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moment and intricacy ; and would be of dangerous consequence to give the Lyon such jurisdiction over all the kingdom. The charger *answered*, that the messenger was unquestionably liable to the Lyon's jurisdiction, and that both he and the cautioner had made themselves liable thereto, by enacting themselves in the Lyon's books, and granting bond registerable therein ; and it would be great inconvenience to pursue messengers before the Lyon only for deprivation and penalty, and have need of another process for damage, and interest ; and that the Lyon has been accustomed to discern cautioners so before.

THE LORDS found the reason of reduction relevant, and turned the decret into a libel, but sustained the decret as to the penalty of 500 merks, in which the messenger was enacted, but not for the damage and interest, neither against the messenger nor cautioner.

Fol. Dic. v. 1. p. 509. Stair, v. 1. p. 522.

1765. January 21.

JOHN CAMPBELL-HOOK, Lyon King at Arms, and his Depute, *against* JOHN COPLAND and JOHN M'COLL.

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The Lyon by his decree deprived several messengers *de plano* ; upon the following grounds: *1mo*, That they had not attended the head-court ; *2do*, That they had not paid their bygone annuities ; *3tio*, That they had not compeared, in order to answer any complaint which might have been preferred against them, and to instruct that their cautioners were alive and solvent. The Lords found the decree irregular and void.

THE statute 1587, c. 46. appoints Lyon King at Arms to hold two courts, upon the 6th of May and 6th of November, yearly, ' for all complaintes to be maid to him, upon the default of officers in time cumming.'

For many years these courts had been little attended to. But, in 1763, Mr Campbell-Hook, Lyon King at Arms, resolved to hold a court, and intimated his resolution in the public newspapers, requiring all the messengers in Scotland to attend, for inspection of their books of executions, for inquiring into the situation of their cautioners, and for payment of their annual dues, being ten merks to the Lyon himself, and about half that sum to his clerk ; and *that* under pain of deprivation.

Many of the messengers attended at this court ; others did not ; and the Lyon deprived about fifty of them *de plano*, upon the following grounds ; *1mo*, That they had not attended the head-court ; *2do*, That they had not paid their bygone annuities ; *3tio*, That they had not compeared, in order to answer any complaint which might have been preferred against them, and to instruct that their cautioners were alive and solvent.

Most of these deprived messengers were re-admitted on their application ; but two of them continued to act as formerly without applying ; and, being charged on the decree, suspended it as contrary to law.

Pleaded for the Chargers ; The precise limits of the jurisdiction of almost every court are fixed, not by statute, but by custom. The Lyon-Court appears even to have been *introduced* in that manner. The first statute which mentions it is 1587, c. 46. It proceeds upon the recital, that a great number of messengers had entered into that office, in a confused and uncertain manner. It

restricts the number of messengers, including the Lyon and heralds, to 200 for all Scotland, and authorises such messengers as should be recommended by the Court of Session, after an inquiry by certain commissioners for each shire.

The statute also appoints caution to be taken from messengers, for observation of 'the injunctions contained in the end of this present act.'

These injunctions do not appear in the printed editions of the statutes, nor have they been discovered in the record. But it has been the immemorial practice to deliver a written copy of injunctions to every messenger at his admission, one article of which requires, 'That he present his book, containing his executions, to the Lyon King at Arms, upon ilk 6th day of May, and 6th day of November yearly,' under pain of deprivation.

A clause is likewise inserted in the bond of cautionry, for enforcing this attendance, and the payment of ten merks yearly to the Lyon, with the ordinary dues to the clerk; and consenting that failure in these articles shall be held to be a lawful cause of deprivation.

The act 1592, c. 127. renews the Lyon's power of depriving messengers, with advice of the Lords of Session; authorises him to exact caution; and ordains all judges to concur with him in executing the statutes in his favour. And there is an act of the Lyon-court, 28th June 1630, ascertaining the annual sum to be paid to the Lyon; and appointing it to be specified in the bonds of cautionry.

The act 1672, c. 21. declares, 'That the Lyon and his brethren heralds are judges in all such causes concerning the malversation of messengers in their office, and are to enjoy all other privileges belonging to their office, which are secured to them by the laws of this kingdom, and according to former practice.'

Upon these grounds, it was *pleaded*, That the annual dues were exigible in virtue of usage, sanctified by statute. That, as these trifling payments could not afford the expense of a process, so they were exigible in a summary manner, in terms of the clause in the cautionary bond.

And though, in the special cases mentioned in the statutes 1587 and 1592, the consent of the Lords of Session was made necessary, that is not to be extended to ordinary deprivations; the jurisdiction of the Lyon is founded on custom as well as statute, and many instances of deprivation, by his own authority, were pointed out from his books. These sentences have been respected by the Court of Session, and executions by messengers deprived by the Lyon found null, as in the case 18th February 1732, Hunter *contra* Montgomery, No 7. p. 3097.; *voce* CONSUETUDE. In other cases, indeed, the execution has been sustained, where the party had been in *bona fide*, and upon the principles of the law *Barbarius Philipus*, l. 3. *D. de Off. Præc.*

There may be a hardship in obliging messengers to attend the courts *personally*; but there is no hardship in their attending by a procurator; and the ad-

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vertisement in the newspapers was not intended to supply the want of citation. It was meant to put the messengers on their guard ; but there was no necessity for a citation, as they are bound to attendance upon the courts by statute and by custom, as well as by the express clause in the injunctions, and bond of cautionry.

Answered ; The only statutes respecting the jurisdiction of the Lyon-King at Arms, are those of 1587, 1592, 1672 ; and, except in one special case, none of them give him any power of depriving messengers. On the contrary, the two first require, that he shall proceed with the advice of the Court of Session ; and the last, which relates chiefly to his jurisdiction in matters concerning bearings armorial, contains only a general clause, and cannot extend his powers beyond the limits of the preceding statutes.

There is nothing in those statutes which can justify any of the grounds of deprivation resorted to in this case. There is no law, which obliges messengers to attend the Lyon's two head-courts. In the case, indeed, of a complaint against any particular messenger, relevantly laid, and executed upon a charge of fifteen days, the party complained on is bound, by the act 1587, to attend at the courts to be held upon the 6th of May, or 6th of November, and may be deprived by the sentence of the Lyon. But, in this case, there was no complaint against the suspenders ; nor, at any rate, could an advertisement in the newspapers be held as a proper service of such complaint.

The claim for the annuities in use to be exacted from messengers, cannot be supported upon the acts of the Lyon-court, which, had they been consented to by the whole body of messengers at the time, could go no farther than to bind those who consented to them. And no argument can be drawn from the form of the bonds of cautionry, or of the injunctions which the Lyon delivers to messengers ; for these, in so far as not supported by statute, are but so many usurpations of a power not founded in law ; a power of imposing a tax, which, by the principles of the constitution, is confined to the Legislature itself.

And as to the compulsitor by deprivation, which the Lyon has exercised for enforcing payment of those annuities, it seems to have been reprobated by the Supreme Court. For, in the only instance where the question appears to have occurred, the execution of a messenger was sustained, though he had been deprived by the Lyon, it being for no malversation, but for a deficiency in the payments demanded by the Lyon ; 11th July 1699, Learmonth *contra* Gordon, No 6. p. 3096.

“ THE LORDS found the decree of deprivation irregular and void ; and suspended the letters *simpliciter*.”

Reporter, *Kennet*.
G. F.

Act. *Lockhart, Cosmo Gordon*.

Alt. *Crosbie*.
Fac. Col. No 31. p. 250.