1763. *June* 21.

MARY RAY of the Parish of St Pauls, Covent Garden, and JOHN WILSON, her Attorney, *against* Mrs GEORGIANE BELLAMY.

No 13.
A foreigner found in this country is not bound to find caution to another foreigner *judicatum solvi.*

GEORGIANE BELLAMY, a celebrated actress, came to Edinburgh in 1762, and soon thereafter, a petition was presented to the Sheriff, by John Wilson, setting forth, That she was indebted to Mary Ray, his constituent, in upwards of L.1000 Sterling, and praying a warrant to apprehend and imprison her person, until she should make payment, or find sufficient caution; and, upon preferring this petition, Wilson made oath, that he had good reason to believe she had lately left London, and disposed of and carried away her effects, in order to disappoint her creditors of their payment.

The Sheriff granted warrant for imprisoning her until she should find caution *judicio sisti;* which was soon thereafter complied with.

Wilson then insisted in his libel before the Sheriff, and presented a second petition, craving an enlargement of the warrant of commitment, until she should find caution *judicatum solvi*, or at least, not to withdraw her person and effects from under the jurisdiction for 40 days after decreet.

This petition being refused, Wilson offered a bill of advocation, and likewise brought an advocation of the principal cause.

The Lord Coalston Ordinary having advocated both causes, and conjoined them, made avisandum to the LORDS with this point, How far the defender is in this case obliged to find caution *judicatum solvi?*

Pleaded for the pursuers: The general rule of law is, that all strangers must find caution, both *judicio sisti et judicatum solvi.* This rule is laid down by Sir James Balfour in his Practics, who confirms it by a decision as far back as 27th March 1527, in the case of Curl *contra* Watson, observed *voce* FORUM COMPETENS; and Lord Stair, lib. 4. tit. 47. § 23. when treating of the admiral-court, where such caution is uniformly exacted, gives this good reason for it, because the admiral's jurisdiction being most conversant about strangers, he is authorised summarily to seize their persons, till they find caution *judicio sisti et judicatum solvi.*

Lord Bankton makes the like observation with respect to the practice of the admiral-court, vol. 1. p. 460. § 33.; and, in the next page, § 36. says, that 'foreigners owing debts to the inhabitants of this country, may be seized by 'summary-warrant at the suit of the creditor, till they pay or find caution.'

This last author indeed is of opinion, that this remedy will not be granted to a foreigner accidentally in this country, against another stranger, likewise occasionally here, in relation to debts contracted abroad; but in this opinion he is singular; and that the distinction has not been allowed in practice, appears from sundry precedents. Thus, in the case of Irvine of Elvies *contra* Vernon, observed

No 13. by Lord Haddington 1610, (*voce* FORUM COMPETENS,) 'warrant of arrestment was 'granted by the LORDS at the instance of an Englishman, upon the goods of another 'Englishman, neither of them being in this country *animo remanendi*, upon bonds 'made in England not bearing any condition of payment to be made in Scot-'land.' So also in the case of Arnold *contra* Young, observed by Fountainhall, February 22. 1684; and by Harcarse, No 487. December 1683, (*voce* FORUM COMPETENS,) 'The LORDS, upon a bill craving warrant to arrest a French-'man's effects in this country, till caution should be found *judicio sisti et judi-'catum solvi*, granted warrant in these terms.' It is indeed true, that these two cases respected only arrestment of the effects, but the principle is the same; and accordingly, in the case of Robertson *contra* Bell, 13th January 1676, (IBIDEM,) it was judged, that Englishmen may be arrested in any burgh, though by strangers.

Answered for the defender: The only cause of arresting either the goods or persons of strangers is, that otherwise they are not liable to the jurisdiction of the courts in this country; where the effects are arrested, these only become liable to attachment, and the decree of the court can have no further effect than to the extent of the goods arrested. If, on the other hand, the person be arrested, it is thereby subjected to the jurisdiction of the court, so that the defender must appear at all the diets of the process. This is all that a pursuer is intitled to claim of a stranger defender, in order to put him in the same case with a native subject, and for this the caution *judicio sisti* is sufficient. So it is laid down by *Peckius de jure sistendi*, *c.* 45. § 7.; and the practice of the Court has, from the earliest times, been agreeable to this doctrine. Sir Richard Maitland observes a case: An Englishman *against* Angelo, an Italian, 22d January 1564, (*voce* FORUM COMPETENS;) in which, upon application to the LORDS by bill, warrant was granted to secure the person of a stranger till he should find caution *judicio sisti;* but, at the same time, the pursuer was also ordained to find surety for the pursuit of the action of damage and interest in case he prevailed not. Another case is also observed by Lord Stair, 10th July 1666; Thomson, No 4. p. 2034. which shews, that it was then clearly understood by the Court, that caution, as law will, imported only *judicio sisti*, not *judicatum solvi.*

The same doctrine was observed in a very late case, 7th March 1755, John Harries *contra* Robert and John Lidderdale, No 11. p. 2044.; and it appears from the collection of this case, that it was *observed* from the Bench, 'That an arrestment *jurisdictionis fundandæ gratia* is usual in most countries, and in our country; but, to oblige a defender to find caution *judicatum solvi*, is not usual, except in maritime causes before the admiral-court; and that it would be dangerous to commerce, and to personal liberty, if a debtor were always obliged, when found in a foreign country, to find caution *judicatum solvi.*'

