

1636. November 16.

STUART against GEDD.

ONE William Stuart having action against one Gedd, skipper in Burntisland, and Edward Little, customer in Edinburgh, before the Admiral-deputes in Leith, for delivery to him of a trunk, with certain abulziements being therein, which he received from ——— in London, in the pursuer's name, to be brought home and delivered to him; in which Court the defender Gedd having found caution, not only *judicio sisti*, but *judicatum solvi*; which cause being advocated to the Lords, and being agitated after advocacy, and disputed before the Lords, it was questioned by the defender, that, in respect of the advocacy, his caution found in the Admiral-court should be freed. And the pursuer answering in the contrary, that seeing caution was found in that court to him *judicatum solvi*, it was no reason to loose his cautioner by the advocacy, seeing the advocacy is not raised, nor granted upon any reason of incompetency of judgment, as that the Admiral was not proper Judge to the parties, or that the matter controverted was not a subject falling within his jurisdiction, or that the Admiral had done any wrong to the parties in that process, or upon any such reasons, which might be *declinatoria fori*, or exeem the parties as not liable to that court, *quo casu* if it had been so, with more probability might the cautioner in this judgment before the Lords be found to be freed; but the advocacy being upon no such ground, no reason the cautioner should be found freed. THE LORDS, in respect of the pursuer's answer, which they acknowledged to be good and relevant, and that the cautioner found before the Admiral was *per expressum* bound, and bore *judicatum solvi*; and that thereafter the Lords had tried, and found, having called Mr James Robertson before them, who was Admiral-depute, by whose declaration they found, it has been the constant custom of the Admiral-court to take such caution, not only *de judicio sisti*, but also *judicatum solvi*, and which custom the Lords thought not unreasonable, nor unjust, in respect matters handled in that court are frequently either betwixt strangers, or skippers, or mean seafaring men and passengers, or such others, who, if they were not urged to find such caution, might and usually so do go out of the country, and sometime never return, or after a long space some may return, whereby pursuers are frustrate of the just effects of their pursuits, if such caution were not taken; therefore the Lords found, that the cautioner ought not to be loosed by the advocacy, but declared that he remained still cautioner; but in other matters, where caution is found, in other inferior courts than the Admirals, as before the Bailies of Burghs, or such like, the Lords found they would take it to their consideration, as the like question occurred, if the caution should be loosed after advocacy, or not, *quo casu* if the cautioner was only *de judicio sisti*, he might be loosed; but if it was also *judicatum solvi ut supra*, if it was advocated for incompetency of the prior judge, the caution might be found free, otherwise to stand. In this process, it was also questioned, if the pursuer's claim should be sustained

No 3.

A cautioner in the Admiral-court *judicio sisti et judicatum solvi*, was found not liberated by advocacy of the cause.

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* absolvitor, 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