warrant now is that the creditor can compel his debtor to appear at a time fixed by the Court, and can then, instead of as formerly incarcerating him on refusal to pay, compel him to grant *cessio*.

The defender replied—The pursuer has extracted a decree which he can at once put in force, and he is now asking for caution not *de judicio sisti* but *judicatum solvi*, which is incompetent. He already holds a warrant which prior to the Act would have given him power to imprison, and he now is asking for a second warrant to imprison. Though the Act took away the power to imprison under the decree till payment, while it excepted *meditatio fugæ* warrants from its provisions, it could not thereby extend the operation of that diligence to the effect of enabling the creditor to require caution *judicatum solvi*. It is necessary further for him to prove, not merely that the debtor is going away, but that he is doing so with the intention of evading payment of his just debts, which he has here failed to do.

Pursuer's authorities—Bell's Com. ii. 445, 449, 451, 453; *Jackson* v. *Smellie*, Nov. 22, 1865, 4 Macph. 72; *Anderson* v. *Anderson*, Nov. 18, 1844, 11 D. 118; *Linn* v. *Casadinos*, June 24, 1881, 8 R. 849.

Defender's authorities—Barclay's Notes on *Med. Fug.* secs. 30, 90, 100, 164; Barclay's Digest, *voce* "*Med. Fug.*" p. 621; *Irvine* v. *Hart*, Mar. 19, 1869, 7 Macph. 723; Ersk. i. 1, 21.

The Lords made avizandum with the case.

At advising—

Lord Rutherfurd Clark read the following opinion—The appellant holds a decree in absence against the respondent, on which as it appears a charge has been given for payment of the sum therein contained. He has applied for a *meditatio fugæ* warrant, under which he seeks to have the respondent imprisoned until he finds sufficient caution for payment and satisfaction of the debt. It is plain that the petition prays for a remedy which the Court could not grant. For under such a proceeding the debtor is not bound to find caution *judicatum solvi*. He can only be required to find caution *de judicio sisti*.

It may be possible, however, to regard this application as one in which a greater remedy is asked and a lesser may be given. To say the least, I have grave doubts on that point. For I am inclined to hold that if in a diligence a creditor is not entitled to the special warrant which he seeks, he is not entitled to any other.

Besides, caution *judicatum solvi* differs from caution *de judicio sisti*, not in degree but in kind.

Waiving this point, which has not been noticed in the Court below, I find that the Sheriff has dismissed the petition on the ground that it has not been established that the respondent was *in meditatione fugæ*. I entertain serious doubts whether I could have affirmed that judgment. The respondent, according to his own statement, has no fixed residence. "His headquarters," he says, "are in Manchester." But even there he stays in an hotel, and as it seems impossible to find any place in which diligence could proceed against him, I should be disposed to look on the present application with favour if I could hold it to be competent.

But the Act 43 and 44 Vict. c. 34, has made a great change in the remedies open to creditors. It has abolished imprisonment for all debts, except a certain class, within which the debt due to the appellant does not fall. At the same time, however, it declares that nothing contained in it shall appeal or prevent the apprehension or imprisonment of any person under a *meditatio fugæ* warrant, or under any decree or obligation *ad factum præstandum*.

This leads me to consider in what circumstances a *meditatio fugæ* warrant may now be issued.

The purpose of the warrant is to secure the person of the debtor, in order that he be subject to such diligence as may lawfully issue against his person. This process never had any reference to the estate of the debtor. It was at one time maintained that a debtor who had a landed estate in this country could not be arrested on a *meditatio fugæ* warrant. But it was held that as it was optional to the creditor to use diligence against the estate or person of his debtor, the warrant was competently issued—*Heron*, M. 8550. Indeed, it might have been said that both forms of diligence might have been used concurrently.

