

The pursuer ANSWERED, That it is a proper part of the messenger's office to give executions, not only bearing the charge, but also the circumstances of the place, and condition of the Sheriff and the rebel; which, therefore, is probative and valid unless it be improven; and the messenger being *functus officio*, his oath is not competent in prejudice thereof. Nor could any such promise be effectual against the party at whose instance the caption was truly executed; and the messenger might have been compelled to give the executions, notwithstanding of any promise to the contrary. Neither is the defence relevant, that the Sheriff had not sufficiency of force; but he ought to have attacked the rebel; and nothing could exoner him but an actual force, *vi majori*.

The Lords repelled the defences, and decerned against the Sheriff.

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1680. *January 27.* AGNES SANDILANDS *against* RACHEL SANDILANDS.

BAILIE Sandilands, in the contract of marriage of his daughter, Agnes Sandilands, provides her with a tocher; and the contract contains this clause, That she shall also be a bairn of the house, and have her share with the other bairns of the family. And, in the contract of Rachel Sandilands, he contracts with her a tocher, which she accepts, in full satisfaction of her portion natural and bairn's part of gear, and all that she can succeed to by the decease of her father, any manner of way. The bailie having died intestate, Agnes and Rachel contend, before the commissaries, for preference,—who should be executor dative; and the commissaries did prefer Agnes, and did exclude Rachel, in respect of the foresaid clauses in her contract of marriage. Rachel raiseth reduction, on this reason:—That the commissaries committed iniquity in excluding her; because where there are more co-heirs or bairns, if all of them should accept tochers in full satisfaction of all they could succeed to by their father's death, that would exclude any of them to succeed, either in heritage or moveables; because, it being a clause in their father's favours, renouncing their interest to him, it returns back to them by his death. For none would pretend that his succession would thereby become *nullius*, or as *bona vacantia* to belong to the king; nor could it belong to any other relation or agnate of the father, seeing the further degree can never succeed while there is a nearer. And, therefore, Rachel's acceptance, “in satisfaction of her,” &c. though it had borne an express renunciation of her father's succession, it could operate no more, but that her father might have freely disposed by nomination, assignation, or legacy, of his dead's part. But, not having so done, Rachel's part must return to her; especially seeing Agnes returns to be a bairn of the house with the other bairns, which must bring in Rachel, there being no other bairn but these two: and, though there were others, yet Agnes, being a bairn, could only give her right to the bairn's part, but not to [the] dead's part; from which either party is excluded by the tocher received.

It was ANSWERED for Agnes, That the reasons of reduction are nowise relevant; for, though it be true, that, where all the children renounce their interest in the father's succession, he not having disposed thereof, it returns to them all,—yet that holds not where some renounce, and others not; for then the re-

nouncer's share accresces to those who renounce not, as in this case. And albeit, at the defunct's decease, there were no bairns, beside the heir, but these two; yet, the time of Agnes her contract, there were other bairns who died before the father. And the clause in Agnes's favours, "to be a bairn in the house," by the conception thereof, extends not only to the bairn's part, but to the dead's part; and, therefore, Rachel's renunciation excludes her, and makes the whole executry to befall to Agnes.

The Lords sustained the confirmation of Agnes; and found, that by the acceptance of the tocher in Rachel's contract, "in full satisfaction," &c.—not being in Agnes's contract, but Agnes being provided to be a bairn in the house, and no relict having survived,—that the whole executry of the defunct accresced to Agnes.

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1680. *January 28.* PHILIP VAN PORTAN and SANDILANDS *against* CAPTAIN ANDREW DICK.

PHILIP Van Portan pursues Captain Andrew Dick, for certain merchant ware, which was robbed at sea from him by Captain Martine, and intromitted with by Captain Dick.

The defender alleged Absolvitor; because he bought the goods *bona fide* from Martine, and did not know that they were taken in piracy.

It was REPLIED for the pursuer, *1mo.* That stealth or robbery are *vitia realia*, and so give interest, to the party injured, to recover his goods, *rei vindicatione*, from any intromitter or haver.

It was DUPLIED for the defender, that *rei vindicatio* hath only effect against the present haver, *aut qui dolo desiit possidere*.

It was TRIPLIED for the pursuer, That *vindicatio* takes not only effect against the present haver, but against any who had the same, *in quantum sunt lucrati*; and, therefore, Captain Dick is liable for what more he got than he gave. *2do.* He is liable for the whole value, because he was accessory to the piracy, by resetting goods from a privateer, with whom he could make no bargain *bona fide*; because, by the law of nations, and the custom of all Admiralties, buying goods from a privateer is prohibited, till they be declared prize; and Captain Dick, by his oath, acknowledged that Martine told him these were prize-goods.

The Lords found it relevant, That these goods were robbed at sea, and were not declared prize, to make the defender liable for restitution of what he had in his possession the time of the citation, and for what he made profit of, which he had disposed of before the citation. And ordained either party to adduce evidences of the neighbouring Admiralties, for clearing the custom,—whether it be unwarrantable to buy any goods from privateers, not only that are in ships taken prize by them, but that are in their caping frigate, until the adjudication pass; to the effect, that, if that custom shall be proven, Captain Dick may be liable for the whole value: for there was produced the late treaty of Breda, in which there was an article to that purpose, but did not sufficiently instruct it to be the common custom of nations. And it was not found sufficient to prove that these goods were taken in piracy by Martine,—that both he and Captain Dick