

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.

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.

1705: July 20. POTTS and HUNTER against MITCHELSON and ROBSON.

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-

veral miles to seek an order from the Sheriff, is to make him lose his debt, and let the party escape; and it were a vast prejudice, if the Bailie of Kelso's jurisdiction were not sustained, as to these personal attachments.—THE LORDS found the Bailie's warrant and decret sufficient, and therefore found the letters orderly proceeded against Robson the cautioner.

Reporter, *Tillicoultry*.  
*Fol. Dic. v. 1. p. 329. Fountainball, v. 2. p. 285.*

\* \* Forbes reports the same case :

JOHN MITCHELSON having got L. 10 : 6s. Sterling from Robert Potts, to buy some English wool for him, and having neither bought it, nor restored the money, was arrested in the town of Kelso at the instance of Robert Potts, according to the border law, till John Robson enacted himself in the Bailie court-books as cautioner for him, *judicio sisti et judicatum solvi*; upon which Mitchelson and Robson being pursued before the Bailies of Kelso, and the receipt of the money proven by Mitchelson's oath, a decret was given against them conjunctly and severally; and being charged to make payment at the instance of Margaret Potts, as executrix to Robert the father, they suspended upon these reasons, *imo*, The decret is null as pronounced *a non suo judice* upon an arrestment by the Baron-Bailie of Kelso, of an Englishman not subject to his jurisdiction; for these personal attachments, though ordinary betwixt the two nations, are only competent to Sheriffs and Bailies of Regality, and the like, as being *magis imperii, quam jurisdictionis*, and not to a Baron-Bailie, who can only judge betwixt tenants and inhabitants of the town in small matters, such as the rents of tenements, bloodwits, and the like, and therefore the attachment being unwarrantable, the obligation of cautionry became null. *2do*, The decret is null, for that the principal and cautioner are therein deterred against conjunctly and severally. *3tio*, It was collusive betwixt the pursuer and principal party in so far as the latter compeared and judicially acknowledged the libel, albeit he could not have been compelled thereto, as living without the jurisdiction.

*Answered*, It is notour that through all England, particularly on the other side of the border, those that are clothed with any sort of power or jurisdiction, attack and arrest Scotsmen till they find caution; and here we are not to measure the power of a Baron-Bailie from the ordinary acts of jurisdiction he may exercise among Scotsmen, but only from the known practice of our neighbour nation, and the town of Kelso where there is great traffic and resort of Englishmen. Yea any judge in Scotland, having civil jurisdiction as to debts betwixt inhabitants within his bounds, may arrest the person of any Englishman till he find caution; nor is there any reason to distinguish betwixt a Sheriff and a Baron-Bailie as to this point. *2do, Et separatim*. This cannot avail Robson the cautioner, because he freely enacted himself, and cannot pretend compulsion.

No 42.

It was also just to decern against principal and cautioner conjunctly and severally; because, all such cautioners are not only liable to sist the person, but also to pay what shall be decerned. 3tio, There is no collusion in the case, for the judicial confession is upon oath; and the cautioner, by enacting himself *judicio sisti*, does subject himself to a probation by the principal's oath, and the principal's compearing and owning the debt is an homologation of the jurisdiction.

*Replied*, The charger must not only prove, for supporting her decret, that by the constant custom of the border, upon both the Scots and English side, any judge, by whatever authority, though limited to a certain effect, has power to arrest those of the other side when found within his district, as being an allegiance upon matter of fact; but also that the custom hath been sustained and approved by a Sovereign Court in Scotland. 2do, The finding of caution *judicio sisti et judicatum solvi*, did not found the jurisdiction of the Baron-Bailie, but only obliged Mitchelson and his cautioner to answer before a competent judge, as if Mitchelson were a native; and if he were a native, without a fixed domicil, he could not be convened but before the Lords of Session. 3tio, It was unjust to decern against principal and cautioner, because naturally the principal should be first discuss'd. 4to, *Cautio judicio sisti, et judicatum solvi* is only given where there is a depending process; but where a person is summarily arrested, as a stranger, or suspected to be *in meditatione fugæ*, all that can be required is *cautio judicio sisti*, which is of the nature of a bond of presentation; and therefore the Bailie of Kelso exceeded his jurisdiction in extorting caution *judicatum solvi*, which is certainly concussion. 5tio, Compearing before the Baron-Bailie was no prorogation of the jurisdiction, but only a sign of collusion; for the jurisdiction of a Baron-court cannot be prorogated in such a case, more than it could be prorogated by parties mutually compearing and debating a divorce before it.

THE LORDS found the Bailie's warrant and decret sufficient, and the letters orderly proceeded.

*Forbes, p. 28.*

1759. January 4.

JAMES HARDIE against GEORGE LIDDEL Merchant in Newcastle.

No 43.  
Arrestment  
on a border-  
warrant,  
founds a ju-  
risdiction to  
the Court of  
Session.

JAMES HARDIE applied to the Sheriff of Roxburgh upon the 21st February 1758, and obtained a border-warrant, authorising him, in common form, 'to arrest the person of George Liddel until he should find caution *judicio sisti et judicatum solvi*; and failing of his person, all and sundry his goods, gear, and debts, to remain under sure fence and arrestment ay and while caution be found acted to the effect foresaid.'