

REPLIED for the pursuer,—He hath prosecuted an action of adherence as far as is necessary to show that his wife's abandoning her family was irregular and unlawful ; having obtained an interlocutor before the Commissaries, sustaining process, and repelling the defence proponed against it. And any decret would be of no effect ; since he could expect little from the care and affection of a wife forced home *obtorto collo*, or by caption, or such legal diligence. But if those who encourage her in her impiety were deterred from it, by feeling the weight of the law, perhaps she might be brought to a better temper of mind. It is not controverted, but that in case the wife could give good and sufficient reasons for her non-adherence, and such as could warrant her desertion, this process against her father would be elided ; but then, these grounds, or reasons for her desertion ought here to be repeated, by way of defence, to exculpate him. Especially considering that there is no manner of connexion, or necessary dependence betwixt this process and that of adherence. They have quite different conclusions ; proceeded upon different grounds, and against different parties. Whatever is done in the process of adherence will not be *res judicata* against this defender. And suppose the pursuer were insisting upon the grounds of adherence, and his wife should offer to adhere, then there is an end of that process : but still the conclusion against her father would be good now, after he hath had an injurious accession to her desertion for the space of several years.

DUPLIED for the defender,—Since the whole imaginary relevancy against the defender lies upon his daughter being a wilful deserter, she must first be convicted of her being so before the proper judicature, by an extracted decret, and her refusing to return notwithstanding. And to oblige the defender to repeat here the grounds why she deserted, were directly to bring the libel for new adherence before the Lords in the first instance, without having the proper contradictor in the field. For, by proponing defences upon the wife's grounds of living separately, the whole question, whether she ought to live separately or not, comes to be determined ; and the Lords might give sentence against a person for entertaining a deserting wife, who yet, in the process of adherence, might be found thereafter to have had just ground to desert.

The Lords stopped procedure in the process against the defender for the pretended damages till the process of adherence before the Commissaries should be determined.

*MS. page 59.*

1714. *June 17.* The EARL OF WINTOUN, *against* Mr. WILLIAM HAY of Drumelzier, and JAMES FINLAY, his Groom.

GEORGE, Earl of Wintoun, raised an action of deforcement *ad civilem effectum*, for damages against Mr. William Hay of Drumelzier, and James Finlay, his servant ; libelling upon the acts of Parliament touching that crime ; and subsuming that the defenders were guilty thereof, in so far as the said James Finlay being legally apprehended by James Calder, messenger at Whittingham, upon letters of second diligence or caption, for his not compearing to depone as a witness in a process at the Earl's instance against the said Drumelzier and others, and

Finlay having desired the liberty to acquaint his master therewith, and they having gone along with him to Drumelzier's chamber, he in a threatening manner said, that he would not let his servant go along with the messenger; who, endeavouring to take his prisoner along with him, when they were near the close, the said James Finlay and Drumelzier's other servants fell upon the messenger, and did beat and bruise him, and thereby rescued Finlay out of his hands; upon which the messenger broke his wand of peace, and protested that Drumelzier, Finlay, and others, assisting to the deforcement, should be liable to the pains of law.

ANSWERED for Drumelzier,—1. Though it should be proven that he said he would not let the prisoner go, that is not relevant to infer a deforcement against him; because he being up stairs in his own chamber, it is not insinuated, that during the whole time, Drumelzier did so much as look out at the window, or in the least encourage or influence his servants to the facts libelled. And the words libelled might admit of a favourable construction in the present case, where the execution of deforcement bears, that a bond of presentation was offered. So that the words could not bear the sense of a simple and absolute refusal, but only qualified, that he would not let his servant go with the messenger, because he had offered an equivalent, viz. a bond of presentation which secured the interest of all parties concerned; for as all the effect of the letters of second diligence was only to keep the witness in custody till he should depone; and being in the vacation time, Drumelzier could not want the use of his servant for three months. So the civil conclusion of this action being only reparation of damages, none can be qualified here, because Finlay did depone in obedience to the will of the letters. 2. The only *medium concludendi* against Drumelzier, being *nuda emissio verborum*, the same cannot be proved by witnesses.

