and the alleged circumstances in which the receipt was granted, we thought that the case should be sent for trial before determining the effect of the discharge. The parties very wisely agreed that the case should be determined by the Lord Ordinary without a jury. We now have before us the evidence taken before the Lord Ordinary, and the judgment pronounced upon it. As he has thought £500 a proper sum to award, I am not prepared to hold that the pursuer is barred by accepting £27. The question we have to determine is, whether we should interfere with that judgment? It has come to be a question of damages, and of damages only. The accident is admitted. It is admitted that the pursuer received some injuries through the fault of the defenders. Now, the amoun of damages turns upon whether the pursuer was pretending injury or not. If he was not, a sum of £27 is absurd. The Lord Ordinary thought he was not pretending injury, and awarded him £500. I think there is evi dence which reasonably supports that view, and I am not for altering the judgment. Whether another view might not have been taken, and reasonably supported by the evidence, I do not say.

LORD RUTHERFURD CLARK—I have had some difficulty about this case, but I agree that we should adhere to the Lord Ordinary's interlocutor. I do not think, however, that we are in precisely the same position as if we were considering the question of granting a new trial. We have more power here in dealing with the judgment. The case turns entirely upon the question of whether or not the witnesses for the pursuer are to be believed. The Lord Ordinary has believed them, and I see no reason for saying that I disbelieve them, and no ground for altering the judgment.

The Court adhered.

Counsel for the Pursuer and Respondent —Rhind—Baxter. Agent — Wm. Officer, S.S.C.

Counsel for the Respondents and Appellants—Asher, Q.C. — Dickson. Agents — Millar, Robson, & Innes, S.S.C.

Friday, November 28.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

HART *v.* ANDERSON AND ANOTHER (ANDERSON'S TRUSTEES).

Diligence — Meditatione fugæ Warrant — Civil Debt—Rent—Debtors (Scotland) Act 1880 (43 *and* 44 *Vict. c.* 34).

A tenant of heritable subjects was imprisoned on a warrant as *in meditatione fugæ* until he should find caution *de judicio sisti* in any action for payment of past and future rent. The Court *suspended* the warrant and ordered liberation, on the ground that both before and after the Debtors Act 1880 warrants *in meditatione fugæ* were only incident to the power of imprisonment for debt, and as personal diligence was not available in respect of the debt alleged, the warrant was incompetent.

The Debtors (Scotland) Act 1880 (43 and 44 Vict. c. 34), sec. 4, provides—"With exceptions hereinafter mentioned, no person shall, after the commencement of this Act, be apprehended or imprisoned on account of any civil debt. There shall be excepted from the operation of the above enactment —1. Taxes, fines, or penalties due to Her Majesty, and rates and assessments lawfully imposed or to be imposed. 2. Sums decerned for aliment. Nothing contained in this Act shall affect or prevent the apprehension or imprisonment of any person under a warrant granted against him as being *in meditatione fugæ*, or under any decree or obligation *ad factum præstandum*."

In November 1890 Mrs Anderson, Leithfield House, and John Clanachan Gardner, solicitor, Stonehaven, trustees of the deceased John Anderson, petitioned the Sheriff of Aberdeen for the arrest of Joshua Hamilton Hart, tenant of Bridgeton House, Aberdeenshire, as being *in meditatione fugæ*. They averred that by a missive of lease dated 11th January 1890 the defender had offered to take the house of Bridgeton, with shootings, from 1st August till Martinmas 1890, and to pay £60 rent therefor. By a lease dated about the same time, the defender had agreed to take the subjects for a period of ten years from Martinmas 1890 at a rent of £125, with a break at the end of the first three years. He had refused to pay the rent of £60, and failed to give security for payment of the rent of the subjects for the next ten years.

They pleaded—"The defender being justly indebted to the pursuers in the sums foresaid, and he being about to leave Scotland before they can obtain decree therefor, and so defeat their claim, the pursuers are entitled to have him arrested and detained till he find caution *de judicio sisti*."