But the ground of the decision was that the *meditatio fugæ* warrant was a diligence against the person. Stair, iv. 47, 23, says that "Any judge ordinary, or even parties, may seize upon persons for public crimes, or for their own debts, on their escape out of the kingdom." Bell in his Commentaries, 2 vol. p. 449, says—"A person who has merely a claim, not yet followed by a judgment in his favour, can in justice demand no more than security for rendering his eventual right effectual when sentence shall have been given in his favour. This security, in so far as the estate of the debtor is capable of affording it, the claimant at once attains in Scotland by arrestment and inhibition. Still it may happen that the security of the claimant may chiefly depend on execution against the person, but to admit of such execution previous to the claim being established is as unjust as it is impolitic. It is quite fair to demand that the person of the debtor shall remain within the reach of the law, so that execution may proceed against him upon sentence being pronounced. This is attained with us by a warrant granted upon satisfactory proof, *prima facie*, of an intended escape. Upon this the debtor is apprehended, and if it shall appear that he really means to leave the kingdom, he is committed to prison, unless he shall find security to the creditor *de judicio sisti*—that is to say, that his person shall be found within the jurisdiction of the Courts upon sentence being pronounced."

And again, Erskine, i. 2, 21, says—"Such debtors must be set free from prison if they give security *judicio sisti*, though they should not offer also security *judicatum solvi*. Thus the proceeding is one directed against the person of the debtor only, and the remedy is satisfied when caution has been given—not that the debt shall be paid, but that the person of the debtor shall be available for the diligence of the creditor. It has no concern with the estate of the debtor."

Again, the warrant could not be competently issued or used where the creditor held a caption against his debtor. There could be no use in issuing a double warrant for his apprehension. No doubt this might be done in exceptional circumstances — as for example, in order to the apprehension of the debtor on Sunday, on which day ordinary civil diligence cannot be executed—Burton Hume's Cases, 400; *Blair*, July 6, 1821, 1 S. 107. But the reason of the exception simply is that the caption required the aid of the *meditatio fugæ* warrant in order that it might be made effectual.

The result is that the *meditatio fugæ* warrant is directed against the person only, and that its proper office is to secure that the creditor shall have all the remedies which the law gives him against the person of his debtor. It is an ancillary and not an independent diligence, and can never by its own power lead to the recovery of the debt.

Now that diligence against the person is abolished by the Act of 1880, it may be urged that all apprehension on *meditatio fugæ* warrants falls with it. But the Act expressly declares that nothing contained in it shall affect the apprehension or imprisonment of any person under such warrants, and it is our duty to give effect to that declaration in so far as the remedy can be of any possible use to the creditor. But after decree has been obtained I fail to see of what use the warrant can be. Nothing can be done against the person of the debtor except to give him a charge, if that can be considered to be diligence against his person. But it would be very idle and very absurd to apprehend the debtor in order that such a charge might be given. For of course it could be given quite as easily without his apprehension. If he were apprehended he would be bound to do no more than to give caution *judicio sisti*. But such security would not avail the creditor, who has already carried his decree into execution as far as the law allows against the person of the debtor, or who may easily do so without causing him to be apprehended. Hence, in my opinion, the warrant for which the appellant has applied cannot be of any use to him, and cannot therefore be competently issued.

The charge on a decree is an important step in the execution of diligence, because when insolvency concurs with an expired charge the debtor becomes notour bankrupt. It is quite possible that a creditor might resort to such proceedings as the present in order to enable him to give an effectual charge. I say nothing on a case which is not before us. But I may remark that it is questionable whether the Legislature had under their notice the true nature and office of *meditatio fugæ* warrants.

It was said that the warrant was justifiable because the creditor might under the 8th section of

the Act bring a process of *cessio* against his debtor. But I cannot see how the apprehension of the debtor, subject to his right of being liberated on caution *judicio sisti*, would aid the creditor. A process of *cessio* at the instance of the creditor is the creature of the Act of 1880. But it can only proceed before the Sheriff of the county in which the debtor has his ordinary domicile. If the debtor has such a domicile his apprehension is not necessary. If he has not, the process cannot proceed. In short, it is a process which is intended to be directed against Scotch debtors only, against whom the Sheriff has jurisdiction *ratione domicilii*. Hence the present application can be in no sense available to the appellant.

I am therefore of opinion that the petition is incompetent, and that it should be dismissed.

LORD CRAIGHILL—I concur.

LORD JUSTICE-CLERK—I concur substantially in the opinion which has been delivered by Lord Rutherfurd Clark, but I am not sure that I share his doubts as to the competency of entertaining this application, in respect that the special warrant which the pursuer asks cannot be granted.

