

No 7.

legal remedy of suspension and reduction ; there being nothing more ordinary before the Admiral-court, than for pursuers to libel extravagant sums designedly to incapacitate the defender to find caution, and so to overtake him by a decret in absence for not finding caution, which passeth of course.

THE LORDS found, That the defender is not bound to find caution *judicio sisti et judicatum solvi* in the process as now stated before the Lords.

Forbes, p. 401.

1743. December 13.

CAPTAIN DUNDAS *against* RODERICK M'LEOD, Writer to the Signet.

No 8.

A Cautioner before the Admiral-court *judicatum solvi*, is not freed by the death of the defender during the dependence. The defender's representatives, though foreigners, may be called by an edictal citation.  
See No 5.  
P. 2034.

THE Captain, an officer in the Dutch service, having enlisted several men, entered into a charter-party with Charles Greig ship-master, for transporting his recruits to Holland. When the ship that they were to go in, came into the road of Leith, the Captain sent his men from Leith to the ship; but, when he came there, he found one Lieutenant M'Leod, an officer also in the service of the States, had taken possession of the ship with another parcel of recruits, and would not allow his men to come a-board; whereupon they returned to Leith, where several of them deserted; and those that remained put him to a considerable charge before he got another opportunity of transporting them. Upon which the Captain brought a process before the Admiral, against Lieutenant M'Leod, for recovering his damage: And to prevent the effect of a warrant which had been issued out for apprehending the defender, until he should find caution *de judicio sisti et judicatum solvi*, Roderick M'Leod appeared, and became caution *de judicio sisti*, &c. After this the process went on; a proof was allowed to both parties, which was advised, and the defender found liable in damages; but before decret he died: whereupon the Captain transferred his process against the defender's representatives, and decret was pronounced against them: and the cautioner, Roderick M'Leod, suspended on the following grounds, *imo*, Because the obligation he came under was an accessory one, pendent entirely on the effect of the obligation that should come out against the principal, and so fell under the rules that relate to cautionary obligations. That though the two different cautions *sistendi et judicatum solvi*, are tacked together, yet there could be no doubt that the *sistendi* was at an end by the defender's death; and, by the principles of the civil law, when the party dies the instance against the dead man is at an end; and until the process and instance is renewed by an action against the heirs, no procedure can be had. The *lis* as to him is *mortua*, and consequently the caution found falls to the ground: and when it is considered that cautionary obligations are, in all cases, *stricti juris*, it was equitable and just to circumscribe it so that it should not affect the cautioner, if the defender died before decret was obtained against him; for this reason, if the ac-

tion for the same thing was altered, the cautioner was free ; or, if the pursuer went from one judge to another, he was let loose, according to the opinion of several lawyers. Now, when the principal defender dies, there is a *mutatio personæ* in the litigation. It may be said, indeed, that an heir is *eadem persona cum defuncto* ; but, notwithstanding this fiction of law, there is certainly a difference of persons, though, as to some effects, they may be considered as the same ; *e. g.* the very calling an heir shows he is not considered, in every point of light, as *eadem persona* with his predecessor, otherwise the citation of the predecessor would be sufficient. In a word, the suspender is bound for Lieutenant M'Leod only, and not for his heirs ; he is bound only for what shall be decreed in this action against him, not in an action against his heirs ; and, as all *fidejussory* obligations ought to be strictly interpreted, there does not appear any solid ground in law upon which he can be made liable.

*2do*, Supposing the cautioner were liable *judicatum solvere* what was decreed against the heirs, yet that still supposes the Court has a jurisdiction to decern against them : But, the case here is, that the heirs of Lieutenant M'Leod, called in the transference, are persons living in Holland, and who never were in Scotland in their lives ; so that the decree is plainly good for nothing, as being pronounced *a non suo judice* : So that here is the suspender, a cautioner, decerned, where there is no principal ; where if he should pay, in obedience thereto, he can have no recourse. See Hodge, 20th January 1680, No 5. p. 2034. ; Stuart, 16th November 1636, No 3. p. 2033. *l. 2. ff. judicatum solvi* ; and *l. 3. and 7. eod. tit. Groenwigen et Bugnion de legibus abrogatis ; Minsingerus ad tit. instit. de satisdat.*

*Answered* : That if the *cautio judicatum solvi* shall be found to be of no greater security than that of sisting the person of the defender, when called in judgment, which is evacuated upon the death of the defender ; a stranger who might be occasionally here, and, as such, with his effects subjected to the arrest *jurisdictionis fundandi causa*, behoved to remain here never so long, till the event of the cause, although he had never so much credit abroad, or business to transact elsewhere. It was therefore necessary that another kind of caution should be introduced, as well for the security of the pursuer, as the convenience of the defender ; and that was the caution *judicatum solvi*, that whatever became of the defender himself, whether he turned bankrupt, or by going abroad should not be found, or if he should die, the pursuer might be secured of his payment of what should be decerned to him. It is for this reason, that enactments in maritime courts are not, that the cautioner should be bound for the defender in whatever might be decerned against him, but *impersonaliter judicatum solvi* ; and, if this were not the case, there would be little difference betwixt the caution for the defender's compearance, and that other caution *judicatum solvi*, that the acts and sentences of the Court should be performed ; seeing, in both cases, the suspender argues the cautioner ought to be free upon

No 8. the death of the defender. There is likewise this other difference betwixt them, that a cautioner *judicatum solvi* is taken to be *fide jussor totius causæ*, whereas the cautioner *de judicio sisti* is only taken to be *fide jussor litis exercitationis*, to which our custom does exactly agree; and when the action is finished by decret, the same goes out against both defender and cautioner at the same time, and diligence may proceed against the cautioner himself, as well as against the defender, without charging the cautioner; because, in such cases, there is no privilege of discussion betwixt principal and cautioner: Nor can the death of the defender be reckoned such an alteration, as to free the cautioner, seeing his representatives come in his place. To the *second* reason of suspension it was answered, That where the judgment is once founded by arrest, whether of the original defender's person or effects, as in the present case, as decret would have gone against the original defender by reason of the *jurisdictio fundata*, so it must regularly proceed against the representatives, if the passive titles were proven, as in this case, or declaratory, that the judgment may have its effect. See 14th February 1627 and 1632, Pynnon.\* Voet in his commentary on the title *Qui satisl. cog.* § 10. and 11.—l. 8. § 3. ff. *de fide juss.*

THE LORDS found, That a cautioner *judicatum solvi*, before the Court of Admiralty, is not liberated by the death of the principal defender, before final sentence; and that it was competent to bring the representatives of the principal defender into process, though foreigners, by edictal citation; and that the said representatives were regularly brought into Court by this action: and therefore found, that in this case the cautionary obligation *judicatum solvi* does subsist.

*Fol. Dic. v. 3. p. 114. C. Home, No 254. p. 409.*

\* \* \* Lord Kilkerran reports the same case:

IN the suspension of a decree obtained before the High Court of Admiralty, the LORDS found, ' That the cautioner *judicio sisti et judicatum solvi* before the Court of Admiralty is not liberated by the death of the principal defender before final sentence; and found it was competent to bring the representatives of the principal debtor, though foreigners, into the process by edictal citation; and therefore found the letters orderly proceeded.'

As to the *first* of these points, the contrary was found, Hodge *against Story*, No 5. p. 2034. That a cautioner was not bound for what might be decerned against the defunct's representatives; and as this was the only decision on record upon that subject, which had now, for so long a time, stood unaltered, it was by some thought to be decisive of the law and practice of this country; the rather, that by the practice of the Court of Session before the act of sederunt 1650, bonds of cautionry in a suspension were so interpreted, that if the suspender was not decerned in his own life, the cautioner was free. It was also observed, that, had no caution been found, the pursuer had no security other

\* Pynnon against Ramsay's Executors, Durie, p. 273. & 644. *vide* WRIT, Privileged.

than committing the person to prison, there to abide the judgment, which was at an end by his death ; and that therefore the caution, in the nature of the thing, should go no farther than that the person himself should remain subject to the jurisdiction of the Court.

But, as it appeared to the LORDS, that the expediency of commerce required, especially where caution was found for a foreigner, that the cautioner should remain bound after the death of the principal ; and that there was no instance where, in the Admiral Court, caution *judicio sisti* had been renewed on the death of the defender ; and that, by the practice in that Court, the representatives of the defender being brought into process, decree proceeded against the cautioner, they considered the practice of the Admiralty as equal to a regulation. And as such also is the modern practice of other trading nations, as observed by Voet, tit. *qui satisd. cog.* § 10. and 11. the LORDS had no regard to the above single decision.

As to the *second* point, That the representatives of the defender, though foreigners, were brought into Court by the edictal citation, this was also by some doubted ; for that, though by our law *morte rei non perimitur instantia* (and in which we differ from the Roman law) yet still the action must be properly transferred against the heir, so as decree may go against him, which cannot be where the heir is *extra territorium*.

But the answer was, that by the *cautio judicatum solvi*, the *jurisdiction* was founded against the defender, and consequently against his representatives ; that such is undoubtedly the effect of it, when thereupon an *arrestum jurisdictionis fundandæ causæ* is loosed, which can be for no other reason than that such is the effect of it in the common case ; for, as the arrestment is loosed, the jurisdiction must remain founded upon the caution itself, or not at all.

Kilkerran, (*Cautio Judicio Sisti et Judicatum Solvi*) No 1. p. 115.

\* \* \* Lord Kames also reports the same case :

A CAUTIONER *judicio sisti et judicatum solvi* before the Admiral, is not liberated by the defender's dying during the dependence. It was urged in behalf of the cautioner, that a fide-jussory obligation is *stricti juris*, and cannot be extended beyond the terms thereof : that he became cautioner for the defender personally, not for his heirs ; and consequently is bound only for what shall be decerned in this action against the defender, not for what shall be decerned in any other action against the defender's heirs. And to prove this, the tenor of the bond of cautionry was appealed to : ' I Roderick M'Leod, writer to the signet, bind  
' and oblige me, my heirs and successors, as cautioner and soverty, acted in the  
' books of the High Court of Admiralty for Norman M'Leod, Lieutenant in  
VOL. V. 12 E

No 8.

‘ Lammie’s regiment *de judicio sisti et judicatum solvi*, in the action at the instance of Ensign Ralph Dundas and others against him, before the Judge of the High Court of Admiralty.’ The answer was in substance what follows: Even in contracts *strictissimi juris*, the extent of the obligation is to be gathered from the nature of the transaction, rather than from clauses of stile slightly or imperfectly framed, and capable of different meanings. In a suit before the Admiral, it is a privilege of every pursuer to demand caution, not only *judicio sisti*, but *judicatum solvi*; the foundation of which is, that strangers being often called in this Court, the prosecutor, before laying out much expence in a tedious process, ought to have some security, in case of prevailing, that his claim shall be made effectual; and therefore the cautionary obligation must be considered as accessory to the claim, and not strictly to be limited to the persons either of the pursuer or defender. If the bond of cautionry be so construed as to release the cautioner where the defender dies before decree, the same must happen where the pursuer dies before decree: so this cautionary obligation would depend upon many chances; without necessity, and indeed contrary to common utility; as chance bargains are contrary to the genius of law.

*Rem. Dec. v. 2. No 47. p. 75.*

No 9.

Juratory  
caution  
*judicio sisti*  
can, in no  
situation, be  
admitted in  
maritime  
causes.

1751. February 8. CHALMER and Others against GORE and Others.

In an action before the Admiral, at the instance of William Chalmer and others against Samuel Gore, an Englishman, and others, for a riot committed at open sea, Gore found James Paterson surveyor at Leith, cautioner *judicio sisti*; and the evidence coming strongly out against Gore, whereby Paterson run the hazard of being brought in for a great sum, Paterson found means to persuade Gore to come down to Scotland and present himself, whereupon Paterson got up his bond, and Gore was put in prison.

Gore presented a petition to the Admiral, craving to be let out of prison upon juratory caution *judicio sisti*, which the Admiral granted upon his deponing and consigning a disposition, as is usual in juratory caution.

Of this order of the Admiral, the pursuer presented a bill of suspension, which was passed unanimously.

THE LORDS were of opinion, that juratory caution *judicio sisti* was not at all to be admitted.

*Kilkerran, (Cautio Judicio Sisti et Judicatum Solvi.) No 2. p. 116.*