

said to have been executed here; *Voet.* lib. 1. tit. 2. § 16.; Erskine, b. 1. tit. 2. § 16.; Scruton *contra* Gray, No 35. p. 4822.

No 36.

The question having been reported to the Court on memorials, the LORDS were unanimous in altering the judgment of the Commissaries. The defender's having been absent from his duty, it was observed, might subject him to some military censure, but a domicil could not be created without residence; and the circumstance of his having a few articles of furniture in Scotland, at the date of the citation, without any arrestment of them, was equally ineffectual.

“ THE LORDS remitted to the Lord Ordinary, to remit the cause to the Commissaries, with this instruction, that they dismiss the action.”

Lord Reporter, *Dreghorn.* Act. *Dickson.* Alt. *Maccormick.*
6. *Fol. Dic. v. 3. p. 239.* *Fac. Col. No 62. p. 112.*

DIVISION V.

Arrestment *Jurisdictionis Fundandæ Gratia.*

SECT. I.

Arrestment of the Debtor's Person.

1527. *March 27.* CURL *against* WATSON.

No 37.

ANE stranger being persewit within this realme befor ony Judge, for ony civil cause or actioun, as for debt, aucht and sould find cautioun *de judicio sisti et judicatum solvi.*

Fol. Dic. v. 1. p. 328. *Balfour, (CAUTION.) No 4. p. 192.*

1564. *January 22.* AN ENGLISHMAN *against* ANGELO an Italian.

No 38.

ANENT the action persewed be ane Englishman againes ane Italian that was in this countrie, it was *allegit* be the said Englishman, That the said Italian

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.

No 39.

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