After certain procedure the Sheriff-Substitute (BROWN) upon 15th November 1890 pronounced this interlocutor—"Finds the complaint proved: Grants warrant to apprehend Joshua Hamilton Hart, within designed, and to commit him to the prison of Aberdeen, therein to be detained till he find caution acted in the Books of Court *de judicio sisti* in any action for payment of the debt mentioned in said petition to be brought against him at the pursuers' instance in any competent court within one month from this date."

The defender was accordingly arrested and lodged in prison.

In this note of suspension and liberation he averred that the respondents were entitled to charge him for payment on a recorded extract of the lease without further proceedings. He denied that there had

been *meditatio fugæ*. £60 had been tendered to the respondents and refused, although this represented the whole debt. Any other claim competent to the respondents was one merely on their failure, should such take place, to obtain another tenant for the house and shootings of Bridgeton, which had been regularly let for a series of years. His agent tendered a bond of caution for £60 to the Sheriff-clerk at Stonehaven, which was wrongously refused. In no case could the complainer be liable to pay a larger sum than £375, being the rents accruing prior to the first break in the lease, and the only sum presently due was the sum of £60.

The complainer pleaded—"(1) The whole proceedings complained of and the warrant of incarceration ought to be set aside, in respect that the debt in question being liquid, and the respondents being empowered by the terms of the said lease to charge the complainer to pay any sums due by him, they were not entitled to apply for or obtain the *fugæ* warrant under suspension. (2) The complainer not having been *in meditatione fugæ*, and it not being proved that he was, the warrant of imprisonment ought to be suspended. (3) The said warrant ought to be suspended in respect of the said offers of payment and caution referred to."

The respondents pleaded—"(4) The complainer having been *in meditatione fugæ*, and the warrant complained of having been regularly granted and regularly enforced, the said warrant is not subject to suspension, and the note should be refused."

Upon 24th November 1890 the Lord Ordinary officiating on the Bills (STORMONTH DARLING) refused the note.

"*Opinion.*—The complainer has been imprisoned as *in meditatione fugæ* on a warrant to commit him to the prison of Aberdeen, 'therein to be detained until he find caution acted in the books of Court *de judicio sisti* in any action for payment of the debt mentioned in said petition to be brought against him at the pursuers' instance in any competent court within one month from this date' (15th November). The debt mentioned in the petition consists (1) of £60 of rent for the house and shootings of Bridgeton from 1st August to Martinmas last, and (2) of rent at the rate of £125 per annum under a current lease of the same subjects for ten years from Martinmas last.

"There can be no doubt of the landlord's right to sue at once for the first of these debts; I should have thought that he had no right to sue (within a month) for the second were it not for the judgment of the Whole Court in the case of *M'Gill* v. *Ferrier*, March 9, 1838, 16 S. 934, in which it was held by a majority that an application by a landlord against a tenant under a nineteen years' lease, which had fifteen years still to run, to have the tenant imprisoned as *in meditatione fugæ* till he found caution *de judicio sisti* to the amount of the whole future rents of the lease, the terms of payment being first come and bygone, was competent and legal. Professor Bell in his Principles, section 1232 (*c*), expresses his disapprobation of this decision, and both the writers on the law of landlord and tenant agree with him (Hunter, ii. 349; Rankine, 313, note 13). My own opinion is in accord with theirs, but I feel myself bound to follow the decision, especially as if I granted liberation I should be defeating the landlord's diligence without the possibility of effectual redress by way of reclaiming-note. This might be the case even as regards the portion of the debt which is admittedly due, for if the warrant is bad as regards part of the debt, it is probably bad altogether—*Garioch* v. *Wilson*, 13 D. 1377; *M'Cubbin* v. *Fulton*, 14 D. 908.

"The complainer has a separate point, for which there is a good deal to be said, viz., that the formal lease under which he now holds the subjects contains the usual clause of consent to registration for execution, and that under this the landlord is entitled to charge him for payment of the rent due and unpaid at any term without the necessity of raising any action. But if *M'Gill* v. *Ferrier* is to be held as good law, it would seem to give the landlord a larger and earlier right of action, and therefore I do not feel justified in the face of that judgment in sustaining this plea to the effect of holding the warrant illegal."

