

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process, after the pursuer had deduced all his other probation, upon the receipt of the trunk, to which time the Lords superceded to give answer as to that part.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

the deceast John Finlay, he could never be decerned, being dead before sentence; and albeit the action may be transferred against the defunct's representatives, yet it can have no effect against the defunct's cautioner *judicatum solvi*, he not being obliged for what should be decerned against the defunct's heirs, but against the defunct personally; and bonds of caution in suspensions were ever so interpreted, that if the suspender were not decerned in his own life, the cautioner was free, until, by an act of sederunt, it was changed for the future. It was answered, *Hæres & defunctus sunt eadem persona in jure*, and what is decerned against the defunct's heir, is alike as against himself.

THE LORDS found that the obligation *judicatum solvi* could not extend to what might be decerned against the defunct's representatives, but only against himself.

Fol. Dic. v. 1. p. 121. Stair, v. 2. p. 743.

1696. February 18. GOEVY and DUPERROW against ELPHINGSTON.

THE reduction pursued by Arent Goevy and Jean Duperrow, Dutchmen, against Elphingston of Lopness, of a decret of adjudication of their ship, as Admiral of Orkney, was advised; and the Lords found the depositions of the crew and company not probative, in regard they were neither subscribed by the judge, nor the sworn interpreter; who, upon re-examination, confessed, that many things were otherwise insert in their oaths, than they had expressed the same; and though these formalities had not been omitted, yet their depositions could not amount to declare the ship a prize; for all they said was, they heard a rumour, ere they came from Amsterdam, that the ship was going to France; whereas others deponed they were bound to Lisbon, which agreed with their passes. The strangers insisting, now after reduction, in their action of repetition; Lopness's procurators denied the value of the ship and goods; and insisted on their decret at least as a libel, and offered yet to prove the ship was going to an unlawful port. And the Hollanders producing the invoice to instruct the worth of the cargo, and craving he might now find caution *judicatum solvi*, conform to the custom of the Admiral-court, or else be decerned to restore: It was replied, *1mo*, That caution was only exacted from strangers: *2do*, The pursuers ought first to give their oaths of calumny on the value, else they might libel such a vast sum for damages as might deter any from becoming caution for him. THE LORDS, considering the strangers were gone home, and so could not presently give their oaths, and that it was only sought to stop restitution, they decerned, unless Lopness should find caution for what should be decerned, betwixt and the 25th of this month, in which case they would assign the strangers the 1st of June to prove their damages, by seizure of their ship and goods.

Fol. Dic. v. 1. p. 121. Fountainball, v. 1. p. 711.

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No 5.
against the
defunct's re-
presentatives.
See No 8.
p. 2038.

No 6.
In an action
for repetition
of the cargo
of a vessel,
which had
been con-
demned by
the Admiral,
but the decree
reduced, the
defender,
though no
stranger, was
decerned to
find caution
*judicatum sol-
vi*, according
to the custom
of the Admi-
ral-court.