

1677. *November 27.* ROBERTSONS and FALCONER *against* DUMBAR.

MAUZE and Isobel Robertsons, and Alexander Falconer, husband to Isobel, pursue James Dumbar, messenger, for payment of the debt in a caption, where-with the messenger had taken the Earl of Mortoun, and suffered him to escape.

The defender ALLEGED Absolvitor; because he had done his duty as messenger, having attached the Earl, and touched him with his messenger's wand, and holden him, and commanded him to go to prison, in his Majesty's name, in obedience to the caption; but he being a person of quality, and very corpulent, he was not able to bear him; but the pursuer being present, and communing with the Earl's good-brother for accommodation, a warrant came, within two hours, by a deliverance, on a bill of suspension, stopping execution: And messengers were never obliged to such diligence, as that they might not keep their prisoners two hours before they were sent to prison. *2do.* The defender offers him to prove, that he having attached the Earl, he was deforced by the Earl, and others in his company, by drawing swords; and yet he waited, in the room and at the door, till the warrant stopping execution came.

The pursuer REPLIED to the first, That whatever latitude there be in the diligence of messengers, as to the time of putting of persons in prison, yet it being in Edinburgh,—where it is known attempts will be made for suspension, and especially where the pursuer urged the messenger presently to incarcerate,—if he might delay, all captions in Edinburgh might be evacuated. And, as to the second defence, of being deforced, *Non relevat*, unless there were such a force as the messengers, with the assistance of the pursuer, could not rationally think to suppress; but it is offered to be proven, that the pursuer had obtained concurrence of the town officers, and had with them ten or twelve persons; whereas there were but two with the Earl. *2do.* It is offered to be proven, that the pursuer brought another messenger, who offered, with the same assistance, to put the caption in execution, notwithstanding of any resistance offered; but the defender refused to quit the caption. *3tio. et separatim,* It is offered to be proven that the messenger colluded, and received money from the Earl.

The Lords found, That the messenger being required, by the party, was obliged presently to incarcerate: And found the reply against the resistance relevant, that either another messenger offered to proceed in the caption, having sufficient strength, or that the messenger received money from the Earl: but did forbear to determine that point,—how far a messenger was obliged to proceed when he met with forcible resistance, being assisted with a greater strength.
Vol. II, Page 567.

1678. *January 11.* CAPTAIN DUNDASS *against* LIEUTENANT-GENERAL HOLBURN.

CAPTAIN Dundass pursues Lieutenant-General Holburn for the levy-money of a company levied *in anno* 1648, whereof Holburn was colonel: and each company had a locality; wherein Dundass his locality fell in Selkirk; with whom he had agreed for £40 for each soldier; and that Holburn had uplifted the

levy money, and the free profit of the company: which was sustained relevant. But the question arose as to the manner of probation: The pursuer offered to prove it by the defender's receipts and subscribed accounts with the commissaries or quarter-masters.

The defender ALLEGED, That, by the known custom among soldiers, the staff-officers count for the whole regiment; whereof every inferior officer receives his share without a discharge; and, therefore, it is only probable by his oath, that he did uplift and retain the pursuer's share; otherwise, the counts with commissaries, or quarter-masters, or collectors of shires, might make all considerable officers liable for the pay of their regiments; which were of dangerous consequence now, after thirty years.

The Lords found the foresaid receipts not to infer a necessity to produce discharges; but that, in regard of the custom, soldiers' payment was presumed, unless it had been questioned *de recenti*; and that it was now only probable, by the defender's oath, that he received the levy money and repaid it not.

Vol. II, Page 590.

1678. *January 16.* MAULD *against* LORD and MASTER of BALMERINO.

THE Lord Cowper, standing in the right of the estate of Balmerino in trust, disposed certain lands to James Mauld; and, in special warrandice thereof, granted an annualrent out of other lands: And there being a distress, by non-entry, at Pourie's instance, who obtained decret for pointing of the ground of the principal land, James Mauld pursues recourse against the warrandice lands.

The defender ALLEGED, No process; because there was no lawful intimation made, by the pursuer to the defender, of Pourie's play, when Pourie's process for pointing of the ground was pursued: In which case the defender had a sufficient defence to exclude Pourie, *viz.* a right belonging to Mrs Mary Ker, proceeding on a sum whereon inhibition was used before Pourie's right; and, if Pourie's process had been intimated in due time, Balmerino would have raised reduction of Pourie's right, upon the inhibition; which, being repeated by way of defence, would have excluded Pourie.

It was ANSWERED, That sufficient intimation had been made; in so far as the dependence of Pourie's process had been verbally intimated to the Lord Balmerino, or the Master, who stands in the fee of the estate; whereupon James Chalmers, advocate, was employed by them, and did take up and return the process, and was never employed by James Mauld. *2do.* After the decret, a bill of suspension had been given in by Balmerino; wherein Pourie prevailed. The cause was disputed upon the bill; and that because there was no reduction raised by Balmerino upon the inhibition; or, if it was, it was but lately raised, and not yet come to be enrolled.

The defender REPLIED, That, whatever was done upon the bill of suspension, imports not; because the reasons behoved to be instantly verified: but if intimation of the play had been made in due time before the sentence, Balmerino would have had time enough to have raised reduction, and repeated it by way of defence. Neither was a verbal intimation sufficient, without an instrument of judicial intimation; without which parties concern not themselves, and are secure.