1762. *March* 2.

MESSRS ROBERTSONS, COUTS, and COMPANY, Merchants in Rotterdam, *against* CHARLES OGILVY, Writer in Forfar.

No 12.
An absolvitor in the Admiral-court, being reduced by the Court of Session, and a sentence condemnator pronounced, the cautioner stands bound to fulfil that sentence.

MESSRS Robertsons, Couts, and Company, being creditors to William Bailie, merchant in Brechin, in the balance due of an account current with them, brought an action against him before the Hight Court of Admiralty for payment of that balance, and interest thereof *nomine damni*; and in this action, Charles Ogilvy, writer in Forfar, became Bailie's cautioner *de judicio sisti et judicatum solvi*; and Bailie was assoilzied from that action by the Admiral's decreet.

The pursuers, Messers Robertsons, Couts, and Company, brought a reduction of the decree of the Admiral-Court before the Lords; and, in this action, they called both Bailie, the original defender, and Ogilvy, who was his cautioner, before the Admiral. In the course of this process of reduction, the pursuers only insisted against Bailie; and they prevailed in obtaining reduction of the Admiral's decree; and Bailie was found liable in the balance of the account, with expences.

After obtaining this decreet of reduction, the pursuers allowed the cause to lie over till Bailie became bankrupt; and, at about three years distance from the date of their decreet of reduction, they raised a wakening both against Bailie, and against Ogilvy, as his cautioner; and they alleged, as their reasons for raising this wakening, that, in the former decerniture, the interest due on the balance of the account from the date of the citation had been omitted; and also, that the decreet was only directed against Bailie, the principal debtor, and not against Ogilvy, his cautioner.

When this wakening came before the Lord Ordinary, Ogilvy *insisted*, That he could not be bound by the bond of cautionry he had granted to the Admiral-court, as Bailie, the principal, had been assoilzied by decree of that court.

This defence the Lord Ordinary over-ruled; and Ogilvy applied to the whole Lords by petition; in which he *pleaded*, That by his bond he only became bound 'as cautioner *de judicio sisti et judicatum solvi* for William Bailie, mer-'chant in Brechin, in the process depending before the High Court of Admi-'ralty against him, at the instance of Robertson, Couts, and Strachan, mer-'chants in Rotterdam:' And that, as the process of reduction was a new process before another court, his cautionary obligation could not be extended so far as to bind him in that process.

All cautionary obligations are *strictissimi juris*, and cannot be extended beyond the words of the obligation, which in this case bound the defender no further than in the action before the Admiral-court; and that it was not presumable, that a Judge-Admiral, by ordering this caution to be interposed, meant to secure obedience to the sentence of any other court but his own. And, if the process before the Admiral, in which the defender was cautioner, had been cast

No 12. upon any informality of the libel or execution, the obligation of the cautioner was at an end; and though a new process had been raised between the same parties, and upon the same grounds before the same court, yet the cautioner would not have been bound to answer for what might have been determined in this new process by the bond of cautionry he had given in the former action.

And as this would have been the case in a new process, upon the same grounds, and before the same court, it must still more hold good, when the court, in which the caution was found, had pronounced a total absolvitor, whereby the process to which the cautioner bound himself *judicatum solvi* was at an end. The obligation supposed to lie on the defender being extinct, the accessory obligation of the cautioner must fall along with it; and although the defender, Bailie, may be liable to the pursuers in the same claim, upon a new action brought before another court, yet such action cannot affect the cautioner, unless he consent to be bound *de novo, judicatum solvi* in that after process. And, in support of what was here pleaded by the defender, a number of authorities were cited from the civil law, particularly, *L.* 3. *judicat. solvi, Voet lib.* 2. *tit.* 8. *Qui satisdare cog.*; and some decisons of the Court were also mentioned, Hodge *contra* Story, 20th January 1680, No 5. p. 2034.; Lord Ross *contra* George Houston, 15th February 1710, No 7. p. 2036.

It was *answered* for the pursuers: That the rigid principles of the civil law, upon the authority of which the defender in a good measure rests his plea, are by no means adopted into our law, further than they are supported by principles of justice and equity; and that even those founded on by the defender were by no means settled, as appears from *Voet, lib.* 2. *tit.* 8. § 19. where he quotes a number of doctors who are of a different opinion from that contended for by the defender.

But, whatever shall be supposed to have been the rule in the civil law in these *prætoriæ stipulationes*, where the caution was in an express form of words, and limited to the judgment that should be pronounced by a particular judge by name; yet these would not apply to the present case, because the caution found in the Admiral-court was in general *de judicio sisti et judicatum solvi*, and plainly refers to the pursuers claim in the action itself, which, though originally instituted in the Court of Admiralty, must accompany the action wherever it goes. The manifest intendment of such caution being to secure the pursuer in payment, or performance of what should ultimately be decreed to him, it is the same *judicium* until it receives a final determination; and the summons before the original court being the foundation of the whole, nothing can be decerned by the court of review that is not contained in that libel; and it is of no consequence in what form of process the action is brought under review of the Superior Court, whether by advocation, suspension, reduction, or appeal; as all these have evidently the same tendency to subject the cause to the judgment of the Superior Court.

