

deforcement; but no such intimation being then made for the master's farm, the LORDS found, That the deforcement could not be now elided, by proponing now in this place upon the master's right, which was then omitted to be mentioned at the time of the execution, and was now only alleged, and offered to be tried to be a just debt.

No 3.

Act. *Advocatus Hope.*

Alt. *Stuart.*

Clerk, *Gibson.*

*Fol. Dic. v. I. p. 231. Durie, p. 338.*

1685. *March.*

ROBERT HARSE *againts* FORK.

FOUND, that a messenger might be deforced in the execution of a pointing of goods in a shop, when he had not his blazon at the time, though he was known in the place. But there was some speciality; for he, before himself appeared, sent a man into the shop as his assistant, whom the people turned out again, and conveyed away some goods.

No 4.

*Fol. Dio. v. I. p. 232. Harcarse, (DEFORCEMENT.) No 412. p. 110.*

1697. *December 30.*

LORD KINNAIRD *against* JOHNSTON of Westerhall and DOUGLAS of Kilhead.

I REPORTED the Lord Kinnaird against Johnston of Westerhall, and Douglas of Kilhead, for deforcing a messenger in the execution of a caption against Bernard Ross. The defences were, the instrument of deforcement was null, because, *imo*, It did not bear the messenger displayed his blazon, and so I was not bound to acknowledge you for one; *2do*, It does not bear you shewed the caption, and when you was required, you only produced a letter from my Lord Kinnaird's Chamberlain, employing you to search for the said rebel; and it was a great and secret virtue in the caption to work at that distance, as the sympathetic powder does; and it is *licita resistentia* in any of the lieges to rescue a rebel out of a messenger's hand who wants a caption; for, in so far he acts without authority, *et tanquam prædo*.—*Answered*, He opposed the execution, bearing, that after he had apprehended the rebel, he touched him with the wand of peace: he disarmed him of his sword, and delivered him to his apparitors and associates, which speaks both his acquiescence, and that all things were legally and formally done; and, for showing his caption to those gentlemen who came after he was his prisoner, he was not bound to show it to them; neither is it always safe for a messenger to do it, for several times it has been torn by the rebel, or carried away by others; and here Ross, the prisoner, neither controverted his being a messenger, nor his having the caption, but submitted;

No 5.

The Lords found, that a messenger apprehending a man for debt was not bound to show his blazon, till he had touched him with the wand, and therefore, found the omission of that to be no excuse of deforcement.

No 5. and he was not bound to satisfy others.—THE LORDS, before answer, allowed either party to adduce what probation they can, whether the messenger had the caption on him at the time, and if a sight of it was required, and if any violence was offered, and how far the rebel acquiesced or sent for help, and upon any other points, for clearing if there was a deforcement or not.

*January 18. 1699.*—THE LORDS advised the mutual probation led in the deforcement pursued by the Lord Kinnaird against Sir James Johnston of Westerraw, and Douglas of Kilhead, for rescuing one Bernard Ross out of the messenger's hands, mentioned 30th December 1697. Several questions occurred, Whether he was bound to show his blazon; and it was thought not, till he had apprehended the rebel, and laid on him the wand of peace; for to show it before, were to discover himself to be a messenger, and give the rebel opportunity to run away: And some thought there might be danger in giving the caption out of his hand, for in these hubbubs they might tear it. But the great debate ran here, if Westerraw, as Stewart-depute of Annandale, might not dismiss the prisoner, where he found he was illegally apprehended, and no caption shown. Some argued, he might have detained them both till the matter was tried, and needed not grant his concurrence to the messenger; but he exceeded his duty in setting the prisoner at liberty.—THE LORDS abstracting from these points, after reading the depositions, found the deforcement sufficiently proven. Some moved to have the witnesses re-examined; but this was laid aside, and the cause determined *ut supra*.

*Fel. Dic. v. 1. p. 232. Fountainhall, v. 1. p. 807. v. 2. p. 36.*

*See APPENDIX.*