

No 38.

callit Angelo had borrowit frae him 1000 merks, for the whilk he had the said Italian's obligation; and because he saw the said Italian in this countrie, he causit summond him befor the Lords of Session for the said soume, upon the said obligation; and the said Italian would not compeir befor the Lords; he being oftentimes callit, the said Englishman seeing the said Italian to depart furth of this countrie, desyrit letters, be the said Lords deliverance, to charge the said Italian to enter his persone in waird, and to apprehend and put him in captivity, while he fand caution to answer to the said Englishman in the said matter. The whilk letters the LORDS grantit; but the said LORDS causit first the said Englishman find suretie for the persuit of the action, and damage and enteres, in caise he prevaill not againes the said Italian.

Fol. Dic. v. 1. p. 328. Maitland, MS. p. 155.

1701. February 6. GEORGE AYRIE against JOHN CHATTO.

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An Englishman being apprehended on a summary warrant for a debt; liberation was refused till he found caution *judicio sisti*, although the warrant was granted by an inferior judge.

GEORGE AYRIE merchant in Newcastle, being debtor by bills to John Chatto in Kelso, and there being mutual processes betwixt them, and Chatto dying, his heirs procure a warrant from the Sheriff of Teviotdale and Bailie of Kelso, to arrest the said Ayrie; whereupon he is imprisoned, and gives in a bill of suspension, craving to be set at liberty as unwarrantably incarcerated, *imo*, That there was no law for summar attachment at the instance of creditors, much less of their executors and representatives; and whatever the Lords of Session or Privy Council have done in extraordinary cases, when the parties were *in meditatione fugæ*, as in Mason's case, 30th November 1665, *voce* MEDITATIONE FUGÆ; yet inferior judges never attempted it; and by the 8th act 1672, it is only allowed to burgesses for payment of meat and drink, and other such accounts. *2do*, That this was done *lite pendente*, after litiscontestation in the cause, contrary to the common law, that, during the dependence, *nihil est innovandum*.—*Answered*, That by the English law any man may be arrested on a claim for debt; only, if it was found malicious, he had his expenses for the wrongous imprisonment; and that it was the constant custom of the Borderers to seize upon one another, there being no way to reach their effects; and which custom was sustained by the Lords on the 13th of January 1676, Bell *contra* Robertson, No 41. p. 4827.; and the act of Parliament 1672, expressly relates to the subjects of this kingdom, and not to strangers. And it does not alter the case, at whatever step of the process the attachment be made, especially where Ayrie was not personally present at the beginning, but only appeared by his procurator; and there was no more required but that he should find caution *judicio sisti et judicatum solvi*, upon which he was to be liberated; and this was daily exacted from Scotsmen deprehended in the English borders; and therefore *retorsione juris iniqui* (if it were so) *eodem jure uti debent*.—THE LORDS thought it inconvenient to alter such a general custom; and therefore

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.

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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 burgess, 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 ward-ed for debt, he will become debtor to the party at whose instance he was ward-ed; 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 burgess of the burgh of Jedburgh, where the arrestment was used; and albeit he had been a burgess, 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 burgesses is only restricted for the price of men's meat and horse meat, and abulziements, for which burgesses have action against those who are their debtors within burgh; whereas the arrestment was for the price of goods bought

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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.