

No 5. That the person interdicted was thereby in the condition of minors; and that he and his heirs could not question any disposition or other deed done by him, upon the naked head of interdiction, unless they allege and qualify lesion; and that the pursuer of the reduction may prove that the bargain was profitably made, and that the price was *in rem versam*: And the Lords declared, they would not be nice as to probation, but reserved the consideration of it to themselves.

It was further *replied*, That the interdiction is null, being execute by a person that was not a messenger, being deprived; which was repelled, in respect of the answer, that it was offered to be proven, that notwithstanding of the sentence of deprivation, he was holden and *tentus et reputatus* to be a messenger; notwithstanding it was *triplied*, that the pursuer, in fortification of the sentence of deprivation, and his own deposition, offered to prove, that it was the common opinion of the country, that the executor was not a messenger, then being deprived; which was thought hard by some of the Lords; being of the opinion, that at least *habitus* and *tentus et opinio* ought to have been allowed to both parties to prove; reserving to the Lords to consider the probation, and to judge according to that which should be found most pregnant.

{Dirleton, No 382. p. 186.

1699. July 11.

No 6.

MR MARK LERMONT, Advocate, *against* The HEIRS of LERMONT of Balcomy, and MR WILLIAM GORDON, Advocate.

A messenger's execution being quarrelled, because he was deprived, and the deprivation published at the market cross of Edinburgh, it being for no malversation, but deficiency in pointing the Lyon's dues, and he being still habite and repute a messenger; the Lords repelled the objection.

MR MARK LERMONT, advocate, against the Heirs of Lermont of Balcomy, and Mr William Gordon Advocate, was reported by me.—It was a process of roup and sale of these lands as being bankrupt.—*Alleged*, The execution of the summons was null, being by one Sibbald a messenger deprived, and his sentence published at the market-cross of Edinburgh.—*Answered*, His deprivation not being for malversation in his office, but only for not payment of some annual dues they owe the Lord Lyon, this cannot infer any incapacity to serve the lieges; *2do*, Whatever was the cause of his deprivation, it is enough to sustain his execution, that he continued notwithstanding to act, and was *tentus, habitus et reputatus* a messenger, according to the decision in the case of Barbarius Philippus, *L. 3. D. de officio prætor.*—THE LORDS repelled this objection, and sustained the execution notwithstanding thereof.—*2do, Alleged*, It is still null, because it is offered to be proven, that the messenger, at the time of delivering the copy, wanted the summons, the warrant thereof; and being required by Mr William Hogg, the defender's advocate, to show his warrant, he refused the same.—*Answered, imo*, The messenger's oath anent his having the warrant amongst with him cannot prejudice the party, unless they offered to im-

prove it ; *2do*, Mr Hogg's calling for it *non relevat*, the messenger being obliged to show it to none but the parties ; *3tio*, It is enough for the messenger that he saw the summons under the King's signet, and copied his execution of it ; for where there are 30 or 40 defenders dwelling *per omnes regni angulos*, it is impossible for one messenger to cite them all ; therefore four or five are employed, and the constant practice is, that though all of them have seen the warrant, yet one of them who has most to cite has the summons alongst with him ; and if this were sufficient to cast messenger's executions, it would endanger many diligences ; and though it may be necessary to have the warrant in hornings and captions, yet not in ordinary processes.—*Replied*, This inconvenience is easily remedied, by taking more copies of the summons from the signet ; and it is most unwarrantable in messengers to give copies of their executions, except they have their warrant in their custody to show, if it be called for.—THE LORDS found the messenger not obliged to show his warrant to third parties, not defenders, and that law presumed he had it on him, unless the contrary were proven.—Then it was *alleged*, The active title of this process was not sufficient, being only an infestment of annualrent which is but a servitude, whereas none can pursue a sale but a creditor having a right of property ; *2do*, It ought to be an infestment over the whole subject, which this is not, but only partial ; *3tio*, The progress is not connected.—*Answered*, All the act of Parliament in 1681 requires, is only, that sales be pursued by creditors having a real right, which agrees to an annualrenter as well as any other ; and it was so sustained to Mr William Monypenny pursuing for the roup of Nicolson.—THE LORDS repelled the defence in respect of the answer.—Then *alleged*, It could not sell, because he had Downie and Morton's apprisings both expired.—*Answered*, The first was reduced, and the second stated in the decret of ranking for its sums, which was inconsistent with its carrying the property ; though a creditor may use it both the ways.—THE LORDS thought the expiration not being declared, the appriser might protest to have his right reserved, but it could not stop the roup *hoc loco* ; being *processus executivus et iudicium maxime summarium*. See RANKING and SALE. See TITLE to PURSUE,

*Fol. Dic. v. 1. p. 201. Fountainball, v. 2. p. 58.*

1732. February 18. HUNTER against MONTGOMERY of Peanstonhall.

No 7.

A NULLITY objected to an execution of poinding was sustained, viz. that the poinding was performed, and the execution thereof subscribed by a person, who was, by the Lyon Office, deprived from being a messenger at arms, and his deprivation intimated or advertised in the public news prints, prior to the poinding. See This case *voce* DEATH. See APPENDIX.

*Fol. Dic. v. 1. p. 201.*