Lord Craighill—I am of the same opinion. In this case, which is a peculiar one, it appears that this dog flew out at the two men who were engaged at the defender's residence, and alarmed the pursuer's companion, but it is not clear whether the dog intended to bite him or not. The pursuer's companion in consequence dropped a piece of coal and injured the pursuer. Well, if there is any fault in the defender in not restraining the dog, then I think it is quite plain that although the person who suffered the injury was not the person upon whom the dog leapt, still the pursuer is entitled to recover damages. That is a matter upon which there is no contention. But it is contended that no relevant case has been stated as to the character of the dog, to make the defender liable in damages. It is no doubt said that the dog was a vicious and ferocious animal, but the defender says that there is a want of specification as to its alleged ferocious character. I think, however, on the contrary, that enough has been said upon record for all purposes, and I am the more persuaded of this, because I think the pursuer cannot succeed unless he proves that the defender had knowledge of the vicious and ferocious character of the dog. Upon the whole matter I think a relevant case has been stated.

Lord Rutherfurd Clark—I am of the same opinion. I think that a case has been relevantly stated on record. It is averred that this dog was ferocious, and that the defender knew it. That being so, the action is relevant. If, however, the pursuer in order to succeed requires to show that the dog was ferocious, and that the defender knew of the ferocity, I think that he had better consider whether he will go any further in the case.

The Court recalled the interlocutor of the Sheriff-Substitute, repelled the defender's first plea-in-law, and remitted the case to the Sheriff-Substitute.

Counsel for Pursuer — Wilson. Agent — D. Howard Smith, Solicitor.

Counsel for Defender—Guthrie Smith. Agents —Macrae, Flett, & Rennie, W.S.

Tuesday, June 14.

FIRST DIVISION.

[Sheriff of Lanarkshire.

ADAM *v.* CROWE.

Process— Warrant to Apprehend as in meditatione fugæ.

A warrant to apprehend as *in meditatione fugæ* cannot be executed except in Scotland.

Archibald Mason Adam, dead-meat salesman, Glasgow, presented a petition in the Sheriff Court of Lanarkshire at Glasgow for the apprehension of John Crowe, cattle salesman, Glasgow. He averred that Crowe was indebted to him in the amount of £500, and that he was *in meditatione fugæ*. On March 12, 1887, the Sheriff-Substitute (Lees) granted warrant for Crowe's apprehension.

On 9th April one of the Liverpool Magistrates endorsed the warrant thus:—"City of Liverpool, in the County of Lancaster, to wit.—Whereas proof upon oath hath this day been made before me, one of Her Majesty's Justices of the Peace for the said city, that the name of J. M. Lees, Esquire, to the within warrant subscribed, is of the handwriting of the Sheriff-Substitute of Lanarkshire within mentioned, I do hereby authorise James Rennie, who bringeth to me this warrant, and all other persons to whom it was originally directed, or by whom it may lawfully be executed, and also all constables and other peace officers of the said city of Liverpool, to execute the same within the last-mentioned city. Given under my hand this ninth day of April, One thousand eight hundred and eighty-seven. — J. Miles, J.P. for Liverpool." Under this warrant Crowe was apprehended on 9th April on board the "Servia" at Liverpool. Until 8th April he had been living at Glasgow, and he was about to proceed to Canada under a written contract of service with a firm in whose employment he had already been. He was brought back to Glasgow, and on 12th April was examined before the Sheriff-Substitute (Spens). On 13th April the Sheriff-Substitute pronounced this interlocutor:—"Finds that the respondent has been admittedly brought from England, having been taken off the 'Servia' at Liverpool on Saturday the 9th April current, on the assumption that he could be legally apprehended in virtue of the warrant issued by one of Sheriff-Substitutes of Lanarkshire on 12th March last, with the relative indorsation by a Justice of the Peace in Liverpool: Finds under reference to note that the respondent's apprehension was not a competent proceeding, and that the respondent is not lawfully within the jurisdiction of this Court; therefore dismisses the petition: Finds the petitioner liable to the respondent in expenses, which fixes at the sum of Four pounds four shillings.

"*Note.*—If I am right in the view which I have taken it is wholly unnecessary to discuss the question of whether in the circumstances disclosed in the respondent's declaration or otherwise admitted at the bar, had the respondent been apprehended in Scotland, petitioner would have been entitled to the order which he asks. I may, however, say that so far as the respondent's declaration is concerned *per se*, I would not have been inclined to grant the order, but the explanation which Mr Watson gave me, he being one of the respondent's employers, to the effect that it was by no means impossible that under the agreement the respondent might have resided in Canada for the whole two years in the agreement, might not impossibly have altered my opinion as to the petitioner's right to demand the order which he asks had the case gone to proof.

