

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.*

12 D 2

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.