

1781. January 18.

WELSH *against* M'VEAGHS.

No 13.

Cautioner of
a messenger
only liable
for his actings
qua messenger.

JOHN SYME, messenger, was entrusted by Welsh with letters of homing and caption against one of his debtors. Instead of attaching the debtor's effects by pointing, the messenger received them from the debtor himself, sold them, by public roup, to the extent of the debt, and applied the proceeds to his own use. He became insolvent; and Welsh, the creditor, pursued M'Veagh's his cautioners, for the debt, who

Pleaded, In pointings, the office of a messenger is to appropriate the debtor's goods, to offer them to the debtor, upon payment of the debt to the creditor or his attorney, and, upon the debtor's not paying, to adjudge and deliver them to the creditor or his attorney. The creditor, or his agent, is, by the form of the diligence, supposed to be present to receive the money or the goods, and to take instruments thereon. Stair, book 4. tit. 47. § 32. 33; Office of a Messenger, p. 299. 315: And the messenger has neither the custody of the one nor of the other.

The defenders are cautioners for the messenger's faithful and exact performance of the duty of a messenger. Beyond that they have no concern. Had the creditor, in this case, attended personally, or employed an agent in due form; as the money was recovered from the debtor, it would have been delivered to him. Instead of doing so, he has employed the messenger as his agent. If the messenger has betrayed that trust, the creditor has himself only to blame.

This defence is clearly established by the statute 1587, cap. 46. defining the nature of the obligation imposed on the cautioners of a messenger. No security is there directed to be taken against embezzlements; although the species of malversation would have formed its most important object, if falling within the compass of the office. It provides solely against the improper execution of diligence. In like manner, the bond of cautionary lodged in the Lyon Court takes the securities bound "for the damage, interest, and expenses, which the lieges shall sustain through the negligence, fraudulent, or informal execution of the messenger."

Such being the nature of a messenger's duty, to which the obligation of his cautioner precisely corresponds, no practice of creditors entrusting messengers to levy money, can subject the cautioners beyond their bond. But the general custom is to send a writer along with the messenger, who acts as attorney for the creditors; so that the practice is likewise in favour of the defenders. It may be said, that the messenger ought to have executed the caption; and the cautioners being confessedly liable for the messenger's negligence will be subjected to the debt on that ground. The answer is, that the messenger having recovered payment of the debt, could not execute the caption.

Answered for the creditors, The statute 1587 requires security to be found "for the skaith, damage, and interest of parties grieved by the falshood, negli-

No 13. gence, or informality of the officer." The bond of cautionry bears, "that the officer shall leally, truly, and honestly, use and exerce the office of messenger." So far as the messenger did not execute the diligence of law, by poinding and imprisonment, he has neglected his duty; so far as he recovered a debt, in consequence of the diligence, and embezzled it, he has not honestly exercised his office, and his cautioners are therefore liable.

The *verba solemnia* in the execution of poindings do indeed seem to imply the presence of the creditor, or his attorney. But as this practice would be very inconvenient and expensive, it is scarcely ever followed. Accordingly, there is not a week in which messengers do not recover debts in consequence of ultimate diligence. If, by means of such subtle distinctions as the present, their cautioners could shake themselves loose from their obligation, the salutary regulation introduced by the statute 1587, for the security of creditors unacquainted with the character of the messengers they employ, would, in a great measure, be frustrated.

Neither is the trust conferred on the messenger, nor the risk to which his cautioners are subjected, greater in this case than in many others which fall within that department. Thus, if a messenger is employed in executing a caption, and allows the debtor to escape, or if he is directed to inhibit, and neglects it, Are not his cautioners bound to indemnify the party suffering?

"THE LORDS sustained the defences."

Lord Ordinary, *Stonefield*. Act. *James Boswell*. Alt. *Alexander Millar*. Clerk, *Campbell*.
C. *Fol. Dic. v. 4. p. 1. Fac. Col. No 16. p. 30.*

No 14.

1791. June 18.

ARCHER against LAW.

A messenger being employed to execute a caption against a brewer, whose residence was within the precincts of the Abbey, but who was not bankrupt, conceiving, that the debtor nevertheless enjoyed the benefit of the sanctuary, bethought himself of a device to bring him out of it, which was by writing a false citation at the instance of a fictitious creditor, summoning him to appear, on a certain day, before the Justices of Peace, which the debtor having accordingly obeyed, was apprehended by the messenger, and put in prison on a Saturday evening, where he remained till Monday. In a summary complaint, the LORDS were of opinion, That the device used by the messenger was illegal, and a prostitution of his office, and they found him liable in damages and expenses.

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

Cautioner for a Messenger; see CAUTIONER.

See APPENDIX.