

1680. *December 10.* GEORGE DRUMMOND *against* JAMES DUMBAR.

GEORGE Drummond pursues James Dumbar, messenger, upon this ground, That he had delivered to him a caption to be executed against the Laird of Dundas, and that he had taken Dundas, having the caption; and, at his incarceration in the tolbooth of Edinburgh, had set down, in the book of the tolbooth, that he delivered Dundas as prisoner upon a warrant of the council, and upon the pursuer's caption. Yet Dundas having addressed to the council for liberty, they granted the same; so that, if he were incarcerated upon no other account but their warrant, and appointed the same to be inquired by the tolbooth book. Wherein Dumbar's incarceration upon the pursuer's caption being found, Dumbar was examined, and gave in his declaration in writ,—That he had taken Dundas only upon the council's warrant, whereupon Dundas was liberated. Which being false, and he malversant in his office, and by his means the prisoner escaping, he ought to be liable for the debt.

The defender ALLEGED, *1mo.* That he had gotten no money. *2do.* That he had not promised to execute the caption. *3tio.* That his declaration to the council was true; for albeit, when he took Dundas, he had the pursuer's caption upon him, and another of his brother's, yet, having but five persons with him, and many appearing about Dundas's house, he durst not venture, for enforcement, to produce his brother's or this pursuer's caption, but only the council's order, upon which only Dundas would yield himself.

The pursuer ANSWERED, That a messenger's acceptance of a caption to execute was a sufficient mandate to require his diligence. And that it was a frivolous and false pretence that he took Dundas only by the council's order; for, when he was so taken, he might have declared him his prisoner by virtue of these captions. Likeas, he did book him as prisoner upon the pursuer's caption, and did not declare to the council, as he ought, that he had booked him as prisoner by virtue of that caption.

The Lords found the libel relevant, and repelled the defences.

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1680. *December 10.* The LORD BALMERINO *against* The EARL of LOTHIAN.

THE Lord Balmerino,—having filled up the name of John Elphingston in a bond subscribed by the deceased Earl of Lothian, *in anno 1653*,—Lothian suspends, and raises reduction upon these reasons:—*1mo.* That this bond was a defective null paper, blank in the sum, wherein *twenty thousand merks* was filled up, with a distinct hand from the writer of the body, not designed, before the subscription, as filler up; likewise the creditor's name was blank; the lands, where infestment and security were to be taken, was blank; the names and designations of the witnesses were blank: and found in the custody of Sir Thomas Nicolson, advocate, who tested upon all other sums, without mention of this. So Balmerino had no title to it, nor any other person, unless Sir Thomas had filled up and perfected it, and declared to whose behoof it was, and on what terms it was in his hand; which not being done, though Sir Thomas deceased three years