

of, proving, by the arbiters' oaths, that they did examine the witnesses in the instrument bearing the promise, upon oath, and that they did prove the promise, or that the party did acknowledge the same before the arbiters.

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1678. *July 2.*

ALEXANDER YOUNG, Supplicant.

ALEXANDER Young gave in a bill of suspension, bearing, That he had a protection from the King, upon payment of annualrents; and that he offered the annualrent to the messenger, and yet he put him in prison by caption: and offered yet the annualrent, and craved liberty.

The Lords refused the bill, in respect that the protection being conditional, he paying his annualrents, that condition not being fulfilled before incarceration, the protection had no effect; neither was the messenger a competent judge to cognosce upon annualrents, or receive the same; nor did this party produce a discharge of the last term's annualrent; and, therefore, the Lords would not suspend the principal sum, upon consignation of the annualrent, without other reasons against the principal sum.

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1678. *July 4.* CAPTAIN HUME *against* ANNA LIVINGSTON.

CAPTAIN Hume, having confirmed himself executor to his mother, and confirmed a necklace of pearl, pursues Anna Livingston, and John Acheson her husband, for delivery thereof.

The defender ALLEGED, Absolvitor; because, in moveables, property is presumed from possession; and none are put further to instruct their author's right or their own. *Ita est*, the defender hath possessed this necklace for nine or ten years.

It was answered for the pursuer, That, albeit possession infer a right of property in moveables, yet that is but presumptive, and admits of contrary probation by the possessor's oath; or otherwise, by condescending how the proprietor ceased to possess, either by stealing, straying, or by the death of the proprietor; as, in this case, the pursuer, being a soldier abroad, offers to prove that this necklace was in his mother's possession in the time of his mother's sickness whereof she died, and so could not be transmitted by any but by an executor confirmed to her. And, albeit the pursuer, being absent when his mother died, suffered his sister, who was with her mother when she died, to keep this necklace till she died; at which time the defender, being her relation, and with her, got the necklace in her hands; but neither his sister nor the defender could have any right thereto.

It was REPLIED, That the defender's sister got this necklace in gift from her mother, and did wear the same in her mother's life; and, therefore, seeing the sister might have gifted the same, the defender is obliged to instruct no farther than possession: and yet, *ex abundante*, she is content to depone she got the same from the pursuer's sister; which is sufficient to fortify the presumption of

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.

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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