

have an extract of such articles of the count-books of the minerals wherein he had an interest as a partner. The said Alexander did intent action against Sir William for exhibition of the count-books here, and did produce a certificate under the hands of some of the Magistrates, bearing, That he was wrongously imprisoned, and that he could not have been compelled in law to have made that transaction to which he was forced to agree for fear of Sir William, being there a man of great power, and copartner with the King of Denmark in the public works. THE LORDS would not find themselves judges to reduce that transaction made in Norway so as to repon the pursuer, the certificate produced being impetrated without hearing of parties, and not being a judicial sentence; neither could they ordain Sir William to produce the count-books here, seeing they were necessary to remain with the manager of the public works; but they did ordain the said Sir William to give his oath upon commission to be direct what count-books he had by him, or what books were in Norway, and who had the keeping thereof, and to consent that the pursuer might have inspection thereof, and might have the extracts of such articles wherein he was concerned. Notwithstanding it was *alleged* for the pursuer, That both parties being Scotsmen, and Sir William having an estate here, he should be liable to do all personal actions founded upon any writ, albeit made in a foreign country, according to the law of Scotland.

Fol. Dic. v. 2. p. 261. Gosford, MS. p. 97.

* * Stair reports a similar case, 4th February 1662, Skene against Lumsden, No 513. p. 12618.

1676. January 13. BELL against ROBERTSON.

JAMES BELL finding one James Patts an Englishman, in Jedburgh, arrests him there upon a bargain betwixt them for some cattle, whereupon James Robertson became cautioner *judicio sisti et judicatum solvi*; and thereafter James Bell obtains a decret against him before the Sheriff of Roxburgh: He suspends on this reason, that the Englishman was unwarrantably arrested by the Magistrates of Jedburgh, contrary to the act of Parliament 1672, Declaring the privilege of burghs to arrest to be only for merchandise, meat, drink, &c. and not for bargains of this nature, not being made with a burges, or for any goods within burgh. It was *answered*, That the act of Parliament doth only limit the peculiar privilege of burgh, and bears, That they shall not arrest any subject of this kingdom, which cannot extend to Englishmen residing in England: But the charger founds upon the local custom of the Border, by which he offers to prove, that, past memory, it is the custom on both sides of the Border, that the inhabitants of either side, being found on the other side, upon application to any Magistrate, they are arrested and incarcerated, till they

No 530.

No 531.
Found in conformity with the above.

No 531.

find caution to answer and pay, which is a reasonable and necessary custom, without which there could be no traffic on the Borders; but parties of either nation behoved to go to another kingdom to pursue for their rights. And seeing it is notourly known, that the English on their side kept that course with Scotsmen in England, there is good reason the same course should be taken with Englishmen in Scotland; so that the arrestment by the Magistrates of Jedburgh is not by the privilege of burgh, but by the local custom, and so was done by them as Magistrates, and might have been done by any Magistrate, as to which the act of Parliament doth make no alteration. Likeas there was a testificate produced by a number of Noblemen and Gentlemen on the Border, declaring that this was the custom.

THE LORDS found the answer, upon the custom of the Border, relevant, and that it was not altered by the act of Parliament, and the arrestment by the Magistrates of Jedburgh was by their common authority as Magistrates, and not by their special privilege of burgh; but would not sustain the testificate for probation of the custom, but ordained it to be proved by witnesses upon oath.

Fol. Dic. v. 2. p. 261. Stair, v. 2. p. 397.

* * * Gosford's report of this case is No 41. p. 4827. *voce* FORUM COMPETENS.
See No 534. *infra*.

1679. December 4. M'CALLA *against* The MAGISTRATES of AYR.

No 532.

Execution of a caption by incarceration found not proved by witnesses, but by the messenger's execution or the jailor's book.

GEORGE M'CALLA pursues the Magistrates of Ayr for payment of two debts due by Major Fullerton, and for which he was incarcerated in the tolbooth of Ayr, and was unwarrantably let go, upon pretence of a consent given by Mr George White, by warrant from M'Calla, which was only conditional, if Captain Kennedy, at whose instance Fullerton was incarcerated, did also consent; and which being referred to Mr George White's oath, whether he consented by M'Calla's warrant to liberate Fullerton, he offered to depone *qualificate*, that he consented only on condition that Kennedy should consent, which oath the Magistrates refused to take, upon pretence that they could not take a qualified oath; and yet they reported to the LORDS, that White was contumacious, and would not depone without expressing the truth of his offer to depone *qualificate*; whereupon M'Calla was decerned to pay Kennedy the sum wherein he stood in trust for Kennedy, reserving to M'Calla to pursue the Magistrates of Ayr as accords. The defenders *alleged* no process, till the caption's and executions thereof were produced, whereby Fullerton was incarcerated. It was *answered*, That the caption is produced, and there needed no execution, seeing the Magistrates of Ayr received the prisoner, and, therefore, needed not to be charged to receive him. But it was offered to be proved by the jailor, and