

CAUTIO JUDICIO SISTI, ET JUDICATUM

SOLVI.

1631. July 1.

Row against MEIKLEJOHN.

No 1.

IF any party be charged by Bailies of a Burgh to find caution as law will, and find the said caution, and thereafter obtain the cause advocated to the Lords, the advocacy frees the cause. (*frees the Cautioner.*)

Fol. Dic. v. 1. p. 121. Auchinleck, MS. p. 9.

1633. November 26.

Lindsay against FAIRFOULL.

No 2.

ONE Lindsay procurator-fiscal, and Scot his informer, having obtained decret before the Stewart of the regality of St Andrews, against Fairfoull cautioner for one Reid to enter him, being cited for a blood, committed upon the said Scot, and the decret being given against the said cautioner upon the same day, at which, by his act, he is obliged to enter him; and the decret decerning the said cautioner, either to enter the party foresaid, or else to pay forty pounds, which was the pain of the act; and also decerning the principal party to pay L. 50 *in pœnam contumaciae*. The principal and cautioner being charged to pay these two sums *respective* to the procurator-fiscal, and to the party hurt, who had both obtained the said sentence; and the said principal and cautioner suspending, THE LORDS suspended the decret and charges thereon for both the sums, because the same Judge, by an act of his court, 22 days after the foresaid sentence, had declared the cautioner to be free of that penalty, in respect he had entered then in judgment the said party, whom he was cautioner to enter: Neither was it respected by the LORDS, That the entry was so long after the sentence, and after that day on which he was obliged to enter him, seeing the decret bore only *either to enter him, or to pay the sum*, and bore not purely to pay the sum, because he had failed to enter him, and so by this entry he obeyed the sentence; neither was it respected, where the party *alleged*, that the entry was elusory, seeing it was not made when this cause was agitate before the Judge; but was done on another court-day, this party not knowing there.

A cautioner, *judicio sisti*, is freed by producing judicially the defender at any time, and protesting to be free, for thereupon the Judge ought again to incarcerate the defender until he find new caution.

No 2.

of, and never being intimate to him, nor being warned thereto, as he ought, and the person entered not being committed to ward, that he might have been pursued by the party hurt; but instantly when he was entered, being demitted by the Judge; notwithstanding whereof the entry was sustained; and if the Judge had done any wrong, the party had his action against him therefor; which would appear to be a hard decision, specially in so mean a matter, and betwixt mean parties, to put them to so long and expensive pursuits; and also the LORDS suspend for the L. 50 decerned against the principal, for contumacy, in respect that the Judge after sentence had discharged him of that sum: And it was repelled, which was alleged, that the Judge, after sentence given by him, *erat functus officio*, and so could not discharge the pain of that sentence, which was obtained by the procurator-fiscal, and the party hurt, specially, seeing before the discharge, the suspender was charged by the Judge's precept, as the tenor of the precept raised on the decret bore, *To pay the pain decerned to the procurator-fiscal, and to the party hurt, obtainer of the decret*, so that the Judge, after that charge, could not discharge him; and it were a great frustration of justice, when parties pursue for blood, if the Judge shall only decern against the other party complained upon not compearing, for a penalty to himself, and have no respect to the party's satisfaction, specially the pursuit being intended, not by the procurator-fiscal only, *quo casu* it might appear, that the Judge might decern a penalty for contumacy, as an obvention and emolument of his court, proper to himself; but the pursuit being also moved, at the instance of the party grieved, it were iniquity, that he should be deprived of all benefit in that pursuit, by his party's absence, and to apply the same to the Judge: For so parties hurt should be deterred to pursue for such wrongs, but should be forced to bear the same without redress; which allegiance was repelled, and the said pain for contumacy in this, and all other the like cases, was found to pertain to the Judge; and that he might discharge the same after sentence, obtained by the procurator-fiscal, and albeit the party was also obtainer thereof; for they found, that the Judge might have tried the fact of blood committed, albeit the party compeared not, and after trial punish the party committer, and appoint satisfaction to the party hurt; but no trial being taken of the fact, no censure could pass upon the party therefor, so that the pain was for contumacy, and contempt of the Judge, and was not to be taken as if any part thereof were given to the party hurt, who might pursue his action for damage and interest, notwithstanding of this sentence against the other party, as he pleased. See PROCESS.

Clerk, Scot.

Fol. Dic. v. I. p. 120. Durie, p. 694.

* * See — against McCulloch, No 8. p. 369.