

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<sup>c</sup>Laurin. 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

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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.

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against him are constituted by a decree, but also till an opportunity is given of compelling payment by imprisonment in the ordinary course of law. The obligation of the cautioner, who interposes to prevent the immediate execution of the warrant, ought therefore to be so explained as to insure the accomplishment of this purpose. Hence, if before extracting the decree the debtor shall escape from Scotland, the cautioner must be liable for the debt. Accordingly it seems to have so been found, 15th December 1774, Telfer *contra* Muir, No 15. p. 2054.

It is of no consequence, that in the present case a decree in absence had been obtained, without making the cautioner a party to the action, and without requiring him to produce the person of the defender. It is in the power of a pursuer at any time to desert the action which he has commenced; and as the latter process, as well as the former, was instituted before the lapse of the six months from the date of the bail-bond, the cautioner has no reason to complain. Indeed, although no second action had been brought, the situation of the parties would have been the same. A decree in absence, as it has not the effect of foreclosing the defender or his cautioner, ought not to introduce any forfeiture of the pursuer's right. And the determination of the case must be the same, as if, before pronouncing any sentence, the cautioner had been required to fulfil his obligation; Erskine, b. 1. tit. 2. § 21.; Stair, b. 4. tit. 47. § 23.

*Answered:* The origin of *meditatio fugæ* warrants in Scotland, is to be found in the Roman law, by which the defender in any action might be required to find security *judicio sisti*. Hence, till judgment is given, the cautioner is obliged, when required, to produce the person of the defender. But after this period, although, on a new application, the judge will authorise a second arrest until a proper warrant of imprisonment can be obtained in the ordinary way, the cautioner is necessarily released from his obligation. The universal practice accordingly is, that the pursuer, before any definitive judgment is given, requires the cautioner to fulfil his engagement. Otherwise the obligation of the cautioner must be supposed to subsist during the course of the long prescription.

In the present case, after decree had been pronounced in the action originally brought, the obligation of the cautioner was at an end; nor could it be revived by the unwarranted measure of bringing a new action, which was calculated for no other purpose than to subject the cautioner, after the debtor himself had been allowed to elope; Voet. ad lib. 2. tit. 8. Dig. § 11.; Sir James Cockburn *contra* Inglis, 1776.

THE LORD ORDINARY, 'advocated the cause, and assoilzied the cautioner;' but after advising a representation, with answers, he took the cause to report.

The opinion of the Court was, that by the mere act of obtaining judgment, without requiring the cautioner to produce the body of the defender, the security of the creditor was not entirely at an end, but that such a requisition might be made at any time before the elapsing of the period allowed for extracting the decret.

THE LORDS adhered to the judgment which had been pronounced by the Lord Ordinary.

No 17.

Reporter, Lord Dreghorn. Act. Catcart. Alt. W. Robertson. Clerk, Mitchelson.  
Craigie. Fol. Dic. v. 3. p. 115. Fac. Col. No 142. p. 282.

1797. November 28.

THOMAS COWAN against WILLIAM AITCHISON and WILLIAM WALKER.

IN August 1795, Thomas Cowan presented a petition to the Sheriff of Edinburgh, stating, that he had taken a sub-lease of certain inclosures from John Aitchison, and had granted three bills for the rent, two of which, amounting to the rent payable to the landlord, Aitchison had promised to indorse to him; but that instead of doing so, Aitchison had indorsed them to third parties, in consequence of which, the petitioner, besides paying the bills, had his stock sequestrated by the landlord for the rent. The petitioner further stated, that Aitchison was about to leave the kingdom, and therefore craved a warrant against him as *in meditatione fuga*.

The Sheriff granted warrant for imprisoning Aitchison, till he should find caution *judicio sisti* in any action for the debt, which should be brought against him within six months.

William Aitchison and William Walker became his cautioners.

In November 1795, John Aitchison retired to the sanctuary.

In December 1795, Cowan raised an action against him for the debt before the Court of Session.

On the 13th February 1796, John Aitchison's estate was sequestrated.

No appearance was at first made for John Aitchison or his cautioners in Cowan's action. But he, instead of taking a decree in absence against Aitchison, on the 17th February obtained an order upon his cautioners to present him on the 23d of that month.

This order having been intimated to the cautioners, they appeared, and stated, that they were not bound to present Aitchison, as he was in the sanctuary, and had not obtained a personal protection.

THE LORD ORDINARY decerned against Aitchison in terms of the libel, and found the bond of caution forfeited. This interlocutor was kept open by representation for Aitchison and his cautioners; and, on 22d June, Aitchison appeared in Court, and his cautioners craved to be reponed.

Aitchison had by this time obtained from the Court a personal protection, with the concurrence of the trustee on his sequestrated estate.

THE LORD ORDINARY adhered to his former judgment as to the cautioners; but the claim against Aitchison remained still in dependence.

The cautioners reclaimed, and

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A bond of caution, for a party, against whom a warrant had been granted, as *in meditatione fuga*, having been declared forfeited, in consequence of the cautioner's failing to present him when required; it was found, that the cautioner was not entitled to be restored, on afterwards presenting the debtor, although before the debt against him was constituted, he having, by that time, obtained a personal protection.