It will at the same time occur, that there is a remarkable difference betwixt the case of Harries and the present. There the caution was asked to secure a

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debt due to a native; whereas here it is sought by a stranger to secure a debt contracted in another country. Of old, it was much doubted, whether this Court could take cognisance of debts contracted betwixt foreigners in foreign countries. Haddington observes, that the Court found they could not, 23d November 1610, Vernour *contra* Elvies, (*voce* FORUM COMPETENS.) But, even supposing that a stranger who contracts debts in this country may be forced to remain until he give satisfaction as to these debts, there is not the same reason, that a stranger, coming occasionally to the country, should be deprived of his personal liberty, because he is not ready instantly to pay, or to find caution for payment of every claim that may be brought against him by other strangers, on account of dealings he may have had in other parts of the world. This would deter strangers from coming to this country, and would prove highly prejudicial to commerce.

The practice of the court of admiralty can have no influence. It was by no means introduced on account that strangers are often defenders in that court; for that is not true in fact, but for a quite different reason, viz. The great dispatch with which it is necessary to follow out maritime causes; and accordingly the practice is confined to maritime causes only. In these, caution must be found *judicatum solvi*, whether the defenders are strangers or natives; but, in causes not maritime, such caution cannot be required by the Admiral.

The case observed by Balfour, in 1527, is shortly stated, and was soon after corrected by the decision above mentioned, observed by Sir Richard Maitland. Again, in the case of Robertson *contra* Bell, the reason of the decision immediately subjoined, viz. 'This being the practice on the English side,' shews, that it proceeded from some peculiarity in the border-laws observed at that time, as it were *lege talionis*; besides, it does not appear that caution *judicatum solvi* was in that case required. And as, in the other two decisions quoted by the pursuer, the caution was confined to the extent of the effects which were arrested; so, for the same reason, when the person only is arrested, the caution ought to be carried no further than that the person should be sisted at the diets of court.

To conclude, the defender has now resided here for many months, without any appearance of an intention to elope; and it is observable, that the pursuer Wilson, in his oath before the Sheriff, did not venture to affirm, that he believed her to be *in meditatione fugæ*; it may therefore be doubted, whether any caution whatever ought to have been exacted from her.

Replied to this last observation: It stands confessed, that the defender is utterly insolvent, that her fixed residence was at London, and that she fled from thence to avoid the diligence of her creditors; her stay here therefore can only be considered as a temporary expedient, dictated by necessity; and the same motives which forced her to leave England will induce her to fly from this country, whenever decreet shall pass against her. Such being her circumstances, no

No 13. oath whatever was requisite; and, unless a more effectual remedy be granted, it is apparent, that the caution *judicio sisti* will be of no earthly significancy.

Observed from the Bench: There is neither justice nor necessity for ordering caution *judicatum solvi.* No justice, because such order might bear extremely hard upon foreigners, who, though they may find persons inclined from humanity to become cautioners *judicio sisti*, will not always have it in their power to procure caution *judicatum solvi.* No necessity, because, when decreet is pronounced, the pursuer may apply to the judge-ordinary, and upon making oath that the defender is *in meditatione fugæ*, he will then obtain a warrant to apprehend her.

'THE LORDS found, That the defender is not, *in hoc statu* of the process, obliged to find caution *judicatum solvi;* reserving to the pursuer, in the future steps of process, to apply, that such caution may be found, as she shall be advised.' *See* FOREIGN. *See* FORUM COMPETENS. *See* MEDITATIO FUGÆ.

Reporter, *Lord Coalston.* Act. *Lockhart.* Alt. *Montgomery & Ferguson.* Clerk, *Tait.*
A. Wight. *Fol. Dic. v.* 3. *p.* 113. *Fac. Col. No* 112. *p.* 259.

1765. *December* 7. BRITISH LINEN CO. *against* CLERKSON.

No 14. UPON an oath *de meditatione fugæ*, the Admiral granted warrant for incarcerating a person said to be debtor in a debt merely mercantile, till he should find caution *judicio sisti et judicatum solvi.*

A suspension having been offered, the Lords passed the bill as to the caution *judicatum solvi*; but refused it as to the caution *judicio sisti.* *See* MEDITATIO FUGÆ.

Reporter, *Elliock.* For the Chargers, *Lockhart.* Alt. ——.
G. Ferguson. *Fac. Col. No* 22. *p.* 238.

1774. *December* 15. JAMES TELFER *against* JAMES MUIR, and Others.

No 15.
A debtor who had found caution *judicio sisti*, sisted himself in Court by his counsel. Decree went against him, and he afterwards absconded. The cautioner found to be free, as

TELFER having present occasion for the advance of some money, in the month of February 1773, wrote upon that head to John Muir, then writer in Edinburgh; and, in answer to his letter, sent him his acceptance for L. 20 Sterling, relying upon his promise to remit him the money immediately.

Telfer finding himself tricked by Muir, who had indorsed the bill to a connection of his own for value, of which Telfer was advised when the bill fell due, and threatened with diligence; and being apprehensive that Muir was about to withdraw himself from this country, to which he made oath accordingly, a warrant was granted, upon his application, for apprehending and bringing Muir before the Sheriff of the county; and, upon advising a declaration emitted by him,