

ROBERT HENDERSON of Cluigh-Heads, Esq., *Appellant* ;
 ROBERT RAMSAY and FRANCIS MAXWELL, }
 Writers in Dumfries, Assignees & Arrest- } *Respondents.*
 ing Creditors of deceased Arch. Malcolm,

1806.

HENDERSON
 v.
 RAMSAY, &c.

House of Lords, 22d July 1806.

SEPTENNIAL PRESCRIPTION—OBLIGATION OF RELIEF—ERROR IN FACT AND LAW.—Circumstances in which the cautioner in a bond was held entitled to relief against one, who came under an obligation to relieve him after the expiry of the period of the septennial limitation; and this, though the obligation was granted in ignorance of the fact and law, that the bond was gone as a valid bond against the cautioner, in respect of the septennial limitation.

Action of relief was raised in the following circumstances: A bond was granted by Alexander Orr, W.S., to Mrs. Murray of Murraythwaite for £1333, being her share of the deceased Mr. Dalrymple's succession, to which she succeeded as one of three heir-portioners. The bond was dated 26th and 29th July 1766, and was made payable at the term of Martinmas next to come, that is, 11th November 1766. It bore to be granted by Alexander Orr as principal, and "William Hay of Craufurdston, W.S., and Archibald Malcolm of Auldgirth, Writer in Dumfries, as cautioners, sureties, and full debtors with, and for me." And there was a clause of relief in this bond, obliging Alexander Orr to free and relieve his said cautioners.

This cautionary obligation was, under the statute 1695, c. 5 (septennial limitation), at an end upon the 29th July 1773. Under the impression, however, that it continued in force until the term of Martinmas, 11th Nov. 1773, the cautioners, Hay and Malcolm, entered into a new obligation in the month of October of this year, to the effect that the bond should continue to have the same force *after* the term of Martinmas as it had *before it*. The obligation narrates the bond, and sets forth, "Therefore, to prevent any such diligence being used for the purpose aforesaid, we do hereby declare that the said bond shall continue in force, and be effectual against us and our aforesaid, as well after the term of Martinmas next, as before the same, aye and until the sums contained in, and due by the bond, are paid." Oct. 22, 1773.

Thereafter Malcolm, one of the cautioners, applied to Mr. Orr to be relieved of his cautionary, whereupon the father of the appellant, Mr. Henderson, of this date, granted a letter, promising and engaging "to free and relieve you of the Nov. 13, 1773.

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“ same, and of every consequence thereof, in the same man-
 “ ner as you had never been bound therein ; and I shall,
 “ when required, execute a formal bond of relief in your fa-
 “ vour of the same, as the said Alexander Orr has given me
 “ relief for this my engagement to you.”

This letter did not refer or narrate the above obligation granted by the cautioners of 22d Oct. 1773, but only the bond itself.

1779. It seems that Mr. Malcolm, who was then relieved of his obligation, had always acted in the capacity of confidential agent and legal adviser. After her death, Mrs. Murray's son raised, in 1779, action against Malcolm, and the heir of Mr. Hay, who was dead, for payment of this bond, in which, having obtained decree therein, the amount of the bond was paid by Malcolm. No defence of prescription was stated by Malcolm to this action. This action was intimated under protest by Malcolm to Mr. Henderson ; and action of relief was at same time raised against him before the Court of Session, in which various procedure took place, and where some claims of compensation were stated.

This action was allowed to fall asleep, and was revived in 1784 ; and afterwards dropped. Another action was raised by Malcolm against Orr's representatives, and the representatives of Hay, the other cautioner, having in view to ascertain his counter claims against Orr's estate ; but, as against Orr's estate, no decree followed.

Mr. Orr, the original debtor, was dead and bankrupt, Mr. Hay was also dead and bankrupt ; Mr. Malcolm, the other cautioner, died, leaving his affairs in great confusion. The action of relief raised by him, and allowed to fall asleep, was, after his death, revived by the respondents, Messrs. Ramsay and Maxwell, his sons in law.

July 11, 1798. The Lord Ordinary (Swinton) pronounced this interlocu-
 tor, after discussion on the merits :—“ In respect the cau-
 “ tionary obligation of Messrs. Hay and Malcolm, contained
 “ in their original bond, along with Mr. Orr as principal,
 “ expired in July 1773, and that the renewal of cautionary
 “ granted by Hay and Malcolm in October 1773, proceeds
 “ on the mistake that the septennial prescription was not
 “ then expired, and therefore was not binding on them ;
 “ finds Mr. Henderson's missive of relief to Mr. Malcolm in
 “ Nov. 1773, could not bind Mr. Henderson to make any pay-
 “ ment to Mr. Malcolm, who was not himself bound effec-
 “ tually ; therefore sustains Mr. Henderson's defence, and
 “ assoilzies him from the action.”

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The respondents then raised their action of repetition against Mr. Murray, who had, in the meantime, received payment of the bond as above mentioned. In this action of repetition, which went before a different Lord Ordinary, (Bannatyne), it was stated in defence, 1. That Mr. Malcolm was barred from pleading prescription under the act 1695, because he was the confidential friend and legal adviser of Mrs. Murray, upon whom she relied in that business, and he was not therefore entitled to avail himself of an omission which he was bound to inform her of. 2. Mr. Murray stated a variety of transactions, which took place after he made this claim against Mr. Malcolm, which he maintained were sufficient to bar an action of repetition, even if otherwise well founded.

