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tion being now perished by the said Isobel Drum's death. *Answered*, The giving out of the extract was a mere mistake, upon the apprehension, that there was a decerniture against her, as well as the other defenders called, and the multitude of them put him to that confusion; and to have given an extract against her would have been a real crime and malversation, whereas the giving out the precept was a mere oversight *et culpa levis* at most; whereas Sir John truly lost his debt by not insisting against her, and taking her oath before she died, especially having discovered the mistake, and so had time enough to put her to her oath. *Replied*, It was impossible he could have brought her to depone, for if he had insisted to discuss the suspension, her answer was, you have no decret against me; and if he had insisted in the commissariot or other inferior courts, her defence was unanswerable,—the cause is suspended, and tabled before the Lords, and so I am not bound to answer here; so by your default I have lost the debt. THE LORDS were generally clear that the clerk was liable; but in regard it might alarm all the clerks of the several judicatories, they laid hold on a circumstance informed on, that Peder, at her suspending, had become cautioner for her in the suspension, which if true, is a clear evidence of his dole to obstruct the discussing, which *in eventu* would have terminated on himself; and therefore ordained that matter of fact to be first tried; and if true, all agreed to find him guilty to refund the sum, and repair the damage *cum omni causa*.

Fol. Dic. v. 2. p. 342. Fountainball, v. 2. p. 539.

1710. November 28. JAMES WOOD *against* ROBERT FULLARTON.

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A writer was employed to raise horning and caption. The messenger denounced before the elapse of six days. The debtor incarcerated on this erroneous charge recovered damages from the creditor, who was found entitled to relief from the writer.

JAMES WOOD having given to Mr Robert Fullarton, his agent, an executed horning at his instance, against William Mackie, in order to cause denounce him and raise a caption; Mr Fullarton put the horning and charge in the hands of Thomas Breakenrig, messenger, to denounce William Mackie, who did denounce before expiring of the days of the charge; and upon that denunciation, when registered, Mr Fullarton raised and signed a caption. James Wood being fined by the Lords in L. 20 Sterling, for imprisoning Mackie upon that unwarrantable caption; he complained to their Lordships, and craved that Mr Fullarton might be found liable to reimburse him of the fine.

Answered for Mr Fullarton; The law of nature and the civil law obligeth indeed to restitution where damage is occasioned *dolo malo* or by design; but here no dole or fault can be charged upon him. And albeit artificers *affectare non debent quod non intelligunt*; this is not to be extended to liberal sciences; otherwise a lawyer failing to propone a good defence that might have occurred to another, should be liable to make up the client's damages sustained through the omission; and Judges might be reached for damages, when their sentences fall to be reviewed and reduced; *2do*, That which gave rise to Mr Wood's

damages, was the fact of the messenger (a person held and reputed knowing in his office, a public officer whom the law hath entrusted for that end, and obliged to find surety to answer any demands upon him *ratione officii*) viz. the denunciation; which, having no obvious nullity *ex facie scripturæ*, and being duly registered, was a sufficient warrant to Mr Fullarton to raise a caption, without noticing the charge. And in a parallel case, Scot *contra* Banks, No 220. p. 6016, a messenger was found *in bona fide* to point, although the decret, upon which the letters proceeded, did not bear the person's name; *3tio*, *Et separatim*, seeing the messenger (whom Mr Fullarton had reason to presume to have executed his office faithfully) was the original occasion of Mr Wood's damages, through the wrong denunciation, he and his cautioner ought first to be discussed; Mr Fullarton, who had no accession to the executing of the denunciation, being at most but liable *subsidiarie*.

Replied for James Wood; He having put the horning in the hands of Mr Fullarton his agent, to raise a caption, and Mr Fullarton having employed such a messenger, and followed his faith implicitly, in raising the caption, without examining the charge and denunciation, both of which were his warrant, he was *in culpa lata, quæ dolo æquiparatur*, and must keep Mr Wood *indemnis*; either *ex contractu mandati*, as having accepted a mandate from him; or *ex contractu locati*, as having hired his pains to him. A lawyer's advice is not parallel to this case, for *consilii non fraudulenti nulla est obligatio*; and there is a difference betwixt giving advice and exercising a commissioned office. Again, writers to the signet are under other sorts of ties, as to writs presented to the Queen's signet and seals, concerning which the Lords do frequently inculcate injunctions upon them, than as to private writs and securities, drawn by them according to the agreement of parties. It cannot be pretended, that there is any such contract betwixt a judge and contending parties, as there is betwixt an agent and his client. Besides, whatever may be the instances of Judges and lawyers, *incommodum non solvit argumentum*; *2do*, It is not Mr Wood's concern to dispute the case betwixt Mr Fullarton, and the messenger, both being *in culpa*, and liable to him. The case of Scot and Banks, is nothing to the purpose, for there the messenger pointed exactly conform to the letters, and was not bound to seek any other warrant; whereas it is not every denunciation that warrants a caption, but only a due and orderly denunciation (as the stile bears) which plainly refers to the execution or charge; *3tio*, It is absurd to pretend, that the messenger must be first discussed; seeing Mr Wood hath directly nothing to do with the messenger, he employed only Mr Fullarton, who received the horning, and undertook to complete the diligence, whereof the denunciation is a part, and employed a messenger of his own choosing unknown to Mr Wood.