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The doctrine insisted on by the defender, That the sentence or judgment of the original court must determine the effect of the cautionary obligation, would lead into evident absurdities; for, according to that doctrine, supposing the defender to be condemned in the original court where the caution is found, but acquitted in a superior court, yet he behoved to pay, because the effect of the cautionary obligation was to be determined by the judgment of that court where the caution was found. As it is a necessary consequence, that, if the judgment of the original court must determine the cautionary obligation in case of an absolvitor, it must do so in case of a condemnator. And several decisions were founded on by the pursuers, particularly, Stewart *contra* Gedd, 16th November 1636, No 3. p. 2033.; Ralph Dundas *contra* Rodrick M'Leod, 13th December 1743, No 8. p. 2038.

'THE LORDS, upon advising the petition for the defender, with answers and memorials, found, That the defender was not bound by the bond of cautionry.'

But, upon a reclaiming petition for the pursuers, they altered, and found, 'the defender bound by the bond of cautionry within-mentioned, and remitted to the Lord Ordinary in the cause to proceed accordingly.' And to this interlocutor they adhered, upon a reclaiming petition for the defender, with answers for the pursuers.

For Robertsons, Couts, and Co. *Lockhart.* For Ogilvy, *Swinton* junior, & *Ferguson.*

Fol. Dic. v. 3. p. 115. Fac. Col. No 87. p. 190.

*** The same case is reported by Lord Kames:

A DECREE absolvitor in the Admiral-court being brought under challenge by reduction in the Court of Session, and a sentence condemnator being pronounced there, it was questioned whether the cautioner taken in the Admiral-court is liable to fulfil that sentence. The tenor of the bond of cautionry, granted by Charles Ogilvie, writer in Forfar, 'binds and obliges him as cautioner *de judicio sisti et judicatum solvi* for William Baillie merchant in Brechin, in the process depending in the High Court of Admiralty against him, at the instance of Robertson, Coutts, and Strahan, merchants in Rotterdam.' These merchants, being the pursuers, contended that this cautionry was not limited to the sentence of the Judge-Admiral, but was interposed for the security of the claim and of the action founded on it; which consequently makes the cautioner liable to whatever is due ultimately of that claim.

It was admitted by the cautioner, that the bond of cautionry is applicable to the action, and not to the sentence of the Judge-Admiral. He admitted as a consequence, that if the cause had been advocated to the Court of Session, which was competent, as the cause is mercantile only, he must have been bound to fulfil the sentence of the Court of Session, as being given in the cause with relation to which he became cautioner. And he also admitted, that a cautioner

No 12. who happens to be taken in the Court of Session, is not liberated by a decree of absolvitor if the judgment be reversed in the House of Lords. Because, as interlocutors pronounced in a court of appeal serve only to direct the proceedings of the inferior court, it continues still the same cause, and it is the inferior court which pronounces the ultimate judgment. But then he *contended*, that in the present case, the process by the absolvitor of the Judge-Admiral was at an end, and with it his cautionary obligement; that both principal and cautioner were thereby dismissed from Court; and that a reduction before the Court of Session was a split new cause, which required a new citation of the parties, precisely as in an original process.

In support of this reasoning, the case was put, That without regarding the absolvitor of the Judge-Admiral, a new process upon the same claim had been commenced before the Court of Session, that the *exceptio rei judicatæ* had been proponed and removed by repeating a reduction of the Judge-Admiral's absolvitor. In this supposed case, there would be no pretext for keeping the cautioner bound; and as little in the real case. For a reduction before the Court of Session is, in every respect, a new process, not less than an original process; and it is put in the form of reduction, in no other view than to obviate the objection of a *res judicata*.

The Judges were much divided. They first pronounced the following interlocutor: 'Having considered all the circumstances, particularly that this is a mercantile, not a maritime cause, Find that the defender is not bound by the bond of cautionry.' But, upon a reclaiming petition and answers, they varied, and found the defender bound by the bond of cautionry.

What prevailed with me to be for the first interlocutor, was not only the point of law above set furth, but other points deeply founded in equity and expediency. Let us *first* consider the case of the cautioner after the decree absolvitor, what greater hardship can be figured than that he shall remain bound for 40 years, perhaps by minorities double that time, without a possibility of withdrawing his neck out of the yoke. Relief he can have none; for if he were demanding it from the principal, this defence in law would meet him, that he is relieved in the most solemn manner by the decree absolvitor; and that, by an application to the Judge, he is entitled to have up his bond of cautionry. In the *next* place, with respect to the public, the hardship imposed upon cautioners by this interlocutor, is so great as justly to deter any thinking man hereafter from interposing for another in the Admiral Court. What then shall become of defenders in maritime causes, strangers especially, who never can hope for a cautioner in such terms? They must be condemned unheard; and the grossest scenes of iniquity must go on without a remedy. But *quæritur*, Is not the cautioner upon an absolvitor entitled to get up his bond from the Admiral? If so, this will remove the hardship.

Sel. Dec. No 195. *p.* 259.