

1756. December 3.

AITKINSON *against* M'BEAN.

No 8.

IN a complaint against a messenger for neglecting or delaying to put a caption in execution, the Court found him liable for the debt, as the proper reparation to his employer for the damage occasioned by his neglect of duty.

*Sel. Dec.**** See this case, *voce* REPARATION.

1764. June 19.

CHARLES MITCHELL, Supplicant.

IN the sale of the estate of Girlsta in Zetland, an act was pronounced for proving the rental and value of the lands, and a commission granted for taking the proof, with letters of diligence directed to messengers at arms as usual, for citing the witnesses.

The estate under sale, though scarce yielding L. 100 Sterling of yearly rent, lies scattered through the islands of Zetland; and the tenants living at great distances from one another, are in number 250. There is at present but one messenger in Zetland; and as he would have by computation above 300 miles to travel by land and water before compleating his circuit, he declined the execution without being allowed several months, with the sum of L. 40 Sterling for his fee and expenses. This produced an application to the Court of Session at the instance of the creditors, praying an authority to employ Sheriff-officers to execute the diligence, who would perform the same expeditiously and at a very small expense; which, considering the circumstances of the case, was readily granted.

No 9.

Sheriff-officers were authorised by the Court to officiate as messengers in executing diligence against witnesses and havers in a sale.

*Fol. Dic. v. 4. p. 1. Sel. Dec. Fac. Col.**** This case is No 87. p. 7355, *voce* JURISDICTION.

1772. November 24.

ROBERT MUNRO *against* ALEXANDER MACPHERSON, Messenger.

BEFORE advising the merits of this complaint, the scope whereof will be understood from the judgment subjoined, the respondent, present at the bar, acknowledged that the fact set forth in his answers, viz. that he had not demanded the expenses from the complainer and his wife, but that he had received the same, on the solicitation of the debtor, was truly a mistake; for that he had demanded them, being ignorant that his doing so was contrary to law, having never heard of the Court's proceedings in the 1738, or of the act of sederunt then made. See No 5. p. 8889.

No 10.

No messenger shall exact fees from a person whom he is employed to apprehend upon a caption.

No 10. "THE LORDS find the complaint relevant and proved, and that the respondent is liable to repeat to the complainer the sum of L. 3 : 6 : 1 Sterling of expenses, illegally exacted by him; for which sum they decern against him; and also decern against him for the expenses of this complaint. But, in respect of the respondent's candid acknowledgment above mentioned, and his ignorance of the proceedings in the year 1738, and of the act of sederunt then made, the LORDS proceed against the respondent to no higher censure; and ordain this interlocutor to be recorded in the books of sederunt."

N. B. By the 4th article of the late injunctions issued by the Lyon King of Arms, with the advice of the Lords of Council and Session, in terms of act 127th, Parl. 1592, appointed to be observed by all messengers at arms within Scotland, in place of the old injunctions formerly established, "It is ordained, that no messenger, in executing diligence of any kind, shall exact, take, or receive, on his own account, from the person against whom such diligence is executed, or meant to be executed, any sum whatsoever, under any name or pretence whatsoever, as he shall be answerable in any court competent."

Act. *R. Sinclair.*

Alt. *B. W. M'Leod.*

Clerk, *Ross.*

Fol. Dic. v. 4. p. 1. Fac. Col. No 32. p. 86.

No 11. 1776. July 19. GILCHRIST against SUTHERLAND.

DECREE being given against a messenger and his cautioner for payment of a debt in a diligence which the former had repeatedly delayed to execute, notwithstanding of peremptory orders from his employer, it was urged in a suspension for the cautioner, that the creditor could qualify no damage, as the debtor remained still solvent. *Answered*, There is no necessity to qualify actual damage, it is enough that the messenger has not done his duty, which, if he had done, the debt, in all probability would have been paid. Another reason of suspension was, that the diligence was in the name of a company which was dissolved before it was issued, therefore there was no proper warrant. *Answered*, This is a matter that does not fall under the cognizance of a messenger, who must execute every diligence that is *ex facie* formal. THE LORDS found the letters orderly proceeded on. See APPENDIX.

Fol. Dic. v. 4. p. 2.

No 12. 1776. December 19. A. against B.

THE LORDS found, That a messenger was not entitled to take fees for executing diligence from a debtor. See APPENDIX.

Fol. Dic. v. 4. p. 1.