

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.'

Pursuant to this warrant, Hardie used arrestment in the hands of certain persons residing in Kelso, as debtors to Liddel, and then executed a summons at the market-cross of Edinburgh, pier and shore of Leith, against Liddel, concluding against him personally for payment of a debt of L. 18. In this summons he did not libel upon the warrant.

Liddel appeared, and *pleaded, 1mo*, That as the warrant was not libelled on, it could give no support to the suit.

*2do*, That the effect of such warrant could only be, as the words of it bear, to detain the person, goods or effects, of the foreigner, till he should prorogate the jurisdiction by finding caution; but that if he chose to lie in jail, or to abandon his goods, nothing further could be done. And if this were not the rule, it would be easy to found a jurisdiction, and obtain a decret against a stranger personally for payment, though he had no effects here, he only using arrestment in the hands of persons as debtors to him, who really owed him nothing.

*3tio*, That border-warrants cannot be granted for every sort of debt, like arrestments against strangers, proceeding from the Court of Session; because they resemble acts of warding, which can be issued for securing tavern and hostlery bills only.

*4to*, An arrestment by the authority of a Sheriff cannot be the foundation of a suit before the Court of Session.

*Answered, 1mo*, The effect of the arrestment on a border-warrant is to fix or detain in this country the effects of a stranger; the consequence of which is, to subject him to the jurisdiction of the Courts here, as much as if he had a land estate; and therefore he may be sued in the same manner as a native.

*2do*, There is no necessity, in order to found the jurisdiction, that the stranger should find caution; for, by fixing his goods within the territory, he is immediately subjected to answer; and the alternative of caution expressed in the warrant, is in favour of the stranger, that he may relieve his effects, if he pleases, by finding security. Those who have no effects here, cannot be thus subjected; for if debts, as in this case, are arrested, the Court will only discern in a furthcoming against the arrestees, after ascertaining the claim against the stranger, to that particular effect; and if the arrestees should owe nothing, the proceedings would be ineffectual.

*3tio*, No authorities are quoted to prove, that border-warrants can be issued for securing tavern and hostlery bills only. The universal practice has been, to grant them for every sort of debt; and it would be impossible to apply to the Court of Session for warrants of this sort without losing the opportunity of using them.

*4to*, An arrestment by authority of the Sheriff, as it has the effect to fix and detain the stranger or his effects in Scotland, must establish the jurisdiction of the Supreme Court of Scotland, in the same manner as it establishes the jurisdiction of the Sheriff himself.

No 43.

' THE LORDS found, That the arrestment on the Sheriff's warrant founded a jurisdiction to the Court of Session ; and remitted to the Lord Ordinary to proceed accordingly.'

Act. P. Murray.

Alt. H. Dalrymple.

W. J.

Fol. Dic. v. 3. p. 240. Fac. Col. No 155. p. 276.

## S E C T. III.

## Burgh Law.

No 44.

A person who was arrested in a royal burgh, for goods bought therein, found caution to answer as law will. This found to subject him to the jurisdiction of the burgh in this cause, though he lived in another jurisdiction.

1633. January 31.

STEVENSON *against* LAW.

JOHN STEVENSON in St Andrew's having sold to Alexander Law in Dunfermling certain lint, the said John Stevenson finding thereafter the said Alexander Law in St Andrew's, by the privilege of burgh, charges him to enter it ward by the town-officer, whereupon he finds caution to answer as law will; and he and the said cautioner being thereafter convened before the Magistrates of the burgh, for payment of the prices of the lint, he raises advocacy, upon this reason, That the Bailies of St Andrew's could not be judges to him, who was actual residenter in Dunfermling, and his finding caution to answer as law will, which was done to eschew the danger of warding, cannot make them competent judges to him.—THE LORDS found this no reason whereupon the action should be advocated to the Lords ; but found the Magistrates of St Andrew's competent judges, albeit the party dwelt not within their judicatory, in respect of the said caution, found to answer as law will, by the which finding of caution, he became subject in that to the jurisdiction of that burgh; specially seeing the matter, for which the caution was found, and for which he was convened, was for wares bought and bargained for within that burgh, and so *ratione rei* he was the more subject to that judgment. And the LORDS found, That the finding the like caution ought to produce this effect, and that it tended not to that end, to make the party who found the caution, liable to answer in his own proper jurisdiction.

Fol. Dic. v. 1. p. 329. Durie, p. 666.