

No 3.

in that part, where it bore the quantity of the clothes put in the foresaid locked chest, was offered to be liquidate by the pursuer's own oath, as the pursuer alleged was admissible in law, *Titulo Nautæ, Gaupones, Stabularii, &c.* But this was referred to be considered in the end of the process, after the pursuer had deduced all his other probation, upon the receipt of the trunk, to which time the Lords superceded to give answer as to that part.

Act. *Advocatus & Stuart.*Alt. *Nicolson & Mowat.*Clerk, *Hay.**Durie, p. 821.*1666. *July 10.*JAMES THOMSON *against* BINNIE.

No 4.

A person became cautioner 'as law will.' He was considered to be cautioner *judicio sisti, aut* (not *et*) *judicatum solvi*, and was relieved by putting the debtor in ward.

THERE being a decret obtained against Binnie, his creditors finding him at Linlithgow, secured him, and he found two burgesses, caution as law will, who being convened for payment of the debt, *alleged* absolutor, because they were only in common form obliged as cautioners as law will, which doth not import *judicio sisti, et judicatum solvi*, but *judicio sisti, aut judicatum solvi*. *Ita est*, They sisted the party for whom they were cautioners, and put him in the Provost's hands, who put him in ward; and protested to be free, conform to an instrument produced. It was *answered, non relevat*, because they only sisted him *judici*, but not *judicio*; they ought to have presented him in the Court when that cause was called; and the pursuer was not obliged to know, or take notice, what they did otherways, which might be by way of collusion.

THE LORDS found the allegiance relevant, for there was no collusion condescended on, providing the defenders prove by the witnesses, insert in the instrument, that it was so acted: For they thought, that if the cautioners put the debtor in ward, at any time during the process, the pursuer was not prejudged; for if he insisted in his process, and upon not presenting of the defender protested, the cautioners would either then allege that he was in prison, or otherways it would import collusion.

*Fol. Dic. v. 1. p. 121. Stair, v. 1. p. 392.*1680. *January 20.*HODGE *against* STORY.

No 5.

A defender, who had found caution *judicatum solvi*, dying before sentence, it was found, that the cautioner was not bound for what might be decerned

DAVID HODGE having pursued John Finlay, master of the Margaret of Leith, for an account of a loading of coals, before the Admiral, who to evite prison, according to the custom of the Admiral, who secures parties persons, unless they find caution *judicio sisti & judicatum solvi*, the said John Finlay found Gilbert Story caution; but, before sentence was pronounced in the cause, Finlay died; whereupon Hodge obtained a decret of transference before the Lords against the representatives of Finlay, and Story as cautioner for umquhile John Finlay. It was *alleged* for the cautioner, that his bond *judicatum solvi* being granted for