

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.
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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