The complainer reclaimed, and argued—1. The authority of *M'Gill* v. *Ferrier* was doubtful. Even if it had been well decided, the respondents were not entitled to arrest the defender as *in meditatione fugæ* under the debts created by the lease, (1) because there was a consent to registration for execution, and the respondents were entitled to charge for payment of the rent due whenever the complainer failed to pay; (2) even if *M'Gill* v. *Ferrier* was an authority for a warrant to be granted when security for a future debt only was asked, the petition asked too much, for the respondents were only entitled at the most to security for three years' rent, and the warrant was incompetent. If the warrant was bad in one point, then it was bad in all—*Garioch* v. *Wilson*, July 17, 1851, 13 D. 1377. 2. The warrant was incompetent in view of the statute. Under the old law a warrant *in meditatione fugæ* could be granted only if the debt for which the creditor sued was one the payment of which could be enforced by imprisonment after the debt had been constituted, and a decree given on which the creditor might charge his debtor. The Act of 1880 had expressly abolished all imprisonment for civil debts with the exception of Imperial taxes and local assessments, and also sums decerned for aliment. The clause providing that nothing should affect the imprisonment of any person under a warrant *in meditatione fugæ* followed immediately after the mention of the debts for which imprisonment could still be awarded, and referred only to them. The words of the Act did nothing to alter the rule of the common law that warrants *in meditatione fugæ* could be granted only when the debt which the creditor alleged against him was one for which the debtor could be im-

prisoned after decree—*Marshall* v. *Dobson*, December 18, 1844, 7 D. 232; Bell's Comm. ii. 449.

The respondents argued—There were two debts here; upon either of them the complainer could have been arrested on a warrant as being *in meditatione fugæ*, but on different principles. In regard to the first, the £60 rent of the property from August to Martinmas, there was no decree of registration, and therefore it was necessary to constitute the debt. The case of *Kidd* v. *Hyde*, May 19, 1882, 9 R. 803, did not apply, because there the debt had been constituted, and decree given so that the creditor could take what diligence was competent to him, but it was different here, and the debtor had been arrested so that the debt might be constituted. The whole meaning of arrest under this kind of warrant was that the debtor should give caution *de judicio sisti—i.e.*, that he should remain in this country until an action was brought against him, and if he could not find caution he must remain in prison. The fact that the complainer was the tenant of heritage in Scotland did not give the Sheriff Court of any county jurisdiction over him—*M'Bey* v. *Knight*, November 22, 1879, 7 R. 255. The Sheriff Court Act 1876 (39 and 40 Vict. cap. 70), section 46, only gave jurisdiction to a Sheriff where the person sued did not reside within his jurisdiction, but carried on a trade or business, and had a place of business within the county. The other debt stood in rather a different position. It was objected that the warrant referred to a debt not yet due. But it had been settled by a series of decisions that a warrant issued for a contingent debt was competent — *M'Gill* v. *Ferrier*, *supra*; *Thom* v. *Black*, December 10, 1828, 7 S. 158; *Davies* v. *Duncan*, February 9, 1861, 23 D. 532. Under the form of the warrant caution is to be found for the debt mentioned in the petition, and although caution would have to be found for the rent due for the whole ten years, while that amount might never be owing, that did not affect the case; the question of the amount of caution was not before the Court at all; the usual form was to find caution for the whole amount claimed —*Muir* v. *Collett*, November 23, 1866, 5 Macph. 47; *Mackenzie* v. *Balerno Paper Mill Company*, July 12, 1883, 10 R. 1147. The break in the lease could not affect the question of whether there should be security for a contingent debt, as various things might happen which would cause a break in the lease quite irrespective of this provision or the wishes of the parties themselves; the Court could not take these into consideration on the question whether caution at all should be granted. The same argument might have been urged in any of the cases where caution for a contingent debt had been granted, especially in the case of *Davies* v. *Duncan*, where it could not be known whether any child would be born alive so as to necessitate aliment. There were various cases where actions for relief had been allowed where the circumstances occasioning the relief might never occur—*Woodward* v. *Wilson*, March 10, 1829, 7 S. 566; *Douglas* v. *Jones*, June 30, 1831, 9 S. 856; *Duff* v. *Bradberry*, May 19, 1825, 4 S. 22. On the general question, whether this kind of warrant was abolished by the Act of 1880, it was plain that it was not, because there was an express clause reserving the power to use this warrant. The Act said that imprisonment for all civil debts was abolished, but imprisonment on a *fugæ* warrant was not imprisonment on a civil debt; it was a means of enabling a creditor to recover his civil debt. That was the meaning of the reservation, because otherwise a debtor in a civil debt could leave the country and prevent the creditor from constituting his debt in the ordinary way.

