

No 7.
An Admiral's
decree being
suspended
and turned
into a libel,
the defender
was not ob-
liged to find
caution *in ini-*
tio litis, judicio
sisti et judica-
tum solvi, as
is done before
the Admiral.

1710. February 15.

LORD ROSS *against* HOUSTON.

THE deceased Patrick Houston, brother to Sir John, being employed as super-cargo in a ship wherein my Lord Ross had a share, he is pursued before the High Court of Admiralty, to count for the profit of the voyages he made to Lisbon and elsewhere, and a decret is obtained against him for not finding caution *judicio sisti et judicatum solvi*, conform to the practice of that Court; and he dying shortly after, my Lord pursues George Houston, his son, for paying the sum decerned, on the passive titles; and he having raised a reduction of the Admiral's decret on this ground, that the signature for the interlocutor was not signed by the Judge *contra* the act of Parl. 1686, c. 3. the LORDS turned the Admiral's decret into a libel; and my Lord insisting against him, *contended* he could not be heard to propone any defence against his libel till first he found caution *judicatum solvi*, according to the form of the Admiral-court. *Answered*, This process is against him, as representing his father, and whatever might have been required of him if alive, the same cannot militate against the defender. Yea, though his father was living, and had suspended the decret, and the Lords had turned it to a libel (as they have now done) the caution would have fallen, and be liberate, as it was in suspensions before the act of sederunt made this Session; and the process being now lifted from the Admiral to the Lords, its nature is so far transmuted, that it must be ruled by the forms used before the act of sederunt made this Session, and not by the Admiral's custom. Besides the design of that caution is, that most of the defender's in the Court of Admiralty are either strangers, or sea-faring men, oft called abroad, so it was fit to cause them fix a domicil and secure the pursuer; but Mr Houston, the defender, is not in these circumstances, but is both law biding and solvent. *Replied*, The pursuer can be in no worse case than if the process were yet depending before the Admiral, and the change of the Court cannot alter the privilege which goes alongst with the cause through the second instance as well as the first. And it is a case purely maritime, and therefore ought either to be remitted back to the Admiral, conform to the 16th act 1681, or enjoy the privilege; and Duvie has remarked a case near approaching to this, 16th November 1636, Stuart *contra* Gedd, No 3. p. 2033. where the Lords took the declaration and opinion of Mr James Robertson, Admiral-depute, on this point. THE LORDS, by a plurality of six against five, found he was not obliged to find caution before the Session, as they do before the Admiral.

Fol. Dic. v. 1. p. 121. Fountainhall, v. 2. p. 568.

* * * Forbes reports the same case :

IN the cause at the instance of the Lord Ross against George Houstoun, as representing his father, for payment of his proportion of fraughts, and profits of

a ship and cargo, intromitted with and disposed of by him while employed as supercargo by the pursuer and others; contained in a decret in absence, obtained by them against him before the Court of Admiralty, for not finding caution *judicio sisti et judicatum solvi*: THE LORDS, July 15. 1708, having reponed the defender against the decret, because the warrant thereof was not subscribed by the Judge; he thereafter craved to be assoilzied from the process, in respect the pursuers did not insist.

Alleged for the pursuers: Before they insist, the defender ought to find caution *judicio sisti et judicatum solvi*; as if the process were depending before the Admiral-court.

Replied for the defender: There is no shadow of pretence for his finding caution *judicio sisti et judicatum solvi* as the process stands; seeing albeit such caution is introduced by custom before the Admiralty, for that matters there tabled do mostly concern strangers and sea-faring men, whose residence is uncertain: Yet where the Admiral's decret and procedure is overturned, and the libel *de novo* insisted in before the Lords, not against Patrick Houstoun himself as supercargo, but against his heir, upon the passive titles, who is not a stranger, or person of uncertain fortune or residence; there is no law nor precedent for obliging him to find caution: And suppose caution had been found before the Admiral, it would have fallen after his decret was turned into a libel.

Duplied for the pursuers: The son, against whom the original process against the father is continued, ought to be liable to the same things that might have been required from his father. Turning the decret into a libel alters not the case; seeing the pursuer is allowed to proceed upon the libel as first raised before the Admiralty, and therefore may do it with the Admiral's privilege. And it is a mistake to think, That by an Admiral's decret being turned into a libel, the cautioner therein *judicio sisti et judicatum solvi* would be assoilzied: For he is not like the cautioner in a suspension of a decret, who is only bound in case the letters be found orderly proceeded, but is liable even to the event of a reduction of suspension before the Lords; being obliged for whatever shall be decerned upon such a libel. Again, it is all a matter, whether the parties be strangers or not, where the cause is maritime; seeing the act 16. Parl. 1681, obligeth all parties without distinction before the Admiralty, to enact themselves and find caution, both for compearance and performance. And if the defender should be exempted from finding caution in this cause, he who is pursued in any maritime cause before the Admiralty, has no more to do but suffer a decret in absence to pass against him for not finding caution, and then to get himself reponed to his defences by a suspension and reduction; whereby the privileges allowed by the act 1681 to the Judge of Admiralty for obliging defenders in causes before him to find caution, would be altogether evacuated, and rendered elusory.

Triplied for the defender: It is true indeed that parties are often under necessity to let Admiral decreets pass against them, and betake themselves to the

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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.

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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-