"The case was continued yesterday from the first diet in the forenoon to three o'clock p.m. in order that a copy of the agreement referred to might be produced, it being explained that the original had been destroyed. At this second diet my attention had been specially directed by Mr Shaw, who had not been present at the first diet, to the fact that the warrant had been executed in England. I was at once disposed to take the view that this was incompetent, but the case was continued till to-day chiefly to allow Mr Angus Campbell, the petitioner's agent—he being merely

represented yesterday by a brother agent—to be heard. I had an able argument from Mr Campbell. I think he said all that could be said in favour of the petitioner's view, but he has failed to convince me that the opinion which I formed yesterday was unsound. I may say that I have consulted with Mr Sheriff Balfour, to whose department in the ordinary case the present application would have come had this not been vacation, and our opinions are identical. There is an old decision in 1855 of Sheriff Glassford Bell's, referred to in Mr Sellar's Forms for Sheriffs and Sheriff-Clerks, p. 172, which may be said to be in favour of the petitioner. On the other hand, there is a decision of Sheriff Dove Wilson's in 1873—*Cook* v. *Sauliere*, Guthrie's Sheriff Court Cases, 257—unmistakeably in favour of the contention of the respondent. I may just note that as the decision of Sheriff Bell was pronounced when he was a Sheriff-Substitute it is not binding upon me as it might have been argued it would have been had his decision been given when he was Sheriff of Lanarkshire. I propose accordingly to consider the point on its merits apart from decision. The question subdivides itself under two heads—First, Whether this Court has any power to address itself to the question of whether the respondent has been legally brought here? and second, Whether, if so, the respondent has been brought legally here? These I will take in their order. (1) I am very distinctly of opinion that this Court is bound to see that its warrant has been properly and legally executed. The indorsation of the English Magistrate is merely ancillary to the warrant of this Court, therefore if something has been done which was outwith the scope of the warrant granted by this Court, the proceedings, it seems to me, are incompetent. The warrant of 12th March was not granted by myself but by one of my colleagues, but I do not doubt that if the application had been expressly to apprehend the person of the respondent in England as *in fuga* there, such a warrant would not have been granted. Had the application been to myself I certainly would not have granted it, and the petition bears to be as against a respondent at the date of the presentation of the petition actually residing within the jurisdiction of the Court. As matter of legal theory England is a foreign country, and in point of fact petitions are frequently presented against respondents on the ground that they are *in meditatione fugæ* to England. Therefore the warrant which was asked and granted was a warrant to apprehend and bring for examination the person of the respondent on the assumption that he was within the jurisdiction of this Court. I have thought it desirable to explain this point at some length in order to show how that in my opinion the Court is not entitled to take the view that it does not matter how the respondent comes to be within the jurisdiction of the Court at the time he is brought before the Court. The Court must be satisfied that the original warrant which was issued, and which the indorsement of the English Magistrate is merely ancillary to, has been legally and competently executed. (2) But although the warrant of this Court did not contemplate the apprehension of the respondent in England, it might be that by some English Act of Parliament or rule of common law a respondent who had moved out of the jurisdiction of this Court could be brought within it by the warrant of an English Magistrate, and if legally brought within it, then it may be that this Court would not only be entitled but bound to deal with the respondent as legally within its jurisdiction. The *onus* of establishing this position rests upon the petitioner. Now, so far as I am aware, the only Act of Parliament in England with regard to which argument can be submitted as to this matter is 11 and 12 Vict. c. 42. In section 15 of this Act it is enacted 'that if any person against whom a warrant shall be issued by the Lord Justice-General, Lord Chief Justice-Clerk (*sic*), or any of the Lords Commissioners of Justiciary, or by a Sheriff, Steward, Depute, or Substitute, or Justice of the Peace, of that part of the United Kingdom of Great Britain and Ireland called Scotland, *for any crime or offence* against the laws of that part of the United Kingdom, shall escape, go into, reside, or be, or shall be supposed or suspected to be, in any county or place in England or Ireland, then it shall be lawful for a Justice of the Peace to grant a warrant to apprehend such person, and so convey him to the Court issuing the original warrant.' The respondent in this case when he was apprehended at Liverpool was on board the 'Servia,' intending to proceeded to Canada *via* New York, under a written contract of service entered into with employers in whose service he had been for some time previous to entering into such written contract. In these circumstances to speak of the respondent as being guilty of a crime or offence is simply absurd. To arrive at such a conclusion would be an abuse of the terms of the section of the Act referred to. It may be the English Justice of the Peace who granted the indorsement may have been induced to believe that the respondent had been guilty of some crime or offence. I have no means of knowing whether this is so or not. The petitioner's statement is that the respondent is owing him some money under two bills dated a considerable time back, which statement I understand the respondent denies, but it is of course nonsense that this can by any human ingenuity be construed as 'a crime or offence."

"I therefore dismiss the petition. As, by arrangement, the respondent is no longer detained in custody, it is unnecessary to make any order with reference thereto."

The pursuer appealed to the Sheriff (BERRY), who on 14th April adhered.

