

possession by the pursuer's sister ten years before her death, and the defender, several years after her death.

The Lords found the pursuer's answer relevant, *viz.* that this necklace was in his mother's possession the time of her death; unless the defender offer to prove that the pursuer's sister wore this necklace before her mother's death, or the sickness whereof she died: at which time, no gift or legacy without writ were sufficient; seeing the necklace, by the acknowledgment of both parties, exceeded £100 Scots.

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1678. *July 20.* ALEXANDER FALCONER *against* JAMES DUMBAR.

ALEXANDER Falconer having employed James Dumbar, messenger, to execute a caption against the Earl of Morton,—the Lords sustained this defence, That the messenger was resisted after he had touched the Earl with his wand; the Earl and several others having drawn their swords, and stood in that posture till a warrant came from some of the Lords to sist execution: and also this reply, That the pursuer having required the messenger to execute his office; and, if he would not, having required his caption to be executed by another messenger, who was present, and offered to put it in execution, and was assisted with sufficient force to that effect.

The defender proved, that after he had touched the Earl, and commanded him to prison, in the king's name, and took him by the arm, to lift him from his chair, the Earl and several others drew their swords, and continued in that posture till the stop came.

The pursuer also proved, that he required the caption; and that another present offered to put it in execution; and that the messengers had two town-officers and ten more to assist, Falconer himself being present: and that the messenger at last gave the letters to the other messenger; but the assistance were gone. Whereupon, the question arose, whether the messenger should be decerned in the sum or not; seeing he either protracted till the stop came, or failed in his duty, having sufficient assistance; but the defender proved, that neither the town-officers, nor any of the assisters, had arms.

The Lords found the resistances proven; but found, that neither the defender nor the other messenger had sufficient assistance against armed men with drawn swords, the messenger and assistance having no arms: and that the creditor being present, might have called to the magistrates of Edinburgh for assistance of their halberts or guards; which the messenger had been obliged to do, if the party had not been present: therefore they assoilyied the messenger.

*Vol. II, Page 638.*

1678. *July 26.* GORDON of SETON *against* CRUICKSHANK.

GORDON of Seton having raised a reduction of a decret-arbitral betwixt him and Cruickshank, as *ultra vires*, being pronounced after the day within which