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,

No 15.
the pursuer had not, before extract, required him to produce the person of the debtor.

warrant was granted to imprison Muir within the tolbooth of Lanark, therein to remain until he find caution to answer Telfer's petition; upon which a bond was granted by James Muir, his father, and two other persons, whereby 'they bound 'themselves, conjunctly and severally, that the said John Muir shall appear 'and answer to any action to be brought against him by Telfer, within six 'months after the date hereof, for and on account of the bill mentioned in the 'petition whereon the warrant proceeded; or, in default thereof, or of the said 'John Muir's leaving the country, we bind us to make payment to the said 'James Telfer of the sum or sums to be concluded for in the foresaid action; 'and we declare that a summons given to the said John Muir, at the Sheriff-'clerk's office Lanark, shall be held as a summons given him personally; con-'senting to the registration hereof,' &c. In consequence of which bond, Muir was set at liberty; but having allowed diligence to be used on the bill against Telfer, who was thereupon carried to prison, and obliged to make payment of the sums therein contained to the indorsee from Muir, Telfer brought an action against Muir and his cautioners, concluding that Muir ought to be decerned to make payment to the pursuer of the foresaid sum of L. 20 Sterling, contained in the bill above-mentioned, and of the legal interest thereof, &c.; and, in default of the said John Muir his appearing personally and answering to this action, or of his continuing to appear personally, and answering thereto till the final conclusion of the same, the said James Muir, &c. ought to be decerned, conjunctly and severally, to make payment to the pursuer of the several sums of money concluded for by the said John Muir, in terms of their bond of caution for him.

THE LORD ORDINARY decerned against John Muir; but, 'in respect that John 'Muir has not left the country, and appears to this action, and that the bond 'of caution is only *judicio sisti*, assoilzied the cautioners;' but superseded the extract of this decree of absolvitor of the cautioners; and, at the same time, allowed the decree against John Muir to be extracted.

Telfer accordingly extracted the decree against John Muir, and raised ultimate diligence thereon; but Muir having kept out of the way, whereby that diligence had been attended with no effect, the pursuer again applied to the Lord Ordinary for a decree against the cautioners, which having been refused, Telfer brought the cause under the review of the Court, and

Pleaded: That, even taking the bond in question to be no more than a cautionary obligation *judicio sisti*, yet still the granters of that bond must be liable in payment of the debt, in respect Muir did not sist himself in such a manner as to give the pursuer an opportunity of securing his person, upon his recovering a decree against him.

It is not many years ago that a question occurred, whether a foreigner, found in this country, was not bound to find caution *judicatum solvi*, as well as *judicio sisti*; and though the Court, in that case, determined that the foreigner was not obliged to find caution *judicatum solvi*, but only *judicio sisti*, yet, both from the

No 15. reasoning on the Bench, and from the interlocutor pronounced, it appears evident, that the caution *judicio sisti* was understood to import, that the person for whom such caution was interposed should remain subject to the attachment of the pursuer, at least till judgment was given against him. *See* Ray against Bellamy, June 21. 1763, No 13. p. 2051.—It necessarily follows, that such caution must be equally broad when granted for the relief of a native of this country, who is apprehended for debt in consequence of an oath made by the creditor, that he believes him to be *in meditatione fugæ*; for if such cautioners were relieved, upon the debtor's appearing by his procurator in defence of the action brought against him, without making any personal appearance, to enable the creditor to apply to the Judge, before whom the action is brought, to secure him upon decree being pronounced against him, the caution in such cases would be perfectly nugatory.

But, 2*do*, The terms of the bond which has been granted in this particular case, and which sets forth the grounds and tendency of the pursuer's application, and whole procedure, must be sufficient to subject the granters thereof in payment of the sums in which John Muir, for whom they interposed their security, has been found liable. *Appearing* and *answering* are certainly no ways synonimous. The one may only import *judicio sisti*, but the other seems to import *judicatum solvi*.