At advising—

LORD JUSTICE-CLERK — The complainer was imprisoned upon a warrant obtained against him on the ground that he was *in meditatione fugæ*. That warrant contains authority to commit the complainer to the prison of Aberdeen, "therein to be detained until he find caution acted in the Books of Court *de judicio sisti* in any action for payment of the debt mentioned in the said petition to be brought against him at the pursuers' instance in any competent court within one month from this date." Now, the original petition under which this proceeding had taken place was a petition in which the complainer was summoned to pay £60 rent due for certain subjects occupied by him, and rent at the rate of £125 per annum on a lease of ten years. The question that arose was, whether the warrant under which he had been committed was competent in the circumstances? Objection to it was taken on two grounds—First, that this was a contingent debt as regarded all the subsequent years during which the lease was to run; and second, that no such warrant was competent at all in reference to an action for debt in consequence of the passing of the Act 43 and 44 Vict. c. 34. Now, the respondent, in his right to have this warrant granted, and the complainer incarcerated upon it, was supported by a reference to a case—*M'Gill* v. *Ferrier*—decided by the Whole Court in 1838, there being a majority of ten Judges as against three, holding that such a warrant for a contingent debt was competent. That was also followed up by other cases, and in particular one in which such a contingency as the prospective birth of a child, of which the pursuer alleged the person said to be *in meditatione fugæ* was the father, was a sufficient ground for granting such a warrant of imprisonment. I must say that if it was necessary for the purpose of deciding this case to decide that question here, I should have the greatest possible difficulty in deciding it in accordance with either of these authorities. But of course as *M'Gill* v. *Ferrier* was a decision by the Whole Court, it is, I think, highly undesirable that I should express my opinion upon the matter as against the opinion of the majority of the consulted Judges if it is not necessary for the decision of this case. Therefore it is advisable to see what decision must be given upon the other

point, namely, whether the Act of 1880, which abolished imprisonment for debt in most cases, did or did not authorise such a warrant as was here granted.

The terms of that Act as regarded this matter were somewhat peculiar. Clause 4, which abolished imprisonment on account of any civil debt, made certain exceptions. These exceptions were taxes, fines, or penalties due to the Crown, rates and assessments lawfully imposed or to be imposed, and sums decerned for as aliment. And the same clause provided as regarded *meditatione fugæ* warrants—"Nothing contained in this Act shall affect or prevent the apprehension or imprisonment of any person under a warrant granted against him as being *in meditatione fugæ*, or under any decree or obligation *ad factum præstandum*." These words occur in a very peculiar way in the clause, and the question is, what do they mean? I think these words must be regarded as meaning that a warrant *in meditatione fugæ* was to be obtained in such cases as by the law was competent. That takes us back as to what was the established principle before in reference to *meditatione fugæ* warrants, namely, that *meditatione fugæ* warrants could only be granted in those cases in which the pursuer, if he was successful in establishing the debt, could make good his claim by the *compulsitor* of imprisonment; and if a person against whom a claim was brought was proved to the satisfaction of the magistrate to be likely to leave the country, and so deprive the pursuer of that *compulsitor* against his person, the magistrate was entitled and bound to have the person apprehended upon warrant and committed to prison until he should find caution, which meant this—that the person who was security for him would either produce him, in order that the law might take effect upon him by the *compulsitor* of imprisonment, or should pay the debt himself. I do not think that the Act of 1880, whatever might have been the reason for the insertion of this clause, or whatever might have been the accidents which led to its being inserted, meant anything more than that. Under the former law, if a claim which was made by a pursuer in an action was not such a claim as could result in his debtor, or the person who had been sued, being subjected to imprisonment if he failed to implement the decree, then no *meditatione fugæ* warrant could be issued.

