

THE LORDS adhered to the judgment which had been pronounced by the Lord Ordinary.

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Reporter, Lord Dreghorn. Act. Catcart. Alt. W. Robertson. Clerk, Mitchelson.
Craigie. Fol. Dic. v. 3. p. 115. Fac. Col. No 142. p. 282.

1797. November 28.

THOMAS COWAN against WILLIAM AITCHISON and WILLIAM WALKER.

IN August 1795, Thomas Cowan presented a petition to the Sheriff of Edinburgh, stating, that he had taken a sub-lease of certain inclosures from John Aitchison, and had granted three bills for the rent, two of which, amounting to the rent payable to the landlord, Aitchison had promised to indorse to him; but that instead of doing so, Aitchison had indorsed them to third parties, in consequence of which, the petitioner, besides paying the bills, had his stock sequestrated by the landlord for the rent. The petitioner further stated, that Aitchison was about to leave the kingdom, and therefore craved a warrant against him as *in meditatione fuga*.

The Sheriff granted warrant for imprisoning Aitchison, till he should find caution *judicio sisti* in any action for the debt, which should be brought against him within six months.

William Aitchison and William Walker became his cautioners.

In November 1795, John Aitchison retired to the sanctuary.

In December 1795, Cowan raised an action against him for the debt before the Court of Session.

On the 13th February 1796, John Aitchison's estate was sequestrated.

No appearance was at first made for John Aitchison or his cautioners in Cowan's action. But he, instead of taking a decree in absence against Aitchison, on the 17th February obtained an order upon his cautioners to present him on the 23d of that month.

This order having been intimated to the cautioners, they appeared, and stated, that they were not bound to present Aitchison, as he was in the sanctuary, and had not obtained a personal protection.

THE LORD ORDINARY decerned against Aitchison in terms of the libel, and found the bond of caution forfeited. This interlocutor was kept open by representation for Aitchison and his cautioners; and, on 22d June, Aitchison appeared in Court, and his cautioners craved to be reponed.

Aitchison had by this time obtained from the Court a personal protection, with the concurrence of the trustee on his sequestrated estate.

THE LORD ORDINARY adhered to his former judgment as to the cautioners; but the claim against Aitchison remained still in dependence.

The cautioners reclaimed, and

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A bond of caution, for a party, against whom a warrant had been granted, as *in meditatione fuga*, having been declared forfeited, in consequence of the cautioner's failing to present him when required; it was found, that the cautioner was not entitled to be restored, on afterwards presenting the debtor, although before the debt against him was constituted, he having, by that time, obtained a personal protection.

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Pleaded: The chief object of caution *judicio sisti*, is to insure the presence of the debtor, when the final judgment is pronounced, that his person may then be secured, till ultimate diligence can be executed against him. His cautioner may indeed be required to present him, at any period of the action, that he may be examined, or for other like purposes. His appearance on these occasions is however of less consequence; and it is not understood, that the failure of the cautioner to present him at such times operates an irrevocable forfeiture of his bond; otherwise it would be necessary for the cautioner to keep the debtor constantly watched during the dependence of the process. If Aitchison had appeared in February 1796, the pursuer could only have demanded, that the caution *judicio sisti* should have been renewed. But the petitioners do not dispute their obligation to that extent; and as the debtor was produced before a final judgment was pronounced upon the debt, the interlocutor of the Lord Ordinary ought to be altered. Upon this principle it has been found, that Magistrates or jailors are not liable for the debt, in consequence of the temporary liberation of a prisoner on a warrant *meditatione fugæ*; 24th January 1786, Gordon against Mellis, *voce* PRISONER; 16th November 1792, Brown against the Magistrates of Lanark, *IBIDEM*.

Nor does it materially alter the case, that, by June 1796, Aitchison had obtained a personal protection. The cautioners only undertake that the debtor shall not leave the kingdom. But as a creditor cannot demand security that the debtor shall not avail himself of the ordinary privileges of the law, such as a suspension of the debt, a *cessio bonorum*, or a personal protection, the bond granted by his cautioners cannot be forfeited by his doing so.

Answered: A cautioner *judicio sisti* must produce the debtor, whenever an order for his attendance is issued by the judge; Erskine, b. 1. tit. 2. § 19.; Stair, b. 1. tit. 17. § 10.; see also Stair, 7th July 1681, Polstead against Scot, No 4. p. 1807. In this case the order was necessary to preserve the obligation of the cautioners, as decree was to be pronounced against the debtor; 15th December 1774, Telfer against Muir, No 15. p. 2054. His retiring to the sanctuary would not have prevented the competency of a warrant for his being produced, if it had been asked by the cautioners; and although it had, as this was a contingency arising from their interference, they were bound to warrant the pursuer against the consequences of it. His situation, however, is now become materially different, as his person is protected under the bankrupt act. The bond is therefore forfeited by their failure to present him in a state to be personally apprehended. Nor is it necessary for the pursuer to qualify any damage from their conduct, more than for a party pleading undue negotiation of a bill, or deviation from the voyage in a question of insurance. At the same time, had it not been for the conduct of the cautioners, the pursuer would, in all probability, have got payment of his debt.

Observed on the Bench: It is not clear that the pursuer did not sustain loss from the cautioners failing to present Aitchison in February 1796; and, at any

rate, the bond being forfeited at strict law, the cautioners could only be restored by afterwards producing the debtor precisely in the same circumstances.

THE LORDS (21st June 1797) unanimously 'adhered' to the judgment of the Lord Ordinary; and, by a great majority, refused a second petition, on advising it with answers.

Lord Ordinary, *Justice Clerk Braxfield.*

Act. *Geo. Fergusson, Monypenny.*

Alt. *Solicitor-General Blair, A. Campbell junior.*

Clerk, *Colquhoun.*

D. Douglas.

Fac. Col. No 45. p. 104.

1797. December 1. ALEXANDER MYLES against ALEXANDER LYALL.

ALEXANDER MYLES brought an action for freight, in the Court of Admiralty, against Bisset and Sons.

Alexander Lyall became cautioner for the defenders, 'de *judicio sisti et judicatum solvi*, in the process at the instance of Alexander Myles against them.'

The Admiral gave judgment in favour of the pursuer, only for part of the sum claimed by him; but, in a reduction of the decree brought before the Court of Session, his whole claim was sustained. By this time Bisset and Sons had become bankrupt, and Myles insisted against Lyall for the whole sum contained in the decree of reduction.

Lyall, on the other hand, contended, that his obligation applied only to the judgment of the Admiral, and could not be extended to that pronounced in the reduction, a new process, with which he had no concern.

The arguments used by him, in support of this proposition, were not materially different from those which will be found in the case, 2d March 1762, Robertson, &c. against Ogilvie, reported in the Select Decisions and Faculty Collection, No 12. p. 2047.

THE LORD ORDINARY repelled the defences. Two reclaiming petitions were refused without answers.

Lord Ordinary, *Justice Clerk Braxfield.*

For the Petitioner, *John Clerk.* Clerk, *Sinclair.*

D. Douglas.

Fac. Col. No 46. p. 107.

See Kirkhead against Nairn, Durie, p. 343. *voce* FORUM COMPETENS.

See MEDITATIO FUGÆ.

See PRISONER.

See APPENDIX.

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A cautioner *judicio sisti et judicatum solvi*, in an action before the Court of Admiralty, is liable to fulfil the decree of the Court of Session, upon a reduction of the judgment of the Admiralty.