REPLIED for the pursuer,—All being peaceable when the messenger entered upon the execution of his office, and the prisoner taken without the least resistance; so soon as Drumelzier declared that the prisoner should not go along with the messenger, the servants of the family set about executing his will, and rescued the prisoner. So that here, as in all other criminal cases, *initium negotii est inspiciendum*; and it has always been sustained as a qualification of assistance, art and part, where a person having power to hinder or forbid the commission of a crime, being present, is silent, and does nothing to the hindrance of it; *qui non prohibet cum, prohibere potest, fecisse videtur*. So, 23d February 1667, *L. Rentoun* against *Lamertoun*, a person was found liable for the value of certain woods that his father was present at the cutting of, although he neither cut himself nor gave orders for it. And in a late case in the Justiciary Court, at the instance of the Procurator for the church against Dugud and others, a magistrate's being present at the resisting of a minister's preaching in Bruntisland, and not forbidding, or using his endeavours to quell the mob, was found a sufficient ground of ditty against him. Now Drumelzier's power in his own family or his servants, is at least equal to that of the civil magistrate. Again, after the deforcement and the prisoner's escape, Drumelzier kept these persons in his service; which being conjoined with the former threat that the prisoner should not go, and his not interposing to hinder the riot and escape, is a manifest *indicium* of his being assistant art and part in all this matter; and ought to be sustained, where the conclusion is only *ad pœnam pecuniariam*. And though the offer of a bond of presentation might

have been a reason of suspension, it can never defend against the deforcement : for there was no warrant in the letters to accept of any such bond, but only to incarcerate. Nor can any man stop execution upon pretence of injustice, which can easily be redressed by suspension or otherwise ; seeing private persons are not to be judges in their own cases *et non est singulis concedendum quod per magistratum fieri debet*. 2. Nothing is more known in law than that in cases of a criminal nature, emission of words is probable by witnesses. So, 18th *February*, 1672, a messenger, citing the Earl of Nithsdale, at the instance of some of his feuars, being beat by the Earl's servants ; the libel of command, Ratihibition, and direction, was sustained against the Earl even when he himself was not present. And if it were not so, the greatest villany might be committed *impune*, by command and hounding out ; since it is not ordinary to give writ in such cases, where a great deal of caution and secrecy is used.

The Lords found the libel of deforcement against Drumelzier not relevant, and therefore assoilyied him. *MS. page 61.*

1714. *July 2.* MARGARET TOD, eldest daughter to the deceased OLIPHER TOD, Shipmaster in Leith, and CAPTAIN PATRICK BAPTIE, Shipmaster there, her Husband, for his interest, *against* OLIPHER TOD, her Brother, and his Curators.

OLIPHER TOD, Shipmaster in Leith, by his disposition, dated 25th August, 1710, assigned 6000 merks to Olipher his son, 5000 merks to Margaret, his eldest daughter, 4000 merks to Helen, his second daughter, and 2000 merks to each of his two youngest daughters ; and by a general clause, assigned in favour of his son and daughters, equally and proportionally among them, all and sundry other sums, goods, gear, &c. that should be resting to him the time of his decease. Thereafter, 7th *April*, 1711, he writ from London to Robert Tod, merchant in Edinburgh, whom, with other friends, he had appointed tutors and curators to his children, a letter containing these words: " There will be little to add to the former testament left with you ; only I think Olipher may be allowed L2000 out of the remanent stock, and the rest divided amongst them equally, above the proportions nominated.—So I pray the Lord may give them grace," &c. After the father's death, Margaret Tod, and Captain Baptie, her husband, pursue Olipher Tod her brother, and his curators, to make payment of the provision. In which process the meaning of the father's letter aforesaid came to be controverted.

The son contended that the said letter writ by way of codicil to the uncle, entitled him not only to L2000 of the remanent stock as a *præcipuum*, but also to an equal share of what was, with the rest of the children. Because, *1mo*, the father appointed to get the foresaid L2000 ; and ordered the rest to be divided amongst them, that is among them equally ; of which the son was a principal one, being heir to his father. *2do*, If there were any dubiety in the word *them*, the same is taken away by the immediately subsequent clause, where the father prays for grace to them ; from which prayer the son could not be understood excluded : and therefore he must be understood also included in *them*, in the former clause.