The Court found the petition incompetent, and dismissed the appeal.

Counsel for Pursuer (Appellant)—Millie. Agents—M'Caskie & Brown, S.S.C.

Counsel for Defender (Respondent)—Dickson. Agents—Webster, Will, & Ritchie, S.S.C.

Friday, May 19.

SECOND DIVISION.

[Lord Adam, Ordinary.

MORTON *v.* THE NATIONAL BANK OF SCOTLAND, LIMITED.

(Before the Lord Justice-Clerk, Lord Craighill, and Lord Rutherfurd Clark).

Bankruptcy—Valuation and Deduction—Bankruptcy Act 1856 (19 *and* 20 *Vict. c.* 79), *sec.* 65 *—Bill—Right in Security—Deed of Arrangement.*

In a deed of arrangement between a sequestrated bankrupt and his creditors, the bankrupt agreed to pay a certain composition, and renounced all objections to claims lodged by the creditors in the sequestration, under reservation, in the case of current or past-due bills, of his right to credit for any sums that might be recovered by the holders from acceptors or prior obligants; the creditors reserved any claims that any of them might have against collateral securities or co-obligants in any securities they might hold; one of the creditors, a bank, besides other claims, held bills endorsed to them by the bankrupt which they had discounted. *Held* that they were not bound to impute sums recovered from other obligants in such bills towards payment of the composition due to them for their claim in respect of these bills and for their other claims, but were entitled to apply them towards payment of the bills until they should operate full payment thereof, on the ground that the bills were the property of the bank, and the reservation by the deed of arrangement was inapplicable to the payments received from co-obligants therein.

The facts out of which this case arose are stated in the note to the Lord Ordinary's interlocutor as follows:—"On the 18th June 1879 the firm of Kimball & Morton, of which the pursuer John Morton was the sole partner, was sequestrated.

"The sequestration was superseded by a deed of arrangement which was entered into between the pursuer and his creditors, dated 27th August 1879.

"By this deed the pursuer bound himself to pay to the creditors of John Morton and Kimball & Morton 9s. per pound of the debts for which he or they were liable at the date of sequestration, and that by instalments, the first of 7s. 6d. per pound in cash seven days after the deed of arrangement was approved of and the sequestration declared at an end, and 6d. per pound at six months, 6d. per pound at twelve months, and 6d. per pound at eighteen months after said date, with interest from and after the respective terms of payment. The pursuer and his cautioner renounced all objections to claims which had been lodged by creditors, or entered in the bankrupt's state of affairs, under reservation, in the case of current or past-due bills, of their right to credit for any sums that might be recovered by the holders from acceptors or prior obligants thereon.

"On the other hand, the creditors exonered and discharged Kimball & Morton and John Morton of all debts and obligations contracted by them or him, or for which they were liable at the date of the sequestration, but under reservation of the claims of the creditors for the composition, and also under reservation to such of them as held collateral securities or obligations for the debts owing by Kimball & Morton and John Morton, of their claims against such collateral securities or obligants.

"At the date of the sequestration the defenders, the National Bank, were creditors of the pursuer on an account-current to the amount of over £12,551, 4s. 2d. They also held bills endorsed to them by the pursuer for value to the amount of £6839, 4s. 5d. The net amount of the defenders' claim appears to have been adjusted at £18,333, 9s. 4d."

It was also stipulated in the deed of arrangement that bills receivable belonging to the estate, and not discounted by the bank, were to remain in the hands of the judicial factor on the sequestrated estate until maturity, the proceeds to be applied in implement of the bankrupt's obligations in the deed of arrangement.

The pursuer pleaded, *inter alia*, that he was entitled, in terms of the deed of arrangement, to credit in account with the defenders for all sums received by them from acceptors or prior obligants.

The defenders pleaded in answer that they were entitled to rank for the full amount of the debt in each bill, until they should operate full payment, and until they should have done so they were not bound to allow sums recovered from other obligants to be deducted from the composition payable by the pursuer.

The Lord Ordinary at the first hearing of the cause sustained the above plea for the defenders, appointed further procedure, and on a re-hearing assoilzied the defenders.