Now, that being the former law, I am quite clear that this clause in this Act of Parliament did not alter the law. It only saved the law. The law which I hold it saved was this—that where the pursuer had such a claim as by the law entitled him, if he did not get payment after judgment, to put his debtor in prison, he could still do so. He could do so certainly as regarded these excepted cases in this particular Act itself, and certain things which were debts of a particular kind were declared to be still sufficient ground for incarceration. To extend that clause to mean anything more would be to make it an enacting clause under which a person claiming a debt from another might use a *meditatione fugæ* warrant for other purposes than those which had been competent under the old law. I know of no law, I know of no case tending at all in this direction, that a pursuer is entitled to have a *meditatione fugæ* warrant for the purpose of enabling him the more conveniently to cite the defender, or more conveniently to charge the defender. The only and sole ground upon which he is entitled to have his alleged debtor incarcerated is, that in the event of his proving his case, and obtaining a judgment for the sum of money, he could, if that sum of money was not duly paid, use a *compulsitor* of imprisonment. In this case it was not questioned that if the pursuer in the Sheriff Court was successful in his action, and obtained a judgment against the complainer for a debt either present or contingent, he could have no power whatever of incarceration. Therefore the power had been taken from him of doing that which alone was the ground of granting *meditatione fugæ* warrants before the Act of 1880. I am for suspending the proceedings.

Lord Young—I confess I do not think that this case is one of much importance now, although no doubt an interesting one. The warrant which we are asked to suspend is one giving authority to apprehend and imprison the complainer until he finds caution *de judicio sisti* in any action for payment of a certain debt. We were asked to do this upon a variety of grounds, but I think that the ground which your Lordship has stated is the only one upon which we can suspend this warrant; in my opinion none of the others are relevant. I am inclined to be of opinion that the case of *M'Gill* v. *Ferrier*, upon which the respondents relied, was not well decided, and if we had to consider the point I confess I would have no great hesitation in deciding in the face of this judgment, which was decided by a majority of the Whole Court fifty-two years ago, and which has since been condemned by several text writers. A great deal has happened since the decision in that case, but in my view it is not necessary to put our judgment upon the question whether that case was well decided or not.

The language of the Act of Parliament is perplexing, and at first sight affords room for an argument for the respondent on apparently strictly logical grounds such as this. He may say to the complainer, You found upon the Act of 1880 as abolishing imprisonment for all civil debts, and therefore that this warrant to imprison you is illegal; but then the Act says that nothing herein contained is to affect warrants taken out against persons *in meditatione fugæ;* therefore if all that you can say against this warrant is that it is illegal under the Act, we can show a provision in the statute in favour of such warrants. But I think that that argument is fallacious, and that it was not the intention of Parliament to alter

the law in regard to warrants *in meditatione fugæ* as that stood before the Act. I think it was the intention of the Legislature to leave the law relating to these warrants as it stood at the time, and also that if it had intended to alter their character it would have done so by other words than are in this clause of reservation.

