

1628. February 1. L. HALKERTON *against* KADIE and GRIEVES.

No 3.

A poiding may bestayed, either by a party pretending to have right to the goods, and offering to make faith thereon, or by a landlord for his hypothec, if security is not given for his rent; but these allegiances must be made at the time of stopping the poiding, otherwise they will not defend against the deforcement.

IN an action of deforcement, L. Halkerton *contra* Kadie and Grieves, tenants to the L. Benholm; THE LORDS sustained a bond of L. 80 of principal sum, and 40 merks of penalty, albeit only subscribed by one notary, and found it not to be a matter of importance, which required to be subscribed by two notaries, albeit the penalty, counted with the principal sum, made it to exceed L. 100; seeing they had respect only to the principal sum of the bond, and the penalty was but an accessory obligation; and because the poiding deduced against the debtor of this bond, for the execution whereof this deforcement was pursued, was begun to be executed before the rising of the sun, as the defender alleged, whereby he *contended* that act to be unlawful, and that therefore he might justly impede the same; albeit at the time when the impediment was made, the pursuer *answered*, That the sun was up and risen; at which time he *replied*, It was not lawful to make a deforcement, although the act of the execution and poiding was begun before the sun rising, which poiding was deduced in the month of June. This exception, nevertheless, was found relevant; for they found, That as no judge could begin and enter to sit in judgment before lawful time of day, and before the rising of the sun, no more could execution be made by officers upon sentences at such times; also they found, That deforcements could not be elided by any allegiance, proverting the goods poided to pertain to another person than to the debtor from whom they were poided, except that either that person's self, to whom they were alleged to pertain, or some other in their name, had compeared at the poiding, either upon the ground, or at some other time, before the act was complete and ended, and offered to make faith that the goods pertained to the other person; which being done, they might have stayed the poiding without danger of deforcement, otherwise not; for the offering to prove against the pursuit of deforcement, that the goods pertained to another, without the offering to make faith at that time of the poiding, was not sustained as relevant to purge the deforcement.—Also the LORDS found that allegiance not relevant to stay deforcement, viz. that the defenders, being servants to L. Benholm their master, who was heritor of the land out of the which the goods were poided, might lawfully stop the poiding for security of their master's farm, addebted for that year to him, by the debtor of that sum for which the poiding was executed, and which debtor was tenant to him also, and in which the master would have preference for his farm before other creditors. This allegiance was repelled; because, at the time of the poiding, and staying thereof, neither the master nor any other in his name, made mention of that cause of the stopping of the poiding, which, if it had been done, the party might have offered surety for the master's satisfaction, and so proceeded to his execution; and if that security had not been granted, the poiding might have been impeded without danger of

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.