THE LORDS decerned Mr Fullarton to pay to James Wood L. 20 Sterling as damage paid by him to William Mackie.

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. Fountainhall reports this case :

1710. November 29.—One Mackie being debtor to James Wood merchant in Edinburgh, he gives the bond to Robert Fullarton writer to the signet, his ordinary doer and agent, to raise horning and caption thereon, who employs one Brackenrig a messenger, who gives Mackie the debtor a charge; and, either by mistake or ignorance, denounces him before the six days were expired, and gives it in to Mr John Mitchelson keeper of the register of hornings; and having got it marked, brings it back to Mr Fullarton, who thereon writes out a caption, wherein he expressly says, that Mackie was orderly and legally denounced rebel, and thereon Mackie is apprehended and imprisoned; but he discovering that he was denounced within the days of the charge, and the caption raised, he gives in a bill to the Lords, complaining of the riot and unwarrantableness of the denunciation, and consequently of the caption and imprisonment; which the Lords finding clearly proved, they fined Wood the creditor in L. 20 Sterling to Mackie, for his damages; but reserved action of relief against the messenger, the writer to the signet, and the register of the hornings. As to the first and his cautioner, there was no necessity, but the messenger was plainly liable and guilty for his malversation and ignorance; and as to the register keeper, there was as little ground to reach him, being no further concerned than to look to the denunciation. All the question arose as to Mr Fullarton the writer's accession; for whom it was *alleged*, That neither fraud nor design appeared in any thing he acted; for having delivered the horning to a messenger habit and repute knowing in his employment, who brought it back denounced and registered, he was obliged to notice no farther, but might warrantably raise a caption thereon; for *esto* he had omitted the three blasts of the horn, or not designed the witnesses, that can never make the writer culpable; for as the fox must pay his own skin, so he cannot be liable for misdemeanors of another office, but only when he fails in his own employment; and what if he had employed an advocate, who, by negligence, suffered a decret to go against his client, must he be answerable for his mismanagement! The consequence of this may go very deep, to ruin the most innocent persons; this defect being no part of the subject of his employment, but only the messenger's province, of whom only he ought to seek reparation of his damage; *et culpa suos tantum debet tenere auctores*. *Answered*, Neither fraud nor ignorance come here to be considered, but Mackie's prejudice, and your, the writer's culpable negligence, who, by the very form and stile of the caption wrote by your servant, assert he was orderly and legally denounced rebel, which, if you had but never so little perused the executions, you would have found a falsehood; besides, the plea was intimated to you, and you did not defend Wood, who was his ordinary agent and doer, and should not have ensnared him an ignorant merchant as to law points, but adverted to his dili-

gence that it might be legal. Put the case he had employed you to lend out 5000 merks on security, and you had taken a bond from the debtors, either holograph, or without designing the witnesses, would not you have been liable to make up his damage, if the bond had been found null, or not probative; and even so here. The *lex aquilia* made a chirurgion *qui imperite venam secuit* liable in the expense of the cure, and why not you; *nemo debet affectare seu profiteri id quod ignorat*. THE LORDS, by plurality, found Mr Fullarton the writer liable to relieve Wood, which was looked on as a new decision, but judged necessary to cause men in public offices look better to the discharge of their duty, that the lieges do not suffer by their carelessness and sloth, to give it no worse name.

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Fountainball, v. 2. p. 601.

1725. July 27.

ARCHIBALD ROBERTSON, Merchant in Edinburgh, *against* Messrs GIBSON and HALL, two of the Principal Clerks of Session.

No 48.

UPON occasion of a complaint's being exhibited to the Lords by Mr Robertson, setting forth, That he had given in a bond, which had been assigned to him, to be registered in the Clerk's Office, and that he could not, for the space of some months, obtain an extract of it, though it had been often required; and that arrestment having been used in the debtor's hand within that time, he was in hazard of losing his money; concluding, That the Clerks, on account of this malversation, should be liable for the sum in the bond;

It was found, That the Clerks were obliged to give out extracts of bonds, or other writs, 24 hours after they were given in to be registered; but if the presenter of the bond, or other writ, should intimate to the Clerks that there was *periculum in mora*, in that case, the same ought to be given out without delay.

THE LORDS, upon another application, found the Clerks liable in expenses to the complainer.

Reporter, *Lord Cowper.*

For the Complainer, *And. Macdonald.*

Alt. *Ja. Fergusson.*

Clerk, *Justice.*

Fol. Dic. v. 4. p. 232. Edgar, p. 202.

1741. July 29.

SUSANNA RAE, Complainer.

A WRITER to the signet having received from the complainer 10s. Sterling, in order to obtain a suspension for her, and accordingly presented the bill, which was past, but neglected to be expedite, for this reason given by him in excuse, that the money received was not sufficient for expediting the bill, but

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