

No 10.

2dly, That this cause was not maritime ; for though the goods were to be sent by sea to Carolina, yet the bargain had no connection with the sea, no more than if the goods had been to be sent to the suspender at Glasgow ; in which case the sending them by land or water would have made no difference on the nature of the action, which the chargers would have had against the suspender.

‘ THE LORDS passed the bill without caution.’ See JURISDICTION, Admiral.

For the Suspenders, *Lockhart.*

For the Chargers, *Ferguson et Johnston.*

*Fol. Dic. v. 3. p. 113. Fac. Col. No 123. p. 182.*

1755. *March 7.*

JOHN HERRIES, Merchant in Rotterdam, *against* ROBERT and JOHN LIDDERDALES, Merchants in London, and THOMAS CARLISLE, Writer in Dumfries, their Factor.

No 11.

A Scotsman, whose residence is abroad, apprehended in this country for a debt, is only bound to find caution *judicio sisti*, and not *judicatum solvi*, unless in maritime causes.

JOHN HERRIES, merchant in Rotterdam, a native of Scotland, became debtor to Robert and John Lidderdales, merchants in London, for upwards of L. 1000 Sterling. In a letter addressed to them the 10th September 1754, he acknowledges he was their debtor, but says not for how much ; begs a little delay until effects which he had in Scotland should come to hand ; and adds, ‘ That if these effects did not soon come to hand, he would go to Scotland for a few weeks to look after his affairs there, but promised to acquaint them before he set out, and with whom he left his procuration.’

Some time after the date of this letter, without giving any further notice to Messers Lidderdales, John Herries came to Scotland, and resided during most of the winter at Edinburgh, attending a suit he had depending before the Court of Exchequer, concerning the seizure of a ship and cargo belonging to him ; in which suit he prevailed. In February 1755, he went to Dumfries to see some relations in that place, and Messers Lidderdales getting notice that he was there, they employed Thomas Carlisle to recover payment of the debt due to them.

Thomas Carlisle, in name of Robert and John Lidderdales, applied by petition to the Sheriff-substitute, setting forth, ‘ That John Herries was debtor to them in L. 1461 Sterling ; that he had left Holland without acquainting them, and was lurking in this country where he had no settled residence ; that they had reason to suspect he was but in indifferent circumstances, and intended to conceal himself from them in order to avoid payment of the debt ; and therefore praying a warrant to apprehend and incarcerate him until he should pay the sum, or find caution *judicio sisti et judicatum solvi.*

The Sheriff granted warrant for bringing John Herries before him ; and upon his appearing and acknowledging that he was owing a debt to the petitioners, and that he could not then either pay it, or give security, the Sheriff ordained,

him to be incarcerated until he should find caution *judicio sisti et judicatum solvi*.

No 11.

John Herries presented to the Court of Session a bill of suspension and liberation, and at the same time a summary complaint against the defenders, complaining of the said incarceration; and *pleaded*, That the warrant of commitment was illegal and oppressive; for that, as he was a native of Scotland, and had effects in it, there was no occasion for a personal arrestment *jurisdictionis fundandæ gratia*; and that by the law and practice of this country, caution *judicio sisti et judicatum solvi* could not be demanded, except before the Admiralty-court in maritime causes, or unless there should appear special circumstances which gave ground to suspect fraud. Such circumstances do not occur here; for it was not true that he was skulking or secreting himself, being every day at the market cross of Dumfries, and it was not alleged in the petition that he was *in meditatione fugæ*, which is absolutely necessary in order to warrant a summary incarceration in cases not maritime.

*Answered* for the defenders: *First*, That it is by no means a settled point, whether natives who have gone abroad *animo remanendi*, are subject to the jurisdiction of the courts in this country *ratione originis*: or whether an *arrestum* be not necessary to found the jurisdiction. *2dly*, That it is foreign residence, without respect to the origin, which makes it proper to indulge a creditor with summary execution against his debtor, when he is found in a country where he does not reside; and that there was no occasion to allege and prove a *meditatio fugæ* against one who has his residence in another country, in order to obtain a summary commitment; for his taking up no residence is sufficient evidence of his intention to depart. Lord Stair, b. 4, tit. 47, § 23, observes, ‘Captions are also granted, without a preceding charge by the Lords, upon special occasions; as if parties be suspected to leave the country, and have no visible estate in it.’ And he likewise observes, ‘That any Judge Ordinary may seize upon persons for their debts, in their escape out of the kingdom, or in clear evidence of their going present about the same;’ And gives this reason for the practice in the Judge-Admirals, of obliging defenders to find caution *judicio sisti et judicatum solvi*; ‘because his jurisdiction is most conversant about strangers.’ And as there is the same reason for obliging a Scotsman, who resides abroad, to find caution, as there is for obliging a foreigner to do it; so there is less hardship in obliging a Scotsman to do it, because he has a greater opportunity of finding friends who will be caution for him.

*Observed* from the Bench: That an arrestment *jurisdictionis fundandæ gratiæ* is usual in most countries, and in our country; but, to oblige a defender to find caution *judicatum solvi*, is not usual, except in maritime causes before the Admiralty-court: That it seemed unreasonable one should be obliged, at the commencement of an action, to give the pursuer more security than he had before; and that it would be dangerous to commerce and to personal liberty, if a debtor

No 11. were always obliged, when found in a foreign country, to find caution *judicatum solvi*.

' THE LORDS granted warrant to set the complainer at liberty, upon his finding caution *judicio sisti* to any action to be brought against him within six months, at the instance of Robert and John Lidderdales, before any competent court.' See FOREIGN. See MEDITATIO FUGÆ.

Act. Lockhart. Alt. J. Ferguson. Clerk, Pringle.  
Bruce. Fol. Dic. v. 3. p. 113. Fac. Col. No 153. p. 227.

\* \* \* Lord Kames reports the same case :

JOHN HERRIES, merchant in Rotterdam, in the course of dealing with Messrs Lidderdales in London, having allowed bills drawn upon him for a considerable value to be returned upon them, wrote them a letter from Rotterdam, September 1754, ' appologizing for what was past, promising punctual payment in time ' coming, intimating that he intended to go for Scotland to gather his effects ' there, and that he would see them in his return; but promising to advise them ' before he set out, and to leave a procuration.' The Lidderdales were alarmed when they heard that their debtor was retired from Holland, without giving them notice according to his promise, and without leaving a procuration. Finding that he was in Scotland, they gave a commission to Thomas Carlisle, writer in Dumfries, to use all execution for their security. John Herries was accordingly apprehended, upon a warrant from the Sheriff, and examined; and the facts above set forth appearing to be true, the Sheriff ' ordained him to be incarcerated in the tolbooth of Dumfries, there to remain till he should find sufficient caution *judicio sisti et judicatum solvi*.' This order was put in execution in the mildest manner. John Herries was kept in the messenger's house for many days, and not put in prison till it was found that his friends could not be prevailed upon to interpose for him. This matter being brought before the Court of Session by a summary petition and complaint; the LORDS were generally of opinion, that in the case of a *meditatio fugæ*, it is irregular to demand caution, both *judici sisti* and *judicatum solvi*. But they were of opinion, that the circumstances of this case entitled the Lidderdales to demand caution *judicio sisti*. And accordingly an interlocutor was pronounced, admitting the complainer to his liberty, upon finding caution *judicio sisti*.

N. B. The caution which may be exacted from strangers apprehended within burgh is only *judicio sisti*. Act of sederunt, 18th December 1613.

Sel. Dec. No 86. p. 114.