"*Note.*—After consideration I agree in the conclusion of the Sheriff-Substitute that this petition should be dismissed. I think it impossible to shut one's eyes to the fact that the respondent has been brought against his will from England to Scotland under the warrant of apprehension granted by Sheriff Lees on 12th March last, and indorsed by a Justice of Peace for Liverpool on 9th April. To grant under such a concurring warrant of an English magistrate a warrant for incarceration of the respondent as meditating flight from Scotland seems to me contrary to the principle on which a *fugæ* warrant proceeds. It may be a question how far I can consider under what authority the English magistrate proceeded in indorsing the warrant, but there can be little doubt that such an indorsement is not authorised by the 11 and

12 Victoria, chap. 42, relative to the indorsement of warrants against persons for crimes or offences against the laws of Scotland. But the ground on which I proceed mainly is that it was, in my opinion, an abuse of the warrant granted by Sheriff Lees to bring back the respondent forcibly from England to Scotland, and that the petitioner is not entitled to avail himself of the fact that by such a proceeding he has brought the respondent within the jurisdiction of this Court. There is a conflict of authority between different Sheriffs-Substitute on the point, and I have the highest respect for the opinion of Sheriff Glassford Bell, who took a different view in 1855 from that which I have expressed. But the opinion since acted on by Sheriff Dove Wilson, and substantially adhered to in his work on Sheriff Court practice, commends itself more to my approval. The pursuer's agent asked that I should grant a warrant for the detention of the defender, but I declined to do so, as inconsistent with the view I take of the case."

The pursuer appealed to the First Division of the Court of Session, and argued that the practice in Glasgow had been to follow the decision pronounced by Sheriff Bell in *Wylie & Lochhead* v. *Kovy*, January 15, 1855, note in 1 Sellar's Forms for Sheriffs, &c., p. 172, although it was quite true that an opposite view had been expressed by Sheriff Dove Wilson in *Cook* v. *Sauliere*, October 11, 1873; Guthrie's Sheriff Court Cases, 257. The Sheriff-Substitute could not address himself to the question whether the procedure was competent. He had nothing to do with the *modus* of apprehension. He had merely to deal with the case before him, where, as here, the warrant was *ex facie* regular. A Scotch judge could not assume that an English judge's warrant, *ex facie* regular, was incompetent—Stair, iv. 47, 23. The procedure under border warrants had been sustained on proof of a practice; and here a practice existed, and the pursuer was ready to prove it. Besides the tendency of the law, *e.g.*, the English Bankruptcy Acts was in this direction.

Counsel for the defender were not called on.

At advising—

LORD PRESIDENT—The case is so clear that it is not necessary to call for an answer. The argument has been very well stated, and in disposing of it I proceed entirely upon the ground relied on by the Sheriff, namely, that here there has been an abuse of the warrant. The respondent was not, in my opinion, legally within the jurisdiction of the Court which issued the warrant, and his apprehension in England was altogether beyond the warrant. That the English Magistrate authorised the officers to execute the warrant does not affect the question. The respondent was not *in meditatione fugæ* when apprehended, and Sheriff Lees' warrant had no efficacy for apprehending him in England.

LORD MURE concurred.

LORD SHAND—As pointed out by Lord Rutherfurd Clark in *Kidd* v. *Hyde*, May 19, 1882, 9 R. 803, the Debtors Act 1880 (43 and 44 Vict. cap. 34) has largely affected these warrants. But even assuming that some good purpose is still served by such warrants, if the application had stated that the person sought to be apprehended was out of this country the Sheriff would have refused to give any deliverance upon it, or would have refused it altogether. Such a warrant is presented on the footing that the person is in and about to leave the country; but it falls the moment the person gets out of the country. The argument, that the Magistrate in England by granting authority to execute the warrant makes the warrant competent, if sound, would amount to this, that a person might be brought back to this country, even after arriving at his destination at the other side of the globe, if a magistrate could be got to endorse the warrant. Such a proposition is extravagant. In short, the warrant is good so long as he is about to leave the country; it is bad so soon as he has left it.

LORD ADAM concurred.

The Court adhered.

Counsel for Pursuer (Appellant)—A. S. D. Thomson. Agent—Wm. Officer, S.S.C.

Counsel for Defender (Respondent)—Guthrie—M'Clure. Agents—Fodd, Simpson, & Marwick, W.S.

Wednesday, June 15.

SECOND DIVISION.

[Sheriff of Lanarkshire.

MARTIN *v.* WARD AND OTHERS.

Reparation — Contributory Negligence — Parent and Child.

In an action of damages by the father of two boys, aged five and three years respectively, who were knocked down by a van, when crossing a public thoroughfare near their home, the defenders pleaded that the pursuer was guilty of contributory negligence in allowing the children to cross the street alone. *Held* that there had been no contributory negligence to the effect of relieving those responsible for the accident from liability.

Reparation—Liability—Employment of Van.

In an action of damages for injuries done by a van which knocked down two children, there were called as defenders the owners of the van, and a spirit merchant and his son. The ground of action against the spirit merchant was that his son, who was his shopman at a weekly wage, had borrowed the van for the purpose of moving goods belonging to his father, and that the accident had happened while the van was so employed. The father saw the van loaded and despatched, his son being in it, but one of the owners of the van being then the driver. On the way it became apparent that the driver was the worse of drink, and the spirit merchant's son accordingly took the reins, and was driving when the accident happened. The Court *held* that the owners of the van, and the driver at the time of the accident, were alone liable, and *assoilzied* the other defender.

This was an action in the Sheriff Court of Lanark-