The law relating to warrants *in meditatione fugæ* was and is that they are accessory and incident to the power of imprisonment for debt. The law gave and gives to a creditor a remedy against the person of a debtor by imprisonment. The law formerly gave that power to all creditors for sums above £100 Scots, and the law of warrants *in meditatione fugæ* was an exceptional measure, to be used only in exceptional circumstances where it could be shown that the debtor was preparing to leave Scotland without settling with his creditors, and the law of Scotland knew no other kind of warrant *in meditatione fugæ*. Accordingly it was shown to us by reported cases that this accessory and incidental remedy was not admissible unless the creditor could imprison the debtor for his civil debt.

Now, did the Act of 1880 change that state of things? I think that if that had been intended it would have required words of positive enactment, and there are none such here. The words of reservation in the Act where they were quoted to us require to be construed. I put the case—a stronger one than the present case—suppose the Act had completely extinguished some class of debts which had previously existed—had enacted, for instance, that that class of debts should prescribe in two years, the words of reservation remaining as at present—suppose, then, a warrant *in meditatione fugæ* taken out by a creditor in such an extinct debt and the debtor put in prison. He brings a complaint and founds upon the clause in the Act which renders his kind of debt extinct. But the respondent says—Here are words of reservation which say that nothing in this Act shall affect the rights of warrants taken *in meditatione fugæ*. If the respondent's argument were sustained his debtor would be imprisoned for a debt which was extinct. The words therefore need construction. I am of opinion that the creditor here has no remedy against the person of this debtor, and I think that the complainer cannot be kept in prison under a warrant *in meditatione fugæ* in order that another and competent diligence may be used against his estate when the creditor has constituted his debt in the usual manner.

LORD RUTHERFURD CLARK—I am of the same opinion.

I have already explained my views in the case of *Kidd*, and I need not repeat what I then said. I hold that by the common law a *meditatione fugæ* warrant can only be used as a means of enabling the creditor to use diligence against the person of his debtor, and therefore that it cannot be used for any purpose where such diligence is incompetent. It was argued that the Act of 1880 enlarges the right of the creditor so as to enable him to use this warrant for purposes for which it could not be used before. I do not think that the argument is sound. The statute enacts nothing. It merely reserves.

LORD TRAYNER—I concur in the proposed judgment on the grounds stated by Lord Young. I also concur in his Lordship's criticism of the terms of the Act 1880.

The Court recalled the Lord Ordinary's interlocutor and passed the note.

Counsel for the Reclaimer—Asher, Q.C.—Guthrie. Agents — Simpson & Marwick, W.S.

Counsel for the Respondents—Murray—Dickson. Agent—William Officer, S.S.C.

Saturday, November 29.

SECOND DIVISION.

[Lord Trayner, Ordinary.

MACGREGOR AND OTHERS (MORRISON'S TRUSTEES) *v.* MACDONALD AND OTHERS.

Succession—Conditio si sine liberis—Vesting.

A testator directed his trustees to pay to the lawful children of his deceased sister a legacy of £1000. One of these children had died many years before the date of the will, leaving children, who on the testator's death claimed a share in the legacy as representing their mother. *Held* (following *Rhind's Trustees* v. *Leitch and Others*, December 5, 1866, 5 Macph. 104) that as their mother had never been instituted to the legacy, the *conditio si sine liberis* did not apply.

Hector Morrison, Inverness, who died on 4th October 1888, by a deed of settlement dated 4th June 1888 directed his trustees, *inter alia*, to pay "to the lawful children of my now deceased sister Mary Morrison or Macdonald £1000 sterling." He also appointed his brothers and sisters and the children of the deceased Mary Morrison or Macdonald to be his residuary legatees, "but that only in shares proportionate to the legacies bequeathed to each of them as before mentioned."

Mrs Macdonald left nine children, one of whom, Mrs Margaret Macdonald, died on 7th November 1873 leaving four children—Norman, Donald, Angus, and Hector, who claimed under the settlement in respect that their mother, if she had survived the truster, would have been entitled to a share in the legacy and residue. The trustees accordingly raised a multiplepoinding, and called as defenders all the parties interested. The amount of the fund *in medio* amounted to about £3000.

Mrs Margaret Macdonald's children pleaded — "(1) The claimants being the