Viewing the matter in this light, it is of no consequence that Muir appeared, by his counsel, to dispute the justice of the pursuer's claim; for the moment a decree was pronounced against him, he thought proper to abscond, and has hitherto baffled every search that has been made in consequence of the diligence that has issued against him. His cautioners ought at least to make his person furthcoming; and, on account of their failing to do so, they fall to be subjected in payment of the sums which have been decerned against him.

Answered for the defenders: The construction put upon the word *answer* is quite new; but, in the present case, it is sufficient to observe, that the pursuer had no right to ask, nor the Sheriff power to exact, caution *judicatum solvi*. There is not even a word of producing him in person.

2*dly*, Suppose it should be understood, that the defenders were bound to produce Muir in person, it is clear they were only so bound in case the pursuer should require it. This was always understood to be the case in caution *judicio sisti*. This caution, it is well known, ceases as soon as decree is extracted; and if the pursuer, to whom the caution is granted, shall not, during the whole proceedings, require the defender to be produced, but take and extract his decree, the obligation upon the cautioners is at an end. In the present case, however, it is not pretended, that, during the whole proceedings from first to last, any such requisition was made.

But, 3*dly*, the matter does not rest here. The defenders are informed that Muir was even personally apprehended, when charged upon a horning on the decree. It is universally allowed, that a cautioner *judicio sisti*, is not bound to

produce the party to execution. By the pursuer's own construction of this obligation, it extends no farther than to produce the party till decree is pronounced. But if this be the fact, the pursuer had Muir in his power even after the decree was extracted. No 15.

THE COURT gave judgment as follows:

'In respect the pursuer did not, at any time during the dependence, or before extract, require the cautioners to produce the person of Muir in Court, find the cautioners are liberated from their obligation *de judicio sisti*, and assoilzie them from this action.'

See —— against M'Culloch, 20th February 1666, No 8. p. 369.

Act. *Wight.* Alt. *Rolland.* Clerk, *Campbell.*

Fol. Dic. v. 3. *p.* 114. *Fac. Col. No* 143. *p.* 374.

1775. *December* 6.

WILLIAM SCOT, Merchant in Newcastle, *against* JOHN CARMICHAEL, Merchant in Morpeth.

No 16.
A summary warrant cannot be issued at the instance of one foreigner against another, when transiently in this country, to the effect of obliging him to find caution *judicio sisti*, in relation to a foreign debt.

IN October 1775, Scot transmitted to his doer at Edinburgh the following affidavit: 'William Scot, of the town and county of Newcastle upon Tyne, 'merchant, maketh oath and sayeth, That John Carmichael, late of Morpeth, 'in the county of Northumberland, shopkeeper, (who has lately retired to 'Edinburgh, as this deponent believes, to avoid the payment of his debts) is 'justly and truly indebted unto this deponent in the sum of L. 65: 0: 6, for 'goods sold and delivered, and for which said sum this deponent has not received any satisfaction or security whatsoever; and, in regard that the wife of the 'said John Carmichael is now selling off his stock, and refuses to pay his debts, 'this deponent verily believes the said John Carmichael intends to defraud this 'deponent and his other creditors, and not to return into England.' And the agent was authorised to endeavour to get Carmichael secured.

The agent accordingly gave in a petition to the Sheriff, praying him to incarcerate Carmichael till he should find caution *judicio sisti*, in any action to be brought against him for payment of the above debt; and the Sheriff having ordered Carmichael to be brought before him for examination, he emitted the following declaration: 'Declares and acknowledges, that he is resting to the petitioner 'William Scot the debt mentioned in the petition: Declares, that he left Mor'peth on the 25th September last, and came to Edinburgh, and has remained 'there ever since, until yesterday that he went to Leith to see if he could find 'a conveyance to carry him to Newcastle: That he intends to return to his 'own home at Morpeth, and that his wife is carrying on his business in his absence, and paying off his debts; and that, since he came here, he has sent 'different parcels of goods to his wife at Morpeth; and that he did not leave