

refused to set him at liberty, unless he found caution *judicio sisti*, &c.; but judged it likewise equitable, that the pursuers should also find caution to him in case they succumbed, to refund his damage and loss by the wrongous imprisonment.

No 39.

*Fol. Dic. v. 1. p. 328. Fountainball, v. 2. p. 108.*

## S E C T. II.

## Border Law.

1611. January 22.

A. against B.

A BURGESS of Edinburgh may take an assignation to a debt owing to another burghess, and thereupon arrest his debtor, and cause ward him till he find caution to answer as law will. If the goaler suffer a man to escape who was warded for debt, he will become debtor to the party at whose instance he was warded; but the debt must first be tried against the principal party, unless his warding proceed upon a decret; and if he who escapes die before payment or re-entry, the goaler will be debtor. A stranger, who is addebted to a Scotsman, coming to this country, may be charged by an officer, at command of a Bailie, to enter in ward till he find caution to answer as law will.

*Fol. Dic. v. 1. p. 328. Haddington, MS. No 2107.*

No 40.

A stranger, who is addebted to a Scotsman, coming to this country, may be charged by an officer, at command of a Bailie, to enter in ward till he find caution to answer as law will.

1676. January 13.

JAMES ROBERTSON against JAMES BELL.

IN a reduction and suspension of a decret obtained before the Sheriff of Roxburgh, at the instance of James Bell against Robertson, who was cautioner for one James Potts, Englishman, who was arrested at Bell's instance as his debtor for the price of certain sheep and goods bought from him in Scotland, upon this reason, that the arrestment was against law, the said Bell not being a burghess of the burgh of Jedburgh, where the arrestment was used; and albeit he had been a burghess, yet he could have no such arrestment, because, by the 8th act of Parliament 2d Cha. II. anno 1672, the said custom and privileges of burghesses is only restricted for the price of men's meat and horse meat, and abulziements, for which burghesses have action against those who are their debtors within burgh; whereas the arrestment was for the price of goods bought

No 41.

Notwithstanding the act of Parliament touching arresting persons within burgh, the Lords found, that Englishmen may be arrested within burgh, on the Scots side of the border, though by strangers and no burghers, this being the practice on the English side.

No 41. in the country in a fair market, by an Englishman, who could only be the subject of a personal action, and falls not within the act of Parliament.—It was *answered*, That notwithstanding of the reason, the arrestment was duly executed; because, by a constant custom of the borders betwixt England and Scotland, as all Scotsmen are ordinarily arrested upon the English side, for any debt due to the inhabitants of England, so the like custom hath been constantly practised for arresting Englishmen on the Scots side of the border, *et tacitus populi consensus pro lege habetur*.—It was *replied*, That such a custom having no authority from law, was a mere oppression, especially not being ratified in that act of Parliament, which is expressly made in consideration of the arrestments of the persons of debtors before sentence, or any process intended.—THE LORDS having considered this and the act of Parliament, did find that it did not fall within that act, which was only made betwixt burgesses and Scots subjects; and therefore found, that the custom on the English side of the borders arresting Scotsmen, and the like custom of arresting English on the Scots side being proven to have been constantly observed, should sustain the decret, and make the cautioner liable, as being founded *in jure commune*.

*Fol. Dic. v. 1. p. 328. Gosford, MS. No 833. p. 527.*

\* \* \* This case is reported by Stair, *voce* PROOF.

No 42. 1705: July 25. POTTS and HUNTER *against* MITCHELSON and ROBSON.

An Englishman having been arrested near the border, though neither by a Sheriff nor Bailie of Regality, but by a Baron-Bailie, conform to the border law, the arrestment was sustained.

ROBERT POTTS in Kelso gives one Mitchelson in England L. 11 or L. 12 Sterling, to buy up some English wool for him, which Mitchelson never did, but kept the money to himself. Potts finding him afterwards at a market in Kelso, he arrests him by a warrant from the Baron-Bailie, till he should find bail conform to the border-law; and accordingly he found one Robson, a glover in Kelso, cautioner both *judicio sisti et judicatum solvi*; and thereon being pursued, Robson is decerned in the foresaid sum by the Baron-Bailie of Kelso, who suspends on this reason, That the warrant was null, being *a non suo judice*; for though those summary attachments be frequent and necessary betwixt the two nations of Scotland and England, yet they cannot be executed by such a pedaneous judge as a Baron-Bailie, whose jurisdiction is only to compel tenants to pay their rents, or fine in a moderate sum, for a bloodwit; but must be by Sheriffs and such other Judges who have *merum imperium* as well as jurisdiction; and so the arrestment being null and illegal, Robson's enacting himself as cautioner for him falls in consequence.—*Answered*, That the practice of England was notour, that if any Scotsman were found in Wooler, or any other part of the English border, any of their Justices of Peace put them under arrest till they found caution, *et quod quisque juris in alium statuerit, ut ipse eodem utatur*; and to oblige a Scotsman, who finds his debtor in Kelso or Jedburgh, to go se-