

malversed in his office, and whether he should be deprived; and he and his cautioner had incurred and should be liable to the pain aforesaid; but as to the civil action against the cautioner, there might be a good ground of action against the cautioner, upon the act of caution before the competent judge, but the Lyon, being *judex pedaneus*, was not judge of actions of that nature and consequence, in respect they may be of great difficulty and importance; for if the cautioner should be pursued for payment of the debt, being supposed to be 1000 merks, upon pretence of the malversation of the officer, and that he had not done his duty in pointing and comprising; it were hard and dangerous, that the Lyon and his brethren should be judges in a matter of that consequence; and it will not follow, that because the messenger had not done his duty in a caption or comprising, that his cautioner should be liable for the debt as damage and interest; seeing the caption and comprising might have been ineffectual, and the creditor could not thereby have gotten payment; and it appears by the said act of Parliament, that the Lyon is only judge to the penal conclusion of deprivation of the officer, and payment of the pain.

THE LORDS notwithstanding found the Lyon Judge competent to the action against the cautioner, for damage and interest; *me inter minimos reclamante*.

Reporter, *Newbyth*.

Clerk, *Gibson*.

Fol. Dic. v. 1. p. 509. Dirleton, No 30. p. 13.

1666. January 19.

JOHN and JOSEPH HERIOTS *against* JAMES FLEMING Messenger, and Cautioners.

JOHN and Joseph Heriots having obtained decret before the Lyon, against James Fleming messenger, and his cautioners, depriving the messenger upon malversation; in so far, as being employed to execute a caption, he had taken the debtor, and had denounced, and apprized his lands, and suffered the debtor to escape, and would not subscribe the decret of apprizing, whereupon he was deprived, and decerned to pay 500 merks, conform to the act of Parliament 1587, cap. 46; and both he, and his cautioners were decerned to pay the sum, as damage, and interest, to the pursuer. They suspend, and *allege*, that the decret is null, in so far as it was pronounced by the Lord Lyon, without the concurrence of the heralds, which is required by the said act. *2do*, Albeit the Lyon be empowered to deprive messengers by the said act, yet their cautioners are not under his jurisdiction, nor the damage, and interest of parties by messengers' malversation, which is only competent to the Judge ordinary. It was *answered* to the *first*, Oppones the decret wherein the cautioners appeared, and so acknowledged the Lyon's jurisdiction as he then sat, likeas the decret itself bears to be by the Lyon, with the heralds. To the *second*, The cautioners having enacted themselves in the Lyon's books, they have made

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Found, that the Lyon was not competent to judge in an action of damages against a messenger and his cautioner.

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themselves liable, and for the damages, they are consequent to every jurisdiction; and the Lyons have been constantly in use to determine the same on this point.

THE LORDS were of different judgments, for they thought, that by the act of Parliament, the Lyon had no such power, but as to long custom, some thought it was sufficient to give that power, and there was no inconveniency, seeing his decreets might be suspended. Others thought that custom being clandestine, and without the contradiction of parties, who might voluntarily submit themselves to any authority, could not be sufficient.

THE LORDS ordained, before answer, the Lyon's books to be produced, to see if there were such a custom, before it were decided, and how far that custom would work.

1673. June 27.

JOHN and Joseph Heriots having employed one Fleming a messenger for apprehending James Heriot with caption, for not fulfilling of a decree-arbitral, who having taken him, suffered him to escape; and thereupon they pursued the messenger and cautioners before the Lyon, and obtained decret, depriving the messenger for his malversation, and the messenger to pay 500 merks of penalty, conform to his bond of cautionry, whereby he became obliged for the messenger for faithful administration of his trust, under the penalty of 500 merks, and likewise to pay the whole sums contained in the decree-arbitral, as the damage sustained by the party, in not executing the caption. The cautioner suspended on this reason, that the Lyon was not judge competent to determine the damage of parties by the default of messengers, which is a process of very great importance; and the old and late acts of Parliament establishing the Lyon's Courts, gives him only power to deprive messengers, and to decern their cautioners to pay their penalties in their bond of caution, without any mention of the damage of parties. It was *answered*, That there is a particular unprinted act produced, ratifying the privileges of the Lyon, and including a power to determine the damages of parties. It was *replied*, that the said ratification, not being a public printed act, but past of course amongst the ratifications unread, was *salvo jure*, especially seeing the last act in the last Session of Parliament gives no such power, but only what the Lyon had by law or custom before.

THE LORDS having ordained the Lyon to produce his books, to instruct what hath been the custom of the Lyon before, they found no such custom proved thereby, and had no regard to the private ratification, and found the two public acts gave the Lyon no power to determine the damages of parties, and therefore reduced the decret.

Fol. Dic. v. 1. p. 509. Stair, v. 1. p. 339. & v. 2. p. 195.

. Gosford reports this case :

1673. *June 27.*—IN a suspension of a decret of the Lord Lyon, King at Arms, against Fleming, who was cautioner for a messenger, who had malversed in his office ; for payment, not only of the penalty of the bond, but of a certain sum of damage and interest to the party ; upon this reason, that the Lyon was not Judge competent as to damage and interest ; but only as to the case of malversation, he might deprive the messenger, and fine him and his cautioners in the penalty of the bond, which ordinarily does not exceed 500 merks. It was *answered*, that by the 46th act of King James VI. Parl. 11. the Lyons have power to hold courts upon all officers of arms, and their cautioners, and to punish them in case they malverse in their office ; and all civil Magistrates are to concur with him to see his acts put in execution, which necessarily implies that they may cognosce of the prejudice the parties sustain, who employ them, likeas they have been in use to decide for damage sustained. THE LORDS, after inspection of the books, and registers of their decreets, bearing only that they had been in use to decern some small sum for expenses of plea, did find the reason of suspension relevant ; seeing the damage of the creditor amounting to no less than the whole sums of money contained in the bonds ; which may be of a great value, the liquidation thereof being the ground of a civil pursuit, should pertain to the civil judge ; whereas the Lyon's office is to punish for a crime.

Gosford, MS. No 602: p. 345.

1668. *February 13.*

ANDREW GREIRSON *against* PATRICK M'ILROY

ANDREW GREIRSON having employed Patrick M'Ilroy messenger, to use inhibition and arrestment against Sir James M'Dougal of Garthland, and having failed to make use thereof in time before he dispoed, did pursue him and — Houston of Cutreoch his cautioner, before the Lord Lyon, whereupon the said Patrick and his cautioner were decerned to make payment of 500 merks of penalty, and of the damage and interest sustained by the pursuer, to the value of the sums, whereupon the inhibition and arrestment should have been used. The messenger and his cautioner raise suspension and reduction, and insist upon this reason, that the decret is null, as a *non suo judice*, because albeit the Lyon be authorised by act of Parliament 1587, cap. 46. to take caution for messengers' discharge of their office, and upon default may summon messengers and their cautioners, and may deprive the messengers, and decern them and their cautioners in the pains and penalty for which they became cautioners, yet the Lyon is not warranted thereby to determine the damage of parties, through default of messengers, which may be of the greatest

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The Lyon competent to judge of deprivation of messengers, and the penalties in their bonds of caution ; but incompetent as to the damage of parties.