

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.

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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

other witnesses above exception, that Fullerton was incarcerated upon the two debts in question, and also by the decret against M'Calla at the instance of Kennedy. It was *replied*, That the decret against M'Calla was *inter alios actum*, and witnesses could not be received to prove any executions, but only the execution itself, for which there is a special act of Parliament 1579, cap. 94.

THE LORDS refused to sustain the incarceration upon the bonds in question by witnesses, but either by the executions of the caption, bearing, That the party in prison was put in prison by virtue of the caption, or was arrested in prison, or at least that he was booked in the jailor's book in the tolbooth for the said bonds.

*Stair, v. 2. p. 716.*

1687. July. COUNCIL OF ABERDEEN *against* THOMSON.

THE LORDS sustained a decret, fining one in L. 50 for opprobrious expressions, upon an extrajudicial acknowledgment to a Bailie, without any other probation, though the suspender denied the same, in respect of the custom of the burgh of Aberdeen: But ordained the Magistrates to rectify that custom in time coming.

*Harcarse, (PROBATION.) No 801. p. 225.*

1708. February 28. The CREDITORS of COLQUHOUN of Kenmuir competing.

IN the ranking, Wardrobe of Dalmarnock, Lockhart of Cleghorn, and Winram of Wiston, objecting against one another's rights, it was *alleged* for Wiston, I must be preferred, because, though our sasines were all registered in one day, yet I offer to prove, mine was offered to the register two hours before theirs were presented; and so, by the 13th act 1693, it is clearly preferable, which makes the date of the registration to be the standard of the preference; and the 14th act, same Parliament, ordains a minute-book to be kept, expressing the day and hour when the sasine is presented to be registered; and by the 18th act 1696, the booking and registration are made to be the only rule. *Answered*, The fundamental act for registration of sasines is in 1617; and all that it requires is, to express the year, month, and day, so that the least distance of time that can be allowed, in preferring one sasine to another, is the space of a day; and how easy it is for a clerk to mistake in the matter of some hours, and even to prevaricate so far, as to gratify one before another, which was presented after me; so, wherever they are registered in one day, they ought to come in *pari passu*. *Replied, Leges posteriores derogant prioribus*; and so the acts in 1693 enlarge and explain that in 1617; so that by the express letter of the law, the difference of hours is to be considered, as is done in two arrest-

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Found in conformity to Wishart against Davidson, No 530. p. 12630.