

1631. *July 26.* The MESSENGERS *against* The LYON.

No 354.

The Lyon may hold his courts where he pleases.

Though the messengers' charity box was appointed for the voluntary relief of their decayed brethren, the Lyon has right to oversee the employment of the money.

THE Messengers pursuing the Lyon, to hear him decerned to hold his courts in the tolbooth of Edinburgh, and to be discharged to convene them, and hold his courts in private houses, and also to be discharged to hinder them to elect their own box-masters to be nominated by them for keeping of the box containing the charitable supply, to be made by them and their brethren, for help of decayed messengers, their wives and children, and other such pious uses; seeing it was their own voluntary charity, which they might only appoint to be kept by such as they pleased to nominate themselves, and wherein no other had interest to intermeddle; for otherwise it might make that good intention and charitable work to cease;—the LORDS found, that the Lyon might convene the Messengers in any place before him, to answer in any private house, the place being specially designed by him in the copy of the summons and execution, to the which, and where he should summon them to compare; and that he was not holden to hold all his courts against them in the tolbooth of Edinburgh, seeing his predecessors Lyons have been in use to hold their courts in their clerk's chamber. And this was found, albeit some of the Lords were of opinion, that no Judge could hold courts, nor sit to do any judicial deed in private places, but in the place publicly destined to sit and judge; and also the LORDS found, that albeit the box of the messengers was appointed for their voluntary charitable help of their decayed brethren, yet that the Lyon had right to oversee the employment thereof; and therefore found, that the Messengers might leit and choose any six of their number to be box-masters, of whom the same being presented to the Lyon, he might choose any two he pleased to keep the said box; and which they found due to be done by the Lyon, albeit the box proceeded from their voluntary charity.

Clerk, *Scott.*

*Fol. Dic. v. 1. p. 509. Durie, p. 601.*

1666. *July 26.*

The LYON *against* ———

No 355.

The jurisdiction of the Lyon was sustained in an action against the cautioners of a messenger, for damage and interest, on account of the messenger's neglect of duty.

BY the act of Parliament James VI. Parliament 11. cap. 46. it is ordained, that officers of arms should find surety to the Lyon, for observation of their injunctions, under the pain of 500 merks, with the damage and interest of the party grieved by the malversation, negligence, or informality of the officer.

In a process between the Lyon and ———, it was controverted, whether the cautioner might be pursued before the Lyon for payment of the debt, as damage and interest, by reason of the malversation of the officer of arms in a pointing. It was *alleged*, that the Lyon was a criminal Judge, and most competent as to the question, whether the messenger had committed iniquity, and

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.