Informations were ordered to the Court on both actions. In the action of repetition, the Court sustained Mr. Murray's defence against repetition brought by the respondents, and assoilzied him from the conclusions of the action. In the action of relief, the Court, of this date, altered the interlocutor of the Lord Ordinary, 11th July 1798, and found "the defender, Robert Henderson, liable to relieve the pursuers of the debt libelled, originally due by Alexander Orr to Mr. Murray, for which Archibald Malcolm was a cautioner by the original bond, and renewed obligation libelled, in consequence of which he was found liable for, and obliged to pay the sums in question." On reclaiming petition the Court adhered.

May 27, 1802.

May 27, and
June 1, 1802.

Against the interlocutors of 27th May and 1st June 1802, the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—The engagement undertaken by the appellant was not that come under by Mr. Malcolm and Mr. Hay, by their declaration executed in October 1773. This engagement was not varied by his letter of the 17th November 1773, for though that letter is affixed to a copy of the declaration executed by Mr. Malcolm and Mr. Hay, yet the appellant thereby promises only to relieve Mr. Malcolm, in terms of his missive to him on the subject "matter thereof on the 13th current." The appellant's letter of 13th Nov. 1773 refers merely to the bond of cautionary obligation in which the appellant engaged to free and relieve Mr. Malcolm. This letter, therefore, of the 13th Nov. is the extent and measure of the appellant's obligation, and the undertaking is to relieve Mr. Malcolm of his cautionary obligation on the bond; but the bond being at that moment gone as a bond against the cautioners, by

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operation of the septennial limitation, there was nothing upon which the appellant's undertaking could operate; and the subsequent writing in Oct. 1773, by which it is attempted to be shown that the original bond was revived, did not revive the bond, because it proceeded on the erroneous narrative of an error in fact and law, that the original bond was then in force, and did not expire or prescribe until the Martinmas term thereafter, whereas it was at that moment expired. As, therefore, the respondents could recover nothing upon the bond, except upon the footing that *that* bond was still a subsisting obligation, the moment this ceased by prescription, it ceased to be binding to any legal effect against the cautioners under the act 1695. Besides, it did not revive the obligation, it only purported to continue it such as it was; and there being at the time no obligation existing, so there was none to continue. Nor is it any answer to this to say, that the appellant ought to have stated this objection at the time when Mr. Murray's action was intimated to him, or, in the first instance, in defence to the action of relief, because he could not have done so, the defence stated to that action being a preliminary one. And the objection here urged was one which, in law, could be stated at any time. Separately, the respondents could recover nothing from the appellant unless upon the footing of Mr. Orr being indebted to Mr. Malcolm; but, so far from Mr. Orr being indebted to Mr. Malcolm, the presumption arose, from the circumstances which had taken place, that Mr. Malcolm was indebted to Mr. Orr in a sum beyond that for which relief is now sought against the appellant.

Pleaded for the Respondents.—1. The payment by the respondents' author Malcolm, in consequence of his cautionary obligation for Orr, the principal debtor, was a necessary consequence of their engagement, and of the decrees and documents which followed in relation to it; for, beyond all doubt, one unavoidable consequence of the renewal of the obligation was, that the creditor might prosecute for the bond, and might try the question of its validity in a court of law. And the decision in the question of repetition at the respondents' instance against Murray has shown that the respondents did their utmost, both for themselves and for the appellant, to set aside the cautionary obligation altogether, and to obtain indemnity for the loss incurred by that engagement. How can it avail the appellant to plead that the interlocutors of the Court of Session, in a question between the respondents and Murray, have been erroneous;

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since it is obvious that, supposing his opinion of the sentences of that Court to be well founded, the parties were, nevertheless, liable to suffer by any involuntary error of their judges; and this, too, was a necessary consequence of the renewed engagement of cautionary, the validity of which came to be raised before the Court of Session. 2. The appellant's obligation to relieve Malcolm from Orr's bond, in which he was a cautioner, was pure and unqualified, and did extend to every consequence of the principal obligation of cautionary. The appellant thereby "promised and engaged to free and relieve Malcolm of his cautionary obligation,"—"and of every consequence thereof, in the same manner as if he had never been bound therein." When the appellant became bound in Orr's bond to relieve Malcolm, it was to avoid prosecution on Orr's obligation. There was then in view two things—a certainty of the obligation coming against the cautioners, and, secondly, its prescription. 3. It has been seen, that on *the very day* when Malcolm was first cited to pay the cautionary debt, the appellant was served on same day with a notarial protest, requiring him, in terms of his obligation of relief, to relieve him. The appellant's answer amounted to this, "I admit that I am bound to relieve you, but pay the creditors in the meantime, and I will settle accounts with you afterwards." This was the gist of his language. But the appellant could not plead compensation upon the counter claims which he alleged that Orr, the common debtor, possessed against Malcolm, and defend himself as he did in the character of creditor to Orr, without admitting his own obligation of relief to be effectual. In the former action, he only stated his defence of compensation, and no one can do this without admitting the justness of the debt. Nothing was pleaded about prescription, and even if competent at all, it is now too late. The appellant ought to have stated his objection at the time when Mrs. Murray's action was intimated to him, or, in the first instance, in his defence to the action of relief, which was allowed to fall asleep, and in which alone the plea of compensation was stated.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

For Appellants, *Sam. Romilly, John A. Murray.*

For Respondents, *Wm. Adam, Robert Corbet.*

NOTE.—